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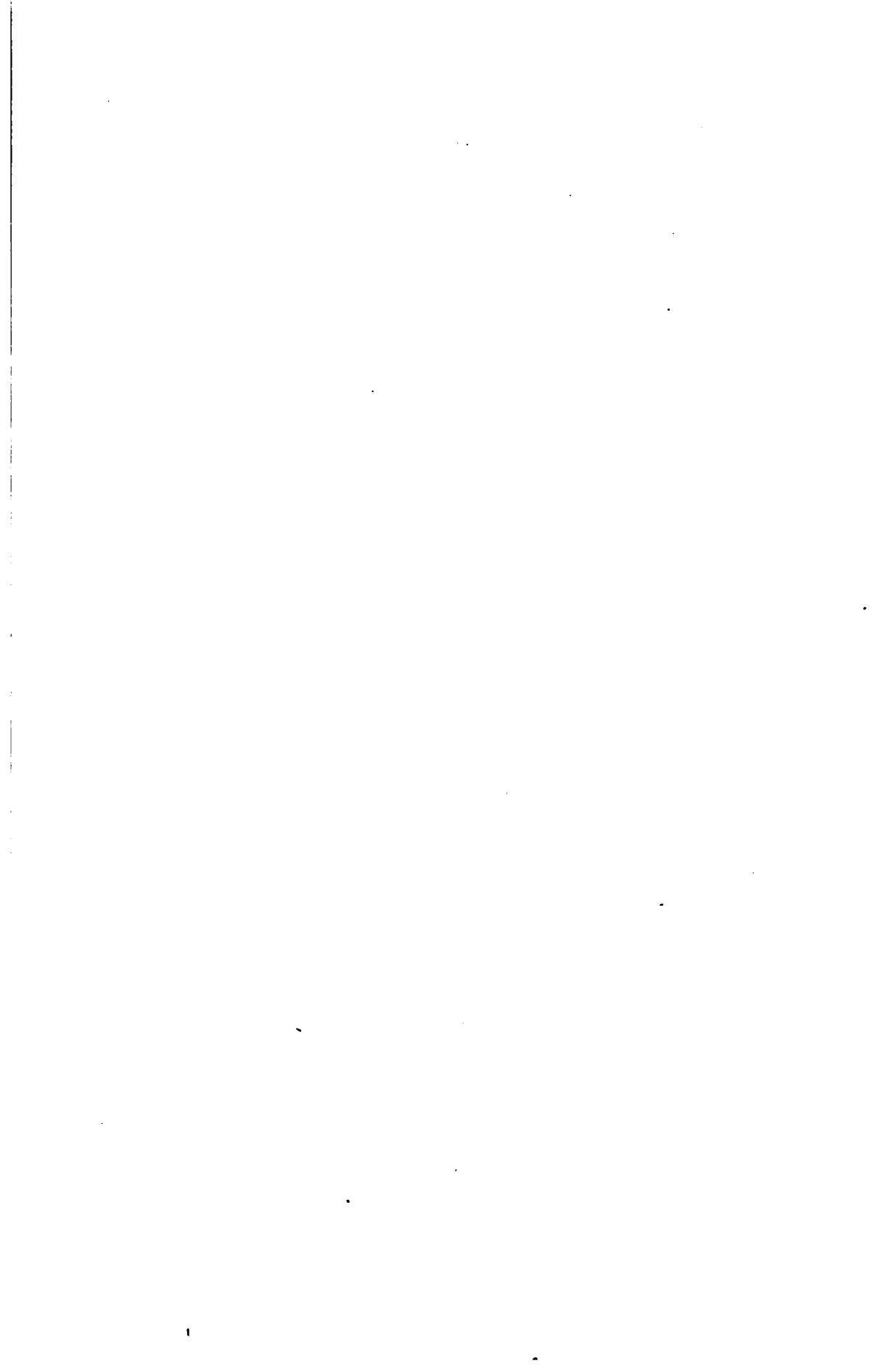




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# THE LAW AND PRACTICE

IN

## BANKRUPTCY

**Under The National Bankruptcy Act of 1898**

BY

**WM. MILLER COLLIER, LL.D.**

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**FOURTH EDITION BY WILLIAM H. HOTCHKISS**

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**TWELFTH EDITION**

**With Amendments of Statutes and Rules, and all Decisions  
to August 15, 1920, Including Amendments to Bankruptcy  
Act of February 5, 1903, June 15, 1906, June  
25, 1910, and March 2, 1917**

BY

**FRANK B. GILBERT**

**Of the Albany Bar, Author of "Annotated (N. Y.) Code of Civil Procedure,"  
Author "Commercial Paper," and Joint Editor of "Annotated  
Consolidated Laws of New York," etc.**

AND

**FRED E. ROSBROOK**

**Of the Rochester Bar**

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## SECTION FIFTY-NINE.

### WHO MAY FILE AND DISMISS PETITIONS.

§ 59. **Who May File and Dismiss Petitions.**—*a* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

*b* Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

*c* Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

*d* If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

*e* In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

*f* Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

*g* A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, *and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their*

*addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard.\**

**Analogous provisions:** In U. S.: As to who may file voluntary petitions, Act of 1867, § 11, R. S., § 5044; Act of 1841, § 7; As to who may file involuntary petitions, Act of 1867, § 39, R. S., § 5021; Act of 1841, § 1; Act of 1800, §§ 1, 2; As to intervention by other creditors, Act of 1867, R. S., § 5026.

In Eng.: Act of 1883, §§ 4, 5, 6, 7; General Rules 143 to 152.

In Can.: Act of 1919, §§ 4, 9.

**Cross-references:** To the law: Definition of creditor, § 1 (9); of petition, § 1 (20); of secured creditor, § 1 (23).

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**I. FILING PETITIONS GENERALLY.**

a. **Comparative legislation.**—In most of the continental countries, a single creditor, no matter what his debt, may petition. The English law permits one creditor, as well as two or more, in not less than £50, to apply.<sup>1</sup> The same is true of the Canadian act, the minimum amount being \$500.<sup>2</sup> Our laws as to voluntary petitions are considered elsewhere.<sup>2</sup> As to involuntary, the law of 1800 permitted a petition "by any one creditor" in \$1,000, or

1. English Act of 1883, § 6(1)-a.  
1a. Can. Bankr. Act of 1919, § 4.

2. See under Section Four of this work.

two creditors in \$1,500, or three creditors in \$2,000; the law of 1841 allowed one creditor in \$500 to petition; while the law of 1867, which originally gave the right to one or more creditors in \$250, was, in 1874, so amended that it could be exercised only by one-fourth in number of the creditors the aggregate of whose provable debts amounted to one-third of all. The present act seems a compromise.<sup>2</sup>

b. *Scope of section.*—This section has to do primarily with: (1) who may file petitions; and secondarily with: (2) the practice where an answer denies that the creditors are less in number than twelve, (3) the intervention of creditors other than the petitioning creditors, and (4) the dismissal of petitions other than on the merits. It should always be read in connection with § 18. Its limited scope and the other sections controlling on the frame of, the allegations in, the verification of, and the service of process under, involuntary petitions, are indicated elsewhere.

c. *Liability of petitioning creditors when unsuccessful.*<sup>4</sup>—A petition filed by *bona fide* creditors, without malice, without libelous and slanderous charges, with reasonable grounds for believing the allegations contained in the petition, with probable cause, and upon legal advice, although not successfully prosecuted, will not sustain an action for damages;<sup>5</sup> but where a bankruptcy proceeding is instituted without probable cause and with malicious intent, an action for malicious prosecution will lie.<sup>6</sup> Material allegations in a petition in bankruptcy are absolutely privileged and cannot be made the basis of an action for libel.<sup>7</sup> A State court has the power to restrain, by injunction, a creditor from prosecuting a fraudulent and oppressive petition in bankruptcy against a debtor, especially in cases where the petitioning creditor has, prior to filing the petition, sought the aid of the State court with reference to the claim held by him.<sup>8</sup>

## II. WHO MAY FILE VOLUNTARY PETITIONS.

a. *In general.*—Subsection *a* provides that any qualified person may file a petition to be adjudged a voluntary bankrupt. Section 4 prescribes who may become a voluntary bankrupt. The discussion under that section may prove useful in determining whether a person is qualified. "Any qualified person" means, therefore, "any person except a municipal, railroad, insur-

2. See "Analogous Provisions," *supra*.

4. See also Am. B. R. Dig., § 286.

5. *Harvey v. Gartner*, 34 Am. B. R. 301, 67 So. 197; *Matter of Terusaki* (D. C., Wash.), 39 Am. B. R. 256, 238 Fed. 934.

6. *Wilkinson v. Goodfellow-Brooks Shoe Co.* (C. C., Mo.), 15 Am. B. R. 554, 141 Fed. 218; *Matter of Moebs & Rechnittzer* (D. C., N. Y.), 22 Am. B. R. 286, 174 Fed. 165.

*Petition against partnership.*—A petition, in an action for malicious prosecution, which alleges that the defendant and others filed a petition in bankruptcy against a certain co-partnership, that it was insolvent and bankrupt, and that the plaintiff was a member thereof, and caused a subpoena to be issued and served on the plaintiff, does not state a cause of action, as the petition in bankruptcy was not filed against the plaintiff. *Peterson v. Perego & Moore Co.* (Iowa Sup. Ct.), 40 Am. B. R. 67, 163 N. W. 224.

7. *Libel, privileged communications.*—Where, in an action for libel, the complaint alleges that defendants maliciously and wrongfully published concerning the plaintiff a statement in a

petition in bankruptcy alleging that the bankrupt had made a fraudulent general assignment and had removed and concealed property with intent to defraud his creditors, the property so removed and concealed including goods recently purchased from defendants, and that a large quantity of said goods were in the possession of the plaintiff and being offered for sale by the plaintiff at a price much less than the present market value, characterizing the action of the plaintiff as dishonest and in collusion with the bankrupt to defraud said creditors and also assist him in concealing his assets, the alleged libel complained of, being a statement in a pleading or petition filed in a court in pending judicial proceedings, pertinent and relevant to the issue there presented, was absolutely privileged and, appearing upon the face of the complaint, said complaint was demurrable. *Rosenberg v. Dworetzky* (Sup. Ct., App. Div., N. Y.), 24 Am. B. R. 583, 139 N. Y. App. Div. 517, 124 N. Y. Supp. 191.

8. *Pusey v. Bradley*, 46 How. Pr. 255, 1 N. Y. Super. Ct. 661.

9. See also Am. B. R. Dig., §§ 121-154, 106-199.



ance or banking corporation."<sup>10</sup> A State court has no right to enjoin a party from applying to the court of bankruptcy to be adjudged a voluntary bankrupt.<sup>11</sup> The motive of the petitioner in filing the petition should not be considered by the court.<sup>12a</sup>

b. Where involuntary petition has been filed.<sup>12</sup>—The practice of allowing a bankrupt to file a voluntary petition in bankruptcy after an involuntary petition had been filed against him appears to have been disapproved by the court under the act of 1867 and an adjudication upon a voluntary petition was set aside,<sup>13</sup> the court evidently not following an earlier case decided under the act of 1841, holding that a debtor might file a voluntary petition after an involuntary petition had been filed against him.<sup>14</sup> Under the present act it is well settled that the pendency of an involuntary petition before adjudication will not prevent an insolvent debtor from making a voluntary petition.<sup>15</sup> The debtor has the right to avail himself of the benefits of the bankruptcy law on his own application, and this right cannot be forfeited or rendered ineffectual merely because the creditors' petition is first filed and pending undetermined when the debtor files his petition.<sup>16</sup> A voluntary proceeding takes precedence over an involuntary proceeding, unless the latter is first heard or has gone to an adjudication.<sup>17</sup> Where both proceedings are instituted in the same court, the duty arises of choosing as to which proceeding is for the best interests of creditors,<sup>18</sup> and if voluntary proceedings are entertained subsequent to the filing of an involuntary petition, notice

10. Upon the petition of a New York corporation to be adjudged a voluntary bankrupt, where neither the body of the petition, nor the verification, nor the schedule annexed thereto, stated or showed that any corporate action had been had authorizing the filing of the petition in bankruptcy, or authorizing the president of the corporation, who signed and verified it, to execute the petition in the name of the corporation, it was held, that the court did not have jurisdiction to adjudge the corporation a voluntary bankrupt until it had a verified petition before it, showing, as provided by the N. Y. General Corporation Law, section 34, that the board of directors at a meeting duly held, had determined to make and file such a petition, and had authorized or designated the officer or officers making it, to execute the same on behalf of the corporation. In re Jefferson Casket Co. (D. C., N. Y.), 25 Am. B. R. 663, 182 Fed. 689.

The institution of dissolution proceedings in a State court does not prevent the stockholders of a corporation from filing a voluntary petition. Matter of Dressler Producing Corporation (C. C. A., 2d Cir.), 44 Am. B. R. 457, 262 Fed. 257.

11. Filligin v. Thorton, 12 N. B. R. 92, 49 Ga. 394; Matter of Hargadine-McKittick, etc., Co. (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155.

11a. Matter of Hargadine-McKittick, etc., Co. (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155. See also Am. B. R. Dig., § 198.

13. Rule under former act.—In the case of In re Stewart, 3 N. B. R. 108, Fed. Cas. 13,419, an adjudication was made upon a voluntary petition but the same was set aside by the court on motion. The court in granting the motion said: "It was never intended by the bankruptcy act and no correct rule of practice can tolerate that when a creditor has instituted proceedings to enforce his debtor into bankruptcy such debtor should be allowed to become a bankrupt and to be adjudicated before the determination of the creditor's petition. To

permit such a practice might work a most flagrant wrong upon the rights of the petitioning creditor."

14. In re Canfield, 1 N. Y. Leg. Obs. 224, 5 Law Rep. 415. See also In re Davidson, 3 N. B. R. 413, Fed. Cas. 3,599.

15. Matter of Veles (D. C., Porto Rico), 39 Am. B. R. 307, 9 P. R. Fed. 404; In re Waxelbaum (D. C., N. Y.), 3 Am. B. R. 392, 98 Fed. 589; In re Dwyer (D. C., N. Dak.), 7 Am. B. R. 532, 112 Fed. 777; In re Stegar (D. C., Ala.), 7 Am. B. R. 665, 113 Fed. 978; Matter of Carpenter (Ref., N. Y.), 25 Am. B. R. 161, citing Collier on Bankruptcy (8th Ed.), p. 629; In re New Chattanooga Hardware Co. (D. C., Tenn.), 27 Am. B. R. 77, 190 Fed. 241; Matter of Pennington & Co. (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388, citing text. The mere pendency of an involuntary petition cannot deprive the bankruptcy court of jurisdiction to receive and consider a voluntary petition; nor can the filing of a voluntary petition be a lawful basis for entering an adjudication or taking any other step in the involuntary proceeding. In re Lachenmaier (C. C. A., 7th Cir.), 29 Am. B. R. 325, 203 Fed. 32.

Intent to effect composition.—It is no objection to an adjudication in voluntary bankruptcy proceedings, upon a petition filed by a debtor subsequent to the filing of involuntary petitions, that the debtor intended to take advantage of section 12-d(1) of the Bankruptcy Act and effect a composition with its creditors. In re New Chattanooga Hardware Co. (D. C., Tenn.), 27 Am. B. R. 77, 190 Fed. 241.

16. Matter of Carpenter (Ref., N. Y.), 25 Am. B. R. 161; In re Stegar (D. C., Ala.), 7 Am. B. R. 665, 113 Fed. 978.

17. Matter of Pennington & Co. (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

18. International Silver Co. v. New York Jewelry Co. (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945. See also Matter of Bloomberg (D. C., Mass.), 42 Am. B. R. 115, 263 Fed. 94.

should be given to the petitioning creditors.<sup>19</sup> But where a question is raised as to the residence or principal place of business of the bankrupt, it has been held that the court in a district in which such residence or place of business is located may retain and exercise exclusive jurisdiction notwithstanding the subsequent filing of a voluntary petition in another district.<sup>20</sup>

c. *Form of petition and practice.*—Section 18 relates to pleadings in voluntary bankruptcies. It has seemed more appropriate to consider under that section the form and sufficiency of a voluntary petition. The petition must be accompanied by a schedule of liabilities and assets. This is considered under § 7, and it is not necessary to discuss it further in this connection. Subsection *c* of this section (§ 59) requires petitions to be filed in duplicate, and this applies to voluntary, as well as to involuntary petitions.

### III. WHO MAY FILE INVOLUNTARY PETITIONS.<sup>21</sup>

a. *In general.*—Subsection *b* definitely declares as to what creditors,<sup>21a</sup>—under certain restrictions as to number and amount,—may file a petition against a person alleged to be bankrupt. The words of the subsection state one of the jurisdictional allegations of all involuntary petitions.<sup>22</sup> Other essential allegations are referred to elsewhere.<sup>23</sup> This section is confined to creditors and contains the only provision of the act that expressly defines who may file a petition in proceedings to have a debtor adjudged an involuntary bankrupt.<sup>24</sup> A bankruptcy petition cannot be filed other than by the debtor, save by (1) a creditor or creditors, (2) having provable claims,<sup>25</sup> (3) aggregating in excess of securities, \$500,<sup>26</sup> (4) if but one creditor petitions, he must aver that the alleged bankrupt has less than twelve creditors in all; otherwise, three creditors must join in the petition.<sup>27</sup> If there are a sufficient number of petitioning creditors holding a sufficient amount of provable claims, bankruptcy administration may be had, although a large majority of

19. *Matter of Continental Coal Corp.* (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113; *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 948.

20. *Rossell Bros. v. Continental Coal Corp.* (D. C., Ky.), 38 Am. B. R. 31, 235 Fed. 343; *Matter of Continental Coal Corp.* (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113.

21. See also Am. B. R. Dig. §§ 200-210.

21a. As to who are creditors, see discussion under Section I, *ante*.

22. Unless this requirement is observed jurisdiction is not conferred upon the court. In *re Gillette* (D. C., N. Y.), 5 Am. B. R. 119, 125, 104 Fed. 769; In *re Rogers Milling Co.* (D. C., Ark.), 4 Am. B. R. 540, 102 Fed. 687. Although it may be that such a defect is waivable since it pertains merely to want of jurisdiction of the person or thing. In *re Mason* (D. C., N. Car.), 3 Am. B. R. 599, 99 Fed. 256.

23. See under Sections Two, Three, Four, Five and Eighteen of this work.

24. In *re J. M. Ceballos & Co.* (D. C., N. J.), 20 Am. B. R. 459, 161 Fed. 445, 451.

25. See *post*, this section, creditors who have provable claims.

26. Effect of reduction of amount of claims prior to adjudication.—Where, in an invol-

untary bankruptcy, the aggregate amount of the claims of the original petitioners is, before adjudication, reduced below the statutory limit by payments made by the alleged bankrupt, and other creditors holding claims to an amount sufficient to make the aggregate amount of all the claims \$500 petition to join in the proceedings, the court has jurisdiction to enter an order of adjudication. In *re Ryan* (D. C., Pa.), 7 Am. B. R. 562, 114 Fed. 373.

Fed. 373.

27. In *re Corwin Mfg. Co.* (D. C., Mass.), 26 Am. B. R. 269, 185 Fed. 976; In *re Brown* (D. C., Mo.), 7 Am. B. R. 102, 111 Fed. 979, holding that, where the petition in an involuntary proceeding avers that the creditors of the alleged bankrupt are less than twelve, and his answer alleges that his creditors are more than twelve, and gives a list of thirteen creditors with their addresses and the amounts owing to them, and the proof shows that one of the creditors has assigned his claim and joined in the petition, and that another alleged creditor claims that he is not a creditor at all, there are still twelve creditors, including the petitioning creditor, and the petition must be dismissed.

the creditors are favorable to a general assignment for creditors.<sup>28</sup> The holders of composition notes given by a debtor, which were assumed by a corporation organized to take over the debtor's business are creditors entitled to file a petition against the corporation.<sup>29</sup>

b. **Stockholders and officers of corporation.**—Stockholders as such are not creditors of a bankrupt corporation and may not file an involuntary petition against the corporation,<sup>30</sup> but creditors of a corporation, who are also directors, are not precluded from petitioning for the adjudication of the corporation on the ground of inability to pay its debts merely because their presence at a meeting of the board of directors when the admission was made was necessary to its validity.<sup>31</sup>

c. **Creditors who were not such at time of commission of act of bankruptcy.**—There are a number of cases holding that a creditor who was not such at the time of the commission of an alleged act of bankruptcy cannot petition his debtor into bankruptcy.<sup>32</sup> This appears to be not only the conclusion of the courts in well-considered cases, but a reasonable construction.<sup>33</sup> It is unquestionably based upon the well-established principle that creditors cannot complain of an act of bankruptcy, consisting of a transfer or preference by the debtor prior to the time they became creditors, unless such transfer or preference was made with the direct purpose of defeating their claim.<sup>34</sup> This doctrine has been disapproved, on the ground that the statute does not specifically declare that petitioning creditors must have been such at the time of the commission of the act of bankruptcy,<sup>35</sup> and it would appear that the weight of authority now favors the proposition that creditors having provable claims at the time of filing the petition may join therein.<sup>36</sup>

d. **Number of creditors and amount of claims.**<sup>37</sup>—(1) **TIME CONTROLLING NUMBER AND AMOUNT.**—The time when the petitioning creditors must be sufficient in number and amount is at the time of the adjudication.<sup>38</sup> Creditors other

28. *In re Perry & Whitney Co.* (D. C., Mass.), 22 Am. B. R. 772, 172 Fed. 745.

29. *Matter of Fleig Mercantile Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 113, 237 Fed. 178.

30. *In re Eureka Anthracite Coal Co.* (D. C., Ark.), 28 Am. B. R. 758, 197 Fed. 216.

31. *Home Powder Co. v. Geis* (C. C. A., 8th Cir.), 29 Am. B. R. 580, 204 Fed. 568.

32. *In re Callison* (D. C., Fla.), 12 Am. B. R. 344, 130 Fed. 987; *affd. sub. nom. Brake v. Callison* (C. C. A., 5th Cir.), 11 Am. B. R. 797, 129 Fed. 201; *In re Stone* (D. C., Pa.), 30 Am. B. R. 392, 206 Fed. 356. See also Am. B. R. Dig. § 205.

33. *In re Brinckmann* (D. C., Ind.), 4 Am. B. R. 551, 103 Fed. 65; *Beers v. Hanlin* (D. C., Or.), 3 Am. B. R. 745, 99 Fed. 695; *In re Muller*. Fed. Cas. 9,912; *In re Burke*, Fed. Cas. 2,156.

34. *Brake v. Callison* (C. C. A., 5th Cir.), 11 Am. B. R. 797, 129 Fed. 201. Text quoted in *In re Stone* (D. C., Pa.), 30 Am. B. R. 392, 206 Fed. 356.

35. *Matter of Hanyan* (D. C., N. Y.), 24 Am. B. R. 72, 180 Fed. 498, holding that a creditor may join in a petition in an involuntary proceeding, if he have a provable claim against the alleged bankrupt at the time the petition is filed and he is not disqualified to act as such where he became a

creditor after the act of bankruptcy alleged in the petition was committed. In the case of *In re Perry & Whitney Co.* (D. C., Mass.), 22 Am. B. R. 772, 172 Fed. 745 (*affd.* 23 Am. B. R. 695, 175 Fed. 52), the court stated that it should not be held that a creditor is disqualified as a petitioner for no other reason than that the claim owned by him was not transferred to him until after the act of bankruptcy.

36. *Emerine v. Tarault* (C. C. A., 6th Cir.), 34 Am. B. R. 55, 219 Fed. 68; *Matter of Kehoe* (C. C. A., 2d Cir.), 36 Am. B. R. 891; *In re Perry & Whitney* (C. C. A., 1st Cir.), 23 Am. B. R. 695, 175 Fed. 52; *Matter of Van Horn* (C. C. A., 3d Cir.), 41 Am. B. R. 12, 246 Fed. 822; *Matter of Page Motor Car Co.* (D. C., Mass.), 41 Am. B. R. 546, 261 Fed. 318.

37. See also Am. B. R. Dig., § 211.

38. *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1,000. In *Moulton v. Coburn* (C. C. A., 1st Cir.), 12 Am. B. R. 553, 557, 131 Fed. 201, the court said: "It is true that, according to express provisions of the statute, the sufficiency of the number of petitioning creditors is to be determined as of the date of hearing, and not as of the date of filing the original petition."

State of claim when petition is filed governs. The fact that a petitioning creditor having a provable claim at the time of filing the petition subsequently became liable to

than original petitioners may join in at any time before adjudication and be counted to make the required number of creditors and amount of claims,<sup>40</sup> even though the original creditors had no provable claims,<sup>41</sup> unless, perhaps, in a case where the original petition shows on its face that an insufficient number of creditors or an insufficient amount of claims had united in the petition.<sup>41</sup> But debts created subsequent to the filing of the petition not being provable, it follows that creditors whose claims were created after such time may not be counted in making up the required number.<sup>42</sup> Neither can the purchaser of a claim, bought after the filing of the petition in bankruptcy for the purpose of creating an additional creditor, be counted in making up the statutory number.<sup>43</sup> Where only two petitioning creditors have qualified, and six out of nine intervening creditors are of unquestioned competency, the proceeding will be sustained.<sup>44</sup>

(2) **BUYING CLAIMS OR INDUCEMENT NOT TO JOIN.**—A person may buy up claims to make the required amount;<sup>45</sup> the debtor may importune his creditors to proceed and the adjudication still be valid;<sup>46</sup> and if a creditor solicits other creditors to join, the bankrupt may solicit them not to do so.<sup>47</sup>

(3) **TRANSACTIONS AFFECTING NUMBER OF CREDITORS AND AMOUNT OF CLAIMS.**—Where several claims are purchased for the purpose of instituting proceedings in bankruptcy the purchaser will be deemed a single creditor in counting the number of creditors;<sup>48</sup> where the main purpose of such a trans-

editors because of immaterial. In re Am. B. R. 344, 165

making creditors.—of making an adjudication, it is not exact amounts due it is enough that shown that they intent sufficient to es (D. C., N. Y.), 2. existence of prov- amount is juris- proceeding. Doty Am. B. R. 68, 244

41. In re Beddingfield (D. C., Ga.), 2 Am. B. R. 355, 96 Fed. 190.

42. Moulton v. Coburn (C. C. A., 1st Cir.), 12 Am. B. R. 553, 557, 131 Fed. 201.

43. Emerine v. Tarault (C. C. A., 6th Cir.), 34 Am. B. R. 55, 219 Fed. 68; Matter of Kehoe (C. C. A., 2d Cir.), 36 Am. B. R. 891.

44. In re Vastbinder (D. C., Pa.), 11 Am. B. R. 118, 126 Fed. 417. See In re Romanow (D. C., Mass.), 1 Am. B. R. 461, 92 Fed. 510.

45. In re Woodford, Fed. Cas. 17,972; In re Shouse, Fed. Cas. 12,815; In re Bevins (C. C. A., 2d Cir.), 21 Am. B. R. 344, 165 Fed. 434; Matter of Kehoe (C. C. A., 2d Cir.), 36 Am. B. R. 891.

46. In re Bouton, Fed. Cas. 1,706; Matter of Brown (D. C., Mo.), 7 Am. B. R. 102, 111 Fed. 979.

It is not illegal for an attorney to agree to pay a creditor's claim upon his joining in an involuntary petition. *Bernard v. Fromme*, 22 Am. B. R. 585, 132 App. Div. 922, 116 N. Y. Supp. 807.

47. In re Brown (D. C., Mo.), 7 Am. B. R. 102, 111 Fed. 979; Matter of Kehoe (C. C. A., 2d Cir.), 36 Am. B. R. 947.

48. Intervening petitioners whose claims are in fact owned by the original petitioner are not existing "creditors who have provable claims," and cannot be considered in making up the requisite number of petitioners for an involuntary adjudication; such procedure is an obvious subterfuge, and the intervening petitions will be summarily dismissed. *In re Burlington Malting Co.* (D. C., Wis.), 6 Am. B. R. 389, 109 Fed. 177, citing *In re Worcester County* (C. C. A., 1st Cir.), 4 Am. B. R. 496, 505, 102 Fed. 808.

39. Creditors other than original petitioners may at any time before an adjudication of bankruptcy or the dismissal of the original petition, and whether before or after the expiration of four months from the act of bankruptcy, join therein in order to supply any deficiency in the amount of provable claims originally set forth in the petition, insufficiency in amount of such claims not being an incurable jurisdictional defect. *In re Mackey* (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355; *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000; *In re Crenshaw* (D. C., Ala.), 19 Am. B. R. 503, 156 Fed. 638; *In re Beddingfield* (D. C., Ga.), 2 Am. B. R. 355, 96 Fed. 190; *Hoffschlaeger Co. v. Nap* (D. C., Hawaii), 12 Am. B. R. 515, 2 U. S. D. C. Hawaii, 96; *In re Romanow* (D. C., Mass.), 1 Am. B. R. 461, 92 Fed. 510; *In re Charles Town Light & Power Co.* (D. C., W. Va.), 25 Am. B. R. 687, 183 Fed. 160; *In re Mercur* (D. C., Pa.), 2 Am. B. R. 626, 95 Fed. 634.

40. *In re Mammoth Pine Lumber Co.* (D. C., Ark.), 6 Am. B. R. 84, 109 Fed. 368.

action is to take the administration of an estate out of the State court where nearly all of the creditors are satisfied that it should remain, the bankruptcy court should be slow to lend its aid, and "should resolve every doubtful question of law or fact against the petitioning creditor."<sup>49</sup> As where two notes given by the bankrupt to a creditor were assigned by an agent under claim of authority, but without the creditor's knowledge, the assignees could not both be counted as petitioning creditors, it appearing that the transaction was for the purpose of securing advantage in the proceedings.<sup>50</sup> A debtor, by reducing the amount of his indebtedness to less than \$1,000 by a settlement with certain creditors after a general assignment, cannot prevent other creditors holding claims sufficient in number and amount, who refused to so settle, from filing an involuntary petition.<sup>51</sup> A transaction devised and entered into for the purpose of preventing a petition by a single creditor by continuing the number of creditors at more than twelve, being an indirect method of defeating the statute, is unlawful and void.<sup>52</sup> The act does not sanction the splitting

49. *Lowenstein v. McShane Mfg. Co.* (D. C., Md.), 12 Am. B. R. 601, 130 Fed. 1007. But where only a comparatively inconsiderable minority of the creditors desire the administration of their debtors' estate in bankruptcy, and the greater proportion of them in number and amount regard the general assignment as more for their interests, the facts do not warrant the court in resolving every doubtful question of fact or law against the petitioning creditors, if there are three *bona fide* creditors whose claims, amounting in all to \$500, insist upon bankruptcy administration. *In re Perry & Whitney Co.* (D. C., Mass.), 22 Am. B. R. 772, 172 Fed. 745, *affd.* 23 Am. B. R. 695, 175 Fed. 52.

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51. Reduction below \$1,000 by settlement with certain creditors after general assignment and before filing of petition.—An alleged bankrupt, owing over \$4,000, committed an act of bankruptcy by making an assignment for the benefit of creditors and thereafter made a settlement with certain of his creditors by paying them a percentage of their claims, receiving releases discharging him and his assignees from all further liability to them, which reduced the amount of his indebtedness to less than \$1,000, the amount required by § 4-b of the bankruptcy act to enable him to be adjudged an involuntary bankrupt. It was held, that other creditors holding claims sufficient in number and amount who refused to so settle could not be thus debarred from filing a petition in involuntary bankruptcy subsequent to such settlement and within four months of the commission of such act of bankruptcy, as, it would seem, the amount of debts owing was intended by § 4-b to be ascertained as of the date of the act of bankruptcy charged, but even if that were not so, the effect of an adjudication would be to annul the general assignment and the dealings thereunder between the alleged bankrupt and the assenting

creditors, created, so far as the petitioners' rights were concerned, a preferential or fraudulent transfer, which, upon adjudication, they were entitled to have recovered by the trustee in bankruptcy, and for that reason the debts of the assenting creditors should be counted as debts owing at the date of the petition. *In re Jacobson* (D. C., Mass.), 24 Am. B. R. 927, 181 Fed. 870. See also *Matter of Boston-West Africa Co.* (D. C., Mass.), 43 Am. B. R. 382, 235 Fed. 924.

52. Assignment of claims to prevent creditors' petition.—Where the assignee under a general assignment for creditors made within the four months' period and prior to the filing of a petition in bankruptcy against the assignor, took assignments in writing to himself of the claims of twelve creditors paying therefor by checks signed by him as assignee and four days before the petition in bankruptcy was filed, each of the said claims were assigned by the assignee to different persons for the same amount that he had paid for them, the purpose of the parties being to keep claims enough alive to prevent a single creditor from maintaining a petition in bankruptcy against the assignor, is an attempt to artificially create a new condition for the specific purpose of defeating, by indirect methods, the scheme of the bankruptcy statute, and cannot receive the approval of the court. *Leighton v. Kennedy* (C. C. A., 1st Cir.), 12 Am. B. R. 229, 129 Fed. 737. Judge Putnam, in delivering the opinion in this case, said: "An attempt to create such a condition, and thus by indirect methods to defeat the scheme of the statute, is unlawful and void, and so clearly so that we need not elaborate the proposition."

Where a creditor in consideration of the transfer to him of all assets of his debtor assumes the payment of all his debts, except one, and under the State law becomes absolutely liable to the creditors so preferred to the full amount of their claims, they may not, in the absence of dissent on their part to such transfer, be counted as creditors in an effort to prevent the single creditor from maintaining an involuntary petition in

than original petitioners may join in at any time before adjudication and be counted to make the required number of creditors and amount of claims,<sup>39</sup> even though the original creditors had no provable claims,<sup>40</sup> unless, perhaps, in a case where the original petition shows on its face that an insufficient number of creditors or an insufficient amount of claims had united in the petition.<sup>41</sup> But debts created subsequent to the filing of the petition not being provable, it follows that creditors whose claims were created after such time may not be counted in making up the required number.<sup>42</sup> Neither can the purchaser of a claim, bought after the filing of the petition in bankruptcy for the purpose of creating an additional creditor, be counted in making up the statutory number.<sup>43</sup> Where only two petitioning creditors have qualified, and six out of nine intervening creditors are of unquestioned competency, the proceeding will be sustained.<sup>44</sup>

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the bankrupt's assignee for creditors because of a wrongful attachment is immaterial. *In re Bevinas* (C. C. A., 2d Cir.), 21 Am. B. R. 344, 165 Fed. 434.

**Amount of claims of petitioning creditors.**—In determining the propriety of making an adjudication on an involuntary petition, it is not necessary to determine the exact amounts due the petitioning creditors but it is enough that the petitioning creditors have shown that they are creditors, and to an extent sufficient to satisfy the act. *In re Hughes* (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872.

**Jurisdictional facts.**—The existence of provable claims to the requisite amount is jurisdictional in an involuntary proceeding. *Doty v. Mason* (D. C., Fla.), 40 Am. B. R. 58, 244 Fed. 587.

**39. Creditors other than original petitioners** may at any time before an adjudication of bankruptcy or the dismissal of the original petition, and whether before or after the expiration of four months from the act of bankruptcy, join therein in order to supply any deficiency in the amount of provable claims originally set forth in the petition, insufficiency in amount of such claims not being an incurable jurisdictional defect. *In re Mackey* (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355; *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000; *In re Crenshaw* (D. C., Ala.), 19 Am. B. R. 503, 156 Fed. 638; *In re Beddingfield* (D. C., Ga.), 2 Am. B. R. 355, 96 Fed. 190; *Hoffschlaeger Co. v. Nap* (D. C., Hawaii), 12 Am. B. R. 515, 2 U. S. D. C. Hawaii, 96; *In re Romanow* (D. C., Mass.), 1 Am. B. R. 461, 92 Fed. 510; *In re Charles Town Light & Power Co.* (D. C., W. Va.), 25 Am. B. R. 687, 183 Fed. 160; *In re Mercur* (D. C., Pa.), 2 Am. B. R. 626, 95 Fed. 634.

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creditors, created, so far as the petitioners' rights were concerned, a preferential or fraudulent transfer, which, upon adjudication, they were entitled to have recovered by the trustee in bankruptcy, and for that reason the debts of the assenting creditors should be counted as debts owing at the date of the petition. In *re Jacobson (D. C., Mass.)*, 24 Am. B. R. 927, 181 Fed. 870. See also *Matter of Boston-West Africa Co. (D. C., Mass.)*, 43 Am. B. R. 382, 258 Fed. 924.

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of a claim into parts in order to create the requisite number of petitioning creditors.<sup>53</sup>

(4) **CREDITORS WHO ARE ESTOPPED FROM FILING PETITION NOT TO BE COUNTED.**—It is only such creditors as may be petitioners who should be counted.<sup>54</sup> A creditor who has a voidable preference may not be counted against the petitioner in computing the number of creditors that must join in a petition, until he surrenders his preference. If he surrenders before adjudication he may be counted,<sup>55</sup> but in determining whether the debts of the alleged bankrupt aggregate \$1,000, not only those which exist unpaid at the time of filing the petition, but also those which the debtor may have paid by preferential or fraudulent transfers within four months, are to be counted.<sup>56</sup> Where the creditors are protected by a guaranty from another creditor to whom the assets of the bankrupt have been assigned, they are not to be counted as creditors in an effort to prevent the guarantor creditor from maintaining an involuntary proceeding.<sup>57</sup> But where one of two or more joint makers or endorsers of a note is petitioned against each of the co-makers or co-endorsers who are required to pay the note has a separate provable claim against the alleged bankrupt and may be counted.<sup>58</sup>

**c. Creditors who have provable claims.**—Under this section it is absolutely necessary that each creditor joining in an involuntary petition should be the owner of a demand or claim provable against the bankrupt within the provisions of the act.<sup>59</sup> Whether the petitioning creditor's debt is provable or not is the important test in determining whether his petition will be entertained. The meaning of "provable debts"<sup>60</sup> is discussed in detail under § 63. There

bankruptcy against the assignor. In re Blount (D. C., Ark.), 16 Am. B. R. 97, 142 Fed. 263.

53. In re Tribelhorn (C. C. A., 2d Cir.), 14 Am. B. R. 491, 137 Fed. 3, holding that, where the attorney for the petitioning creditors becomes a creditor by an assignment of a part of the claim of one of the petitioning creditors in an involuntary bankruptcy made after the filing of the petition he may not be counted as a petitioning creditor; In re Independent Thread Co. (D. C., N. J.), 7 Am. B. R. 704, 113 Fed. 998, holding that, where a sufficient number of creditors are not willing to file an involuntary petition against a corporation, and for the purpose of evading the requirements of the statute it procures one creditor to assign part of its claim to third persons, in order to create the necessary number of creditors, their petition will be dismissed.

54. In re Miner (D. C., Mass.), 4 Am. B. R. 710, 104 Fed. 520, holding that creditors who have assented to a general assignment are not to be counted.

55. **Creditors holding voidable preferences.**—Matter of Murphy (D. C., Mass.), 35 Am. B. R. 635, 225 Fed. 392; Stevens v. Nave-McCord Co. (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71, in which the court says: "But after a thoughtful consideration of this and other contentions of counsel, the evil of preferences which the bankrupt law was enacted to remove, the remedy of an equal distribution of the property of the

bankrupt which it was passed to provide, the prohibition of the use of their claims by preferred creditors until they surrender them which the act contains, the general scope of the law and all its provisions considered together, and the duty to give it a rational and sensible interpretation have forced our minds to the conclusion that it was the intention of Congress that creditors who hold voidable preferences should not be counted either for or against the petition for an adjudication in bankruptcy until they surrender their preferences." Compare *McMurtrey v. Smith* (Ref., Tex.), 15 Am. B. R. 427; *Leighton v. Kennedy* (C. C. A., 1st Cir.), 12 Am. B. R. 229, 232, 129 Fed. 739.

56. In re Cain (Ref., Ill.), 2 Am. B. R. 378; In re Norcross (Ref., Mo.), 1 Am. B. R. 644; In re Tirre (D. C., N. Y.), 2 Am. B. R. 493, 95 Fed. 425; *Boston-West Africa Trading Co. v. Quaker City Morocco Co.* (C. C. A., 1st Cir.), 44 Am. B. R. 315, 261 Fed. 665.

57. In re Blount (D. C., Ark.), 16 Am. B. R. 97, 142 Fed. 263.

58. *Wright v. Rumph* (C. C. A., 5th Cir.), 38 Am. B. R. 235, 238 Fed. 138.

59. *Matter of Howell* (C. C. A., 2d Cir.), 32 Am. B. R. 572, 215 Fed. 1; *Hansen v. Uniform Seamless Wire Co.* (C. C. A., 1st Cir.), 39 Am. B. R. 627, 243 Fed. 177.

60. **Provable and allowable claims distinguished.**—The distinction between "proved" and "allowed" is always made apparent throughout the bankruptcy act, and the term "provable claims" in section 59d, is not to be given the same meaning as allowable claims. *Matter of Hornstein* (D. C., N. Y.), 10 Am. B. R. 308, 122 Fed. 266.

are numerous cases under the present law where a creditor's petition has been attacked on this ground; these will be considered here. The provability of the creditors should be established by at least *prima facie* evidence, although it is not essential that formal proof be presented.<sup>61</sup> As to the person petitioning, it has been held that a wife may do so,<sup>62</sup> also where the petitioner is the only creditor and is such by virtue of a judgment for breach of promise,<sup>63</sup> and that, if also creditors, stockholders may petition against their corporation,<sup>64</sup> or a partner against his partnership, but not as mere stockholders or partners;<sup>65</sup> It is clear too, that the creditors of a partnership may file against an individual partner.<sup>66</sup> Depositors in an insolvent bank may join in a petition against a stockholder of the bank, where a State statute makes the stockholder personally liable for deposits.<sup>67</sup> A tax collector cannot file a petition without alleging that the taxes are a provable claim under the State law.<sup>68</sup> An unliquidated claim, under the present law, not being yet "provable," will not sustain a petition.<sup>69</sup> But it has been held that a creditor, having an unliquidated debt, may file a petition, provided the debt is provable.<sup>70</sup> Whether a surety on a debt not due may file a petition is a question.<sup>71</sup> That an indorser can is not doubted, his claim being provable,<sup>72</sup> so also, if the surety has, on default of his principal, assumed the latter's obligation:<sup>73</sup>

61. In re McNally Co. (Ref., N. Y.), 29 Am. B. R. 772.

62. In re Novak (D. C., Iowa), 4 Am. B. R. 311, 101 Fed. 800.

63. In re Penzanaky (Ref., Mass.), 8 Am. B. R. 99.

64. In re Rollins, etc., Co., 2 N. B. N. Rep. 988.

65. See In re Schenkin & Coney (Ref., N. Y.), Am. B. R. 162, *affd.* on this point, 113 Fed. 421.

66. In re Mercur (D. C., Pa.), 2 Am. B. R. 326, 95 Fed. 634. See also Matter of Eclipse Poultry Co. (C. C. A., 3d Cir.), 42 Am. B. R. 49, 250 Fed. 96.

67. In re Walker (C. C. A., 9th Cir.), 21 Am. B. R. 132, 164 Fed. 680. Such liability is contractual. In re Brown (C. C. A., 9th Cir.), 21 Am. B. R. 123, 164 Fed. 673.

68. Petition by tax collector.—Where petitioner in involuntary bankruptcy proceedings was a tax collector and there was no allegation that at the date of the petition the taxes had remained unpaid for three months after being committed to the collector, the collector had no provable claim and was incapable of maintaining the petition, as, under the Massachusetts law, such allegation was necessary in order to maintain an action. In re Corwin Mfg. Co. (D. C., Mass.), 26 Am. B. R. 269, 185 Fed. 976.

69. Unliquidated claim.—Beers v. Hanlin, (D. C., Oreg.), 3 Am. B. R. 745, 99 Fed. 695; In re Brinckmann (D. C., Ind.), 4 Am. B. R. 551, 103 Fed. 65; In re Morales (D. C., Fla.), 5 Am. B. R. 425, 105 Fed. 761; In re Big Meadows Gas Co. (D. C., Pa.), 7 Am. B. R. 697, 113 Fed. 974. See also Am. B. R. Dig. § 206.

70. In re Manhattan Ice Co. (D. C., N. Y.), 7 Am. B. R. 408, 114 Fed. 400, *affd.* as In re Stern (C. C. A., 2d Cir.), 8 Am. B. R. 569, 116 Fed. 604. And compare In re Hilton

(D. C., N. Y.), 4 Am. B. R. 774, 104 Fed. 981.

A claim for damages for breach of warranty upon the sale of personal property is a provable debt, and the amount may be liquidated upon a jury trial demanded upon a petition filed against the debtor. In re Grant Shoe Co. (D. C., N. Y.), 11 Am. B. R. 48, 125 Fed. 576.

The amount to be paid a subcontractor for work and materials in the construction of a building, under a contract providing that the contractor shall pay to the subcontractor a certain portion of the sum received from the owner, is not a provable claim against the contractor, where the owner has not paid anything to him. In re Ellis (C. C. A., 6th Cir.), 16 Am. B. R. 221, 143 Fed. 103.

71. Philips v. Dreher Shoe Co. (D. C., Pa.), 7 Am. B. R. 326, 112 Fed. 404, holding that, where the maker of promissory notes not yet due executes a general assignment for the benefit of creditors, thus committing an act of bankruptcy, the sureties upon the notes, unless they have paid them, has no provable claim, and no standing to institute proceedings to have the maker adjudged an involuntary bankrupt.

72. In re Gerson (D. C., Pa.), 5 Am. B. R. 89, 105 Fed. 891; *affd.* s. c., 6 Am. B. R. 11, 107 Fed. 897.

73. Surety on defaulting contractor's bond may file petition.—Where in the absence of evidence that the authorities of a municipal corporation acted fraudulently in forfeiting and canceling a contract for the execution of certain work in connection with the city's water works, because the work was not proceeding satisfactorily, and the surety company upon the contractor's bond under its contract of indemnity with its principal,

and so can the holder of a note not yet due, indorsed by the alleged bankrupt.<sup>74</sup> The provability of such debts is considered elsewhere.<sup>75</sup> Numerous cases under the former law will be found in point.<sup>76</sup>

**f. Secured creditors not to file.**—Creditors who are fully secured may not petition. This seems to have been otherwise under the former law, the petition being considered a waiver of the security.<sup>77</sup> But the intention under the present act is clear. A secured debt can be counted in dollars only to the amount unsecured;<sup>78</sup> if there be no such amount, it should not be counted at all. But a secured creditor may surrender his security and prove his whole claim and thereby entitle himself to file a petition.<sup>79a</sup> It is doubtful whether the doctrine of implied waiver will apply under the phrasing of the present law. If, on the other hand, the claim is not fully secured, it may sustain a petition, provided, when reckoned at the unsecured amount, the required aggregate of \$500 is reached.<sup>79</sup> The cases seemingly *contra*<sup>80</sup> under the former law are not in point, referring, as they do, to the number of the creditors, rather than the existence of a petitioning creditor's debt.

**g. Creditors who have received preferences.**—Prior to the amendatory act of 1903, all partial payments after insolvency were preferences. Thus, the objection was often made to involuntary petitions that the creditors had not provable debts. That, in such cases, it was well taken is sustained by a number of authorities under both the former and the present law.<sup>81</sup> If a payment to a creditor was made more than four months prior to the date of the petition, it is not preferential, and does not disqualify him as a petitioning creditor.<sup>82</sup> The use of the word "provable" has been thought to refer to the proof of a debt as distinguished from its allowance.<sup>83</sup> Some question has arisen as to whether a preferred creditor has a "provable" claim before the surrender of his preference, so as to give him any rights as a petitioning creditor. All debts can be "proved" whether secured, or preferred, or fraudulent; they cannot be "allowed" unless the advantage is surrendered. It would seem within reason to assert that "provable" must be here considered the equivalent of "allowable."<sup>84</sup> But at the present time the weight

and with the permission of the municipal authorities, assumes charge of and completes the work at an expenditure in excess of the contract price, the surety company is entitled to be regarded as having been lawfully substituted in the place of the contractor for the execution of the work which it had guaranteed, and is entitled to file a petition against the contractor. *Boyce v. Guaranty Co.* (C. C. A., 6th Cir.), 7 Am. B. R. 6, 111 Fed. 138.

74. In *re Rothenberg* (D. C., N. Y.), 15 Am. B. R. 485, 140 Fed. 798, holding that, under the present act, the simple test is whether the claim is provable. The fact that it is not yet allowable is immaterial.

Pendency of a suit in the State court between the payee and endorsers of a note in relation thereto is not a sufficient reason from striking the name of the payee from an involuntary petition against one of the endorsers. *Doty v. Mason* (D. C., Fla.), 40 Am. B. R. 58, 244 Fed. 587.

75. See under Section Sixty-three of this work. 76. *Michaels v. Post*, 21 Wall. 398; *Sloan v. Lewis*, 22 Wall. 150; *Linn v. Smith*, Fed. Cas. 8,375; In *re Alexander*, Fed. Cas. 161; In *re Western Savings, etc., Co.*, Fed. Cas. 17,442; In *re Nickodemus*, Fed. Cas. 10,254; In *re Chamberlin*, Fed. Cas. 2,580; In *re Matot* Fed.

Cas. 9,282; In *re Broich*, Fed. Cas. 1,921; In *re Noesen*, Fed. Cas. 10,238; In *re Cornwall*, Fed. Cas. 3,250.

77. In *re Stansell*, Fed. Cas. 13,293. Compare also In *re Bergeron*, Fed. Cas. 1,342; In *re Hatje*, Fed. Cas. 6,215.

78. *Emerine v. Tarault* (C. C. A., 6th Cir.), 34 Am. B. R. 65, 219 Fed. 68. Compare In *re Smith* (D. C., N. Y.), 23 Am. B. R. 864, 176 Fed. 423.

79a. *Morrison v. Riegan* (C. C. A., 7th Cir.), 41 Am. B. R. 325, 249 Fed. 97.

79. See In *re Hazens*, Fed. Cas. 6,285.

80. In *re Frost*, Fed. Cas. 5,134; In *re Scraf-ford*, Fed. Cas. 12,556.

81. In *re Rogers Milling Co.* (D. C., Ark.), 4 Am. B. R. 540, 102 Fed. 687; In *re Gillette* (D. C., N. Y.), 5 Am. B. R. 119, 104 Fed. 769; In *re Hunt*, Fed. Cas. 6,882; In *re Rado*, Fed. Cas. 11,522; In *re Israel*, Fed. Cas. 7,111; *Clinton v. Mayo*, Fed. Cas. 2,899.

82. In *re Girard Glased Kid Co.* (D. C., Pa.), 12 Am. B. R. 295, 129 Fed. 841.

83. See In *re Norcross* (Ref., Mo.), 1 Am. B. R. 644.

84. This seems sustainable under the authority of In *re Gillette* (D. C., N. Y.), 5 Am. B. R. 119; In *re Fishplate Clothing Co.* (D. C., N. Car.), 11 Am. B. R. 204, 125 Fed. 988.

of authority is opposed to this doctrine, and the rule now is that a preferred creditor holding a voidable preference may present, or may join in, a petition for an adjudication of bankruptcy.<sup>85</sup> It is probable, in any event, that where a preferred creditor petitions, or joins in a petition, he should set up his willingness to surrender his preference.<sup>86</sup>

**h. Creditors who have attachments.**<sup>87</sup>—The cases are not uniform as to the right of an attaching creditor to file a petition. A number of creditable cases are to the effect that such a creditor may not petition.<sup>88</sup> There is some doubt whether an attachment less than four months old amounts to a "preference;"<sup>89</sup> it more nearly resembles a security. On broad principles of equity, however, it is an advantage, placing the creditor having it out of that class which alone can file an involuntary petition. Only after a surrender of it, or at least an offer to surrender, should he be allowed to file.<sup>90</sup>

**85. Stevens v. Nave-McCord Co.** (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71; *In re Douglass Coal & Coke Co.* (D. C., Tenn.), 12 Am. B. R. 539, 551, 131 Fed. 769; *Matter of Murphy* (D. C., Mass.), 35 Am. B. R. 635, 225 Fed. 392. See also Am. B. R. Dig. § 202.

**Preferred creditor's claim provable.**—Judge Ray, in the case of *Matter of Hornstein* (D. C., N. Y.), 10 Am. B. R. 308, 321, 122 Fed. 266, insists that equity demands that those creditors who have received a preference be allowed to file petitions even if they have not surrendered their preferences. He emphatically dissents from the text as contained in the 4th edition of this work, p. 407, and says: "That 'provable' as used in the bankruptcy act, is to be considered as the equivalent of 'allowable,' as used in the same act, is a contention that ought not to prevail. Those words are not used in the act as equivalents, or as expressing the same meaning. Nor are the acts of or proceedings for 'proving a claim' and of 'allowing a claim,' the same." In the case of *In re Herzikopf* (D. C., Cal.), 9 Am. B. R. 90, 118 Fed. 101, it is held that a creditor may be a petitioner in bankruptcy notwithstanding the receipt of a preference which is unsurrendered. Citing *In re Norcross* (Ref., Mo.), 1 Am. B. R. 644; *In re Cain* (Ref., Ill.), 2 Am. B. R. 378; *In re Bloss*, Fed. Cas. No. 1,562; *In re California Pacific Ry. Co.*, Fed. Cas. 2,315; *In re Stansell* Fed. Cas. No. 13,293; *Rankin v. Railway Co.*, Fed. Cas. No. 11,567.

**86. Return of preference.**—In the case of *In re Vastbinder* (D. C., Pa.) 11 Am. B. R. 118, 126 Fed. 417, it was held that a creditor may surrender his preference and thus qualify as a petitioner, and it is sufficient if he offers to do so in the petition. In *re Fishplate Clothing Co.* (D. C., N. Car.), 11 Am. B. R. 204, 125 Fed. 986, holding that, where in an involuntary proceeding it appears that one of the petitioning creditors had received a payment on his claim within the four months' period which he had not surrendered, and that the petitioners had not asked for leave to amend the petition to

conform to the provisions of the bankrupt law, the petition will be dismissed.

A preference which has not been fraudulently obtained does not estop the preferred creditor from filing a petition, provided he surrenders such preference. In *re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764.

A creditor who has received a voidable preference, which he has not mentioned in an involuntary petition, but which he offers to return on a hearing before the referee, and before the court, may be counted as a petitioning creditor, upon deposit of the amount of the preference with the clerk, to be paid over to the trustee upon the latter's appointment. *Matter of Murphy* (D. C., Mass.), 35 Am. B. R. 635, 225 Fed. 392.

**87. See also Am. B. R. Dig. § 204.**

**88. In re Burlington Malting Co.** (D. C., Wis.), 6 Am. B. R. 369, 109 Fed. 777, holding that a creditor with an attachment obtained and permitted by his debtor while insolvent may not follow up his attachment with a petition for an adjudication of bankruptcy against his debtor based upon the same claim without a formal release of his levy; *In re Schenkein*, 113 Fed. 421, revg. on this point, a. c., 7 Am. B. R. 162.

**89. Compare In re Schenkein** (Ref., N. Y.), 7 Am. B. R. 162, with *In re Hazena*, Fed. Cas. 6,285, and *In re Broich*, Fed. Cas. 1,921.

**90. In re Schenkein** (Ref., N. Y.), 7 Am. B. R. 162; *In re Burlington Malting Co.* (D. C., Wis.), 6 Am. B. R. 369, 109 Fed. 777, holding that a creditor with an attachment obtained and permitted by his debtor while insolvent may not follow up his attachment with a petition against his debtor based upon the same claim without a formal release of his levy.

A creditor who has received an attachment within the four months' period may be a petitioner in proceedings to have his debtor adjudged a bankrupt, but before an order of adjudication is made he must formally surrender his attachment lien, and in the meantime the court of bankruptcy will restrain all persons from interfering

i. **Creditors who have an advantage through fraud.**—As has been seen, proofs of debt are not allowed if objection is made by a party in interest and that objection is sustained.<sup>91</sup> Thus, debts paid in part by a fraudulent transfer would probably be refused allowance. It is thought such claims will not sustain a creditor's petition, unless the petitioner surrenders his fraudulent advantage. Creditors who have merely connived at a "fraud on the law,"<sup>92</sup> as well as those who have attempted or accomplished a fraud on the other creditors, cannot institute an involuntary proceeding. Neither class, it seems, comes into court with clean hands. But the adjudication of an insolvent corporation may not be defeated because its directors and stockholders join in the petition, thus preventing a sale of corporate property under an execution.<sup>93</sup>

j. **Estoppel of creditors.**<sup>94</sup>—(1) **IN GENERAL.**—If it appears that the act of bankruptcy was secured by the connivance of a creditor, he should not be permitted to institute the proceedings.<sup>95</sup> A petition may not be filed by a creditor who procures a judgment creditor to issue execution for the sole and express purpose of enabling him to file a petition against the debtor,<sup>96</sup> or by two petitioning creditors who fraudulently compelled the bankrupt to pay the claim of a third creditor, thereby reducing the requisite number.<sup>97</sup> It is not immoral or illegal for petitioning creditors to solicit the alleged bankrupt not to defend, where he is in fact insolvent and has committed an act of bankruptcy, and this fact alone will not preclude them.<sup>98</sup> On general principles of equity it would seem that a creditor who is also an officer of a corporation ought not to be permitted to petition his debtor (such corporation) into bankruptcy on the ground

with the attached property until an adjudication is had and a trustee appointed, or the petition in bankruptcy is dismissed. *Matter of Hornstein* (D. C., N. Y.), 10 Am. B. R. 308, 122 Fed. 266.

91. See generally under Section Fifty-seven of this work.

92. Consult *In re Gutwillig* (C. C. A., 2d Cir.), 1 Am. B. R. 388, 92 Fed. 337; *West v. Lea*, 174 U. S. 590, 2 Am. B. R. 463.

93. *First Nat. Bank v. Wyoming Valley Ice Co.* (D. C., Pa.), 14 Am. B. R. 448, 136 Fed. 466.

94. See also Am. B. R. Dig. § 209.

95. *In re Marks Bros.* (D. C., Pa.), 15 Am. B. R. 457, 142 Fed. 279; *Clark v. Henne* (C. C. A., 5th Cir.), 11 Am. B. R. 583, 127 Fed. 288; *Moulton v. Coburn* (C. C. A., 1st Cir.), 12 Am. B. R. 553, 131 Fed. 201; *In re Curtis* (D. C., Ill.), 1 Am. B. R. 440, 91 Fed. 737, affd. 2 Am. B. R. 440, 91 Fed. 737, affd. 2 Am. B. R. 226, 94 Fed. 630. And see, for what acts do not constitute an estoppel, *Simonson v. Sinsheimer*, 96 Fed. 579, as affirmed by C. C. A., 6th Cir., 3 Am. B. R. 824, 100 Fed. 426; *In re Winston* (D. C., Tenn.), 10 Am. B. R. 171, 122 Fed. 187; *Matter of Taylor House Association* (D. C., N. Y.), 31 Am. B. R. 727, 732, 209 Fed. 924; *Perry v. Langley*, Fed. Cas. 11,006; *Spicer v. Ward*, Fed. Cas. 13,241.

**Preference made with approval of creditors.**—Where an alleged bankrupt conducting its business under the direction of a creditor's committee, with the approval of

the latter, borrowed money from a bank within four months preceding the filing of a petition against it, and gave collateral security to an amount greater than the loan, and the trust company applied the excess to the bankrupt's past indebtedness to it, the creditors who were members of the committee are estopped from objecting to the transfers as acts of bankruptcy. *Matter of Freeman Cotting Coat Co.* (D. C., Mass.), 32 Am. B. R. 489, 212 Fed. 548.

96. *In re Marks Bros.* (D. C., Pa.), 15 Am. B. R. 457, 142 Fed. 279.

97. **Fraudulently reducing number of creditors.**—Where two of three petitioning creditors after filing their petition colluded in an attempt to compel the alleged bankrupt to pay the claim of the third and by various means procured a judgment by a justice of the peace, which the alleged bankrupt was compelled to and did pay and satisfy; and that thereupon there was a failure of the requisite number of petitioning creditors, it was held that the two petitioning creditors being responsible for the situation and the third creditor having obtained the judgment and payment thereof and been allowed to withdraw, the remaining two were estopped from proceeding further as petitioning creditors. *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507.

98. *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

that such corporation has committed an act of bankruptcy, which act he himself brought about and caused to be committed.<sup>99</sup>

(2) **ASSENT TO OR PARTICIPATION IN ASSIGNMENT OR RECEIVERSHIP.**—

Where a creditor has voluntarily assented to the administration of the bankrupt's estate by means of an assignment, as by accepting its terms, or otherwise actively co-operating in its execution, he is estopped from thereafter filing an involuntary petition;<sup>100</sup> and this disability extends to their subsequent vendees, disqualifying the latter from filing an involuntary petition in bankruptcy.<sup>101</sup> However a creditor may not be estopped where it appears that he was misled into the assignment by misstatements,<sup>102</sup> or where the petitioning creditors had

99. Per Judge Ray in *Matter of Taylor House Association* (D. C., N. Y.), 31 Am. B. R. 727, 733, 209 Fed. 924.

100. Assent to general assignment.—*Doty v. Mason* (D. C., Fla.), 40 Am. B. R. 58, 244 Fed. 587; *Utz & Dunn Co. v. Regulator Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 167, 213 Fed. 315; *Despres v. Galbraith* (C. C. A., 8th Cir.), 32 Am. B. R. 170, 213 Fed. 190; *Matter of Campe & Co.* (D. C., Cal.), 38 Am. B. R. 792; *Durham Paper Co. v. Seaboard Knitting Mills* (D. C., N. Car.), 10 Am. B. R. 29, 121 Fed. 179; *In re Miner* (D. C., Mass.), 4 Am. B. R. 710, 104 Fed. 520; *In re Perry & Whitney Co.* (D. C., Mass.), 22 Am. B. R. 722, 172 Fed. 745, *affd.* 23 Am. B. R. 695, 175 Fed. 52; in this same case (22 Am. B. R. 780), on the petition of one of the bankrupt's creditors to intervene it was held that where the holder of a note against a debtor had knowledge that he had made an assignment for creditors, allowed four months to elapse without any attempt to become a party to bankruptcy proceedings, charging said assignment as an act of bankruptcy, both he and the assignee of the note are estopped from maintaining the bankruptcy petition. Compare *Hays v. Wagner* (C. C. A., 6th Cir.), 18 Am. B. R. 163, 150 Fed. 533.

In the case of *Simons v. Sinsheimer*, 3 Am. B. R. 824, 37 C. C. A. 337, 95 Fed. 948, Judge Taft said: "Where a debtor makes a general assignment for the benefit of his creditors, and judicial proceedings are instituted to enforce and carry out the assignment, creditors who, on being made parties to such proceedings, do not repudiate the assignment, nor begin proceedings in bankruptcy, but file their claims under the assignment, and participate in the administration of the estate, and suffer the assignee to sell the property and collect the proceeds, involving a delay of several months, and the incurring of costs and expenses, are estopped thereafter to file a petition in involuntary bankruptcy against the assignor based solely on the ground of the assignment."

Where, upon an insolvent debtor's making a general assignment for the benefit of creditors, certain creditors have voluntarily become parties to such assignment proceedings, such creditors by assenting to the assignment are estopped from instituting involuntary bankruptcy proceedings against their debtor, based upon such assignment as an

act of bankruptcy. *In re Romanow* (D. C., Mass.), 1 Am. B. R. 461, 92 Fed. 510, citing *Perry v. Langley*, 19 Fed. Cas. 282, 283, where the court said: "If the proof was that Perry had advised the making of the assignment, or after its execution had expressly given his assent to it, as a creditor of Langley, he would have been precluded from insisting on it as an act of bankruptcy, and could not have maintained a standing in this court as a petitioning creditor."

Creditors, assenting in writing to a common-law assignment for the benefit of creditors, are not, except under special circumstances, entitled to join in an involuntary petition, alleging as the sole act of bankruptcy the making of such assignment. *Moulton v. Coburn* (C. C. A., 1st Cir.), 12 Am. B. R. 553, 131 Fed. 201, *affg.* 11 Am. B. R. 212.

Where, upon the proposal made at a meeting of all the creditors but one, of an insolvent debtor, he executes a transfer in the form of a deed of trust or chattel mortgage in the usual form, with power of sale and condition of defeasance of his stock of goods, etc., to a trustee, the creditors are estopped from setting up such conveyance as a ground of bankruptcy. *Clark v. Henne* (C. C. A., 5th Cir.), 11 Am. B. R. 563, 127 Fed. 288.

In the Territory of Hawaii, there being no insolvent laws, creditors assenting to an assignment for the benefit of creditors, and acting under it to the extent of filing claims, are not thereby estopped from petitioning for a decree of bankruptcy against the assignor. *Matter of Hirose* (D. C., Hawaii), 12 Am. B. R. 154, 2 U. S., D. C. Hawaii, 111.

Creditor participating in proceeding under State law.—A creditor participating in proceedings under a State insolvency law which are void because the operation of such law has been suspended by the bankruptcy act, is not estopped from attacking such proceedings and joining in a petition to have the debtor adjudicated an involuntary bankrupt. *In re Weedman Stave Co.* (D. C. Ark.), 29 Am. B. R. 460, 199 Fed. 948.

101. *Utz & Dunn Co. v. Regulator Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 167, 213 Fed. 315.

102. *Matter of Canner* (Ref., Mass.), 21 Am. B. R. 199, *affd. sub nom. Canner v. Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 168 Fed. 519.

simply filed their claims as required by the State law, but had not by any other act assented to or participated in or made themselves parties to the assignment complained of as an act of bankruptcy.<sup>103</sup> The same estoppel exists where the creditor has been an active and voluntary participant in receivership proceedings in a State court,<sup>104</sup> but the mere fact that such proceedings have been brought and a creditor has filed a claim with the receiver appointed therein as required by the practice of the court, will not prevent his subsequent participation in bankruptcy proceedings against the debtor.<sup>105</sup> But if the participation in receivership proceedings extends so far as the acceptance of dividends the creditor is estopped.<sup>106</sup>

**k. Counting creditors when but one creditor petitions.**<sup>107</sup> — Subsection *b* also provides that where all the creditors are less than twelve, one of such creditors whose claim equals the sum of \$500 may file a petition. The doctrines already declared also apply where the sole question is the number of creditors in a given case. Only persons having provable debts<sup>108</sup> can be counted. The term "creditor" does not include those who have small current monthly accounts against the bankrupt for groceries, fuel, and the like.<sup>109a</sup> Where the total of the indebtedness is at issue, all debts preferentially paid must be counted.<sup>109</sup> A preferred creditor may not be counted against a petition, nor in computing the number of creditors that must join in the petition, unless he first surrenders his preference. But, if he surrenders his preference before the adjudication, he may be counted after the surrender.<sup>110</sup> Were it not for these rules, a debtor might often successfully resist a petition by collusion with creditors whom he had preferred. It seems to be the rule that where, upon the filing of an involuntary petition in bankruptcy, there are not the proper number of petitioning creditors nor a sufficient amount of claims to support the petition, but subsequently and before the adjudication other creditors enter their appearances and join in the petition, such creditors and the amounts of their claims will be reckoned in making up the number of the

103. *In re Curtis* (D. C., Ill.), 1 Am. B. R. 440, 91 Fed. 737, *affd.* 2 Am. B. R. 226, 94 Fed. 630. See also *Durham Paper Co. v. Seaboard Knitting Mills* (D. C., N. C.), 10 Am. B. R. 29, 121 Fed. 179.

104. *Lowenstein v. McShane Mfg. Co.* (D. C., Md.), 12 Am. B. R. 601, 130 Fed. 107; *Woodford v. Diamond State Steel Co.* (D. C., Del.), 15 Am. B. R. 31, 138 Fed. 582. *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 223 Fed. 667; *In re Gold Run Mining & Tunnel Co.* (D. C., Col.), 29 Am. B. R. 563, 200 Fed. 162; *Ohio Motor Car Co. v. Eiseman Magneto Co.* (C. C. A., 6th Cir.), 36 Am. B. R. 237, 230 Fed. 370.

105. Filing claim in receivership proceedings.—The fact that proceedings have been instituted in a State court and are being conducted under a statute authorizing any creditor of an insolvent corporation to institute an action in the nature of a creditor's bill, for the purpose of winding up the business, and, through the medium of a receiver, bringing to sale its property and paying the proceeds to the creditors according to their priorities, does not preclude the creditors from petitioning to have the corporation adjudged a bankrupt and have its assets administered in the bankruptcy court. While the mere filing of a claim with a receiver

appointed in such proceedings will not operate to estop the creditor from thereafter joining in a petition to have the insolvent adjudged bankrupt, still, if with full knowledge of his rights, a creditor delays such action, making no suggestion to those interested in the administration of the estate until the property is sold, expenses incurred, and the rights of innocent persons attached, he will not be permitted to proceed in a bankruptcy court after long delay, upon the sole ground that an assignment was made or a receiver appointed. *Matter of McKinnon Co.* (D. C., N. C.), 38 Am. B. R. 727, 237 Fed. 869.

Fed. 860.

106. *Ohio Motor Car Co. v. Eiseman* (C. C. A., 6th Cir.), 36 Am. B. R. 237, 230 Fed. 370.

107. See also Am. B. R. Dig., § 211.

108. Bankr. Act, § 1(9); note the exception of employees and laborers, discussed later. Compare on this, *In re Barrett Co.*, 2 N. B. N. Rep. 80.

109a. *Matter of Burg* (D. C., Tex.), 40 Am. B. R. 126, 245 Fed. 173.

109. *In re Norcross* (Ref., Mo.), 1 Am. B. R. 644; *In re Tirre* (D. C., N. Y.), 2 Am. B. R. 493, 85 Fed. 425. See also *In re Cain* (Ref., Ill.), 2 Am. B. R. 378, and *In re Barrett Co.*, 2 N. B. N. Rep. 80.

110. *Stevens v. Nave-McCord Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 617, 150 Fed. 71.

creditors and the amount of claims necessary to support an involuntary petition in bankruptcy. The number of creditors should be reckoned as of the date of the petition.<sup>111</sup>

1. **Involuntary petitions must be in duplicate.**—(1) **IN GENERAL.**—Although this seems to mean two petitions, each an original and not an original and a copy,<sup>112</sup> it has been held that the statute is fully satisfied by filing an original and a certified copy of the original prior to the four months' period.<sup>113</sup> These papers must be filed with the clerk; handing them to him out of his office, while not usual, is enough.<sup>114</sup> The duplicate is served with the subpoena on the alleged bankrupt.

(2) **WAIVER OF DUPLICATE.**—As the only benefit of filing a duplicate petition is to enable the debtor to answer more speedily and conveniently, an answer without a demand of the privilege is a waiver of it. It estops the debtor from thereafter insisting upon it, because it leads the petitioner to proceed and to incur expense in reliance upon the renunciation of the privilege which has become *functus officio* by the answer.<sup>115</sup>

#### IV. PRACTICE IF ANSWER AVERS MORE THAN TWELVE CREDITORS.

a. **In general.**—Though the policy of the law is to require the concurrence of at least three creditors in a petition, subsection *d*, in connection with subsection *f*, in practice, results in petitions by one creditor in most cases where there is neither time nor opportunity to ascertain whether the alleged debtor has twelve or more. As a consequence, even if an answer alleging that number of creditors is interposed, the quota of three is easily supplied by intervenors, and a bankruptcy through one creditor in \$500 is nearly as easy as it was under the former law before the amendments of 1874. The allegation that the creditors are less than twelve can, nay, often must be, on information and belief, and, if so, it seems, sufficient.<sup>116</sup> Insufficiency in the allegation as to the number of creditors is not an incurable jurisdictional defect.<sup>117</sup>

b. **Filing "list of creditors."**—The "list of creditors" required of the defendant debtor by § 59-d of the statute, when he sets up as a defense to a petition by a single creditor that the number of his creditors is more than twelve, must contain, besides the bare names and addresses of such creditors, at least a statement of the amount due each creditor, the date of the debt, when due, whether due by note or account or by some form of contract, the consideration therefor, whether owned jointly with another, as partner or otherwise, and such full particulars as will enable the petitioning creditor to

111. *Moulton v. Coburn* (C. C. A., 1st Cir.), 12 Am. B. R. 553, 131 Fed. 201, affg. 11 Am. B. R. 212, holding that, in determining whether, upon a petition filed by a single creditor, the number of creditors of an alleged bankrupt is less than twelve, thirteen creditors, induced by the bankrupts' assignee under a general assignment acting in behalf of creditors not to join in the petition, should be counted.

112. *In re Dupree*, 97 Fed. 28; *In re Stevenson* (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 110. In each of these cases a single paper had been filed within the four months' period. In each of them an application was made after the four months had expired to permit the filing *nunc pro tunc* of a copy or a duplicate original.

113. *Millan v. Exchange Bank of Manington* (C. C. A., 4th Cir.), 24 Am. B. R. 889, 183 Fed. 753.

114. Compare under Section Eighteen of this work. See also Am. B. R. Dig. §§ 232-234.

115. *In re Plymouth Cordage Co.* (C. C. A., 9th Cir.), 13 Am. B. R. 605, 135 Fed. 1000.

116. *In re Scamman*, Fed. Cas. 12,427; *Perrin & Gaff Mfg. Co. v. Peale*, Fed. Cas. 10,981; *In re Mann*, Fed. Cas. 9,033.

117. *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 362, 68 C. C. A. 340, 136 Fed. 73. See *infra* this section, *Amendments of Petition*.



negotiate with others to join with him in the petition and save the necessity and cost of a reference to ascertain the facts. There should be no concealment of these particulars by the debtor in making such a defense. If the particulars of the debts contained in the list of creditors, where it is alleged by debtor that his debts are more than twelve in number, are not disclosed in the answer of the defendant, the court will, if necessary, refer the case to ascertain them, and thus settle any dispute between the parties concerning them.<sup>118</sup>

c. *Practice.*—The practice on such an answer is distinctly marked out in this subsection.<sup>119</sup> A practical difficulty arises where a reference has been made to a special master. He is not “the court” and cannot, therefore, give the notice to the other creditors. This difficulty is usually met either by obtaining from the court an order directing him so to do, or by a stipulation of the parties. The mode of service of the notice is left to the discretion of the court; if the creditors named were actually served in time to intervene, the mode of service is immaterial.<sup>120</sup> If other creditors “join in,” they must do so in the court proper and not before the special master. Where such an answer raises other questions and other creditors do not intervene, the evidence should at first be confined to the single question of the number of creditors; the burden is on the alleged bankrupt. If the decision is with him, the petition must be dismissed. The words “such hearing” clearly refer to a trial of this issue only. Creditors may join in at any time before the evidence thereon is closed. The cases under the former law are often in point.<sup>121</sup>

#### V. EXCLUSION OF EMPLOYEES, RELATIVES AND OFFICERS.

Subsection *e* excludes from the computation the bankrupt’s employees and relatives within the third degree. While claimants who have an advantage in dollars are not excluded in ascertaining the number of creditors, those presumably in the control of the bankrupt are. The purpose—to prevent the creation of fictitious debts and thereby the number of creditors where less than twelve are alleged—is clear. But the subsection hardly goes far enough to prevent that evil. In line with its policy, it has been held that the officers of a bankrupt corporation, who are also its creditors, should be excluded.<sup>122</sup> This may be doubted.<sup>123</sup> The subsection is by way of limitation and should be construed strictly. Only employees at the time of the bankruptcy and relatives by consanguinity or affinity within the third degree should be excluded. The statute is silent concerning whether, being so excluded, these classes may be petitioning or intervening creditors. It has been held that a relative who may not be counted in computing the number of creditors may bring a petition.<sup>124</sup>

118. *W. A. Gage & Co. v. Bell* (D. C. Tenn.), 10 Am. B. R. 696, 124 Fed. 371.

119. That the list of creditors must be “under oath,” compare *In re Steinman*, Fed. Cas. 13,357; *In re Hymes*, Fed. Cas. 6,986. See also “Supplemental Forms,” *post*.

120. *In re Tribelhorn* (C. C. A., 2d Cir.), 14 Am. B. R. 491, 137 Fed. 3.

121. *Robinson v. Hanway*, Fed. Cas. 11,953; *In re Sheffer*, Fed. Cas. 12,742.

122. *In re Barrett Co.*, 2 N. B. N. Rep. 80.

123. Creditors of a corporation, who are also directors, are not precluded from pe-

tioning for the adjudication of the corporation in bankruptcy on the ground that it had admitted its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, merely because their presence at the meeting of the board of directors, when such admission was made, was necessary to its validity. *Home Powder Co. v. Geis* (C. C. A., 8th Cir.), 29 Am. B. R. 580, 204 Fed. 568.

124. *Perkins v. Dorman* (D. C., N. Mex.), 30 Am. B. R. 767, 208 Fed. 858.

VI. INTERVENTION BY OTHER CREDITORS.<sup>128</sup>

a. In general.—After the amendments of 1876, intervention by other creditors, under the previous law, was regulated by statute. The time, ten days, was rather short. There is no such limitation in the present law. Creditors other than the original petitioners may, at any time, enter their appearance and join in the petition, and creditors so joining in a petition subsequent to its filing may be counted in making up the number of creditors and amount of claims required by the act to support the petition.<sup>128</sup> The purpose of Congress in expressly authorizing creditors, as well as the debtor, to answer an involuntary petition in bankruptcy, was to guard against an improvident adjudication and to protect those whose peculiar interests might be prejudiced by establishing the status of bankruptcy.<sup>128a</sup> Application by a party in interest to intervene in an involuntary proceeding calls for the exercise by the court of a sound discretion in determining in the first place whether the leave ought to be granted.<sup>127</sup> Under subsection f it is now well settled that creditors may join at any time before adjudication, even though it be more than four months after the act of bankruptcy was committed, and will be counted to make up the number of creditors and the amount of claims required by the act,<sup>128</sup> but a delay of a year has been thought unreasonable and permission to intervene refused.<sup>129</sup> No settlement that the petitioning creditors make can defeat the right.<sup>130</sup> If the original petitioners withdraw, the creditors who intervene prior to such withdrawal will be permitted to continue the proceeding, although such intervention is more than four months subsequent to the alleged act of bankruptcy,<sup>131</sup> and the adjudication will

<sup>128</sup> See also Am. B. R. Dig., § 267.

<sup>128a</sup> In re Crenshaw (D. C. Ala.), 19 Am. B. R. 502, 156 Fed. 638.

Policy of act.—The court in the exercise of its discretion in granting or refusing leave to intervene should take notice of the policy which is evidenced by the provision of section 59-f that creditors other than the original petitioners may at any time enter their appearance and file an answer and be heard in opposition to the prayer of the petition. Abbott v. Wauchula Mfg. & Timber Co. (C. C. A., 5th Cir.), 33 Am. B. R. 510, 229 Fed. 677.

<sup>128a</sup> Effect of failure to intervene.—Creditors entitled to intervene in bankruptcy proceedings who do not exercise their rights to become parties remain strangers to the litigation and, as such, unaffected by the decision of even essential subsidiary issues, and are merely

so far as it is strictly pty. Gratiot County v. B. Sup. Ct.), 43 Am. B. R. rev'g 38 Am. B. R.

In Manufacturing & Co. (C. C. A., 5th Cir.), 36 Am. B. R.

v. Blaceman (C. C. A., 7th Cir.), 7 Am. B. R. 230, 130 Fed. 370; In re Lower Co. (D. C. W. Va.), 183 Fed. 160; In re 5 Am. B. R. 286, 105 Fed. 29; In re Plymouth Co. (C. C. A., 1st Cir.), 13 Am. B. R. 434. In re 1 Am. B. R. 461, 92 Fed. 100; In re Matter of Jule & Co. (C. C. A., 1st Cir.), 1 Am. B. R. 166, 268 Fed.

their appearance and join in the petition, said: "It is urged that to permit other creditors to procure an adjudication who have not sought to do so until after four months have elapsed since the act of bankruptcy would enable them to overhaul conveyances and sales as fraudulent or preferential which could not be done otherwise, and might work injustice to those whose titles had by lapse of time become safe. Nothing in the bankrupt act indicates a solicitude for the protection of fraudulent vendees, and if creditors whose preferences may be disturbed have any equities to urge against an adjudication, they are authorized by section 59 to intervene and present them. And, even if imaginable cases of hardship may arise, the plain language of the act, authorizing creditors 'at any time' to join in the original petition, cannot be disregarded."

<sup>129</sup> In re Jemison Mercantile Co. (C. C. A., 5th Cir.), 7 Am. B. R. 588, 112 Fed. 968, holding that, where the petition for an involuntary adjudication is dismissed upon the request of the petitioning creditors, the application of other creditors for a reinstatement of the proceedings may after the lapse of a year be denied with costs upon the ground of unreasonable delay. Compare also Citizens' Nat. Bank v. Cass, Fed. Cas. 2,732.

<sup>130</sup> In re Calendar, Fed. Cas. 2,307; In re Buchanan, Fed. Cas. 2,073.

<sup>131</sup> Matter of Bolognesi (C. C. A., 2d Cir.), 34 Am. B. R. 692, 228 Fed. 771, in which the court said: "The original petition was undoubtedly valid on its face, and gave the court jurisdiction. Matter of New York Tunnel Company (C. C. A., 2d Cir.), 21 Am. B. R. 531, 166 Fed. 284, 92 C. C. A. 202. When that petition was filed a proceeding became pending in the District Court, initiated in accordance with the statute and in which creditors who had not participated in its initiation were entitled to intervene. Bankruptcy Act, section 59-f. We do not

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Joining before adjudication.—In the Stein case, *supra*, Judge Wallace, after referring to the provision which authorizes creditors other than original petitioners "at any time" to enter

operate on preferences within four months of the original filing.<sup>132</sup> In such a case, the intervening petitioners need not be three in number or have debts aggregating \$500.<sup>133</sup> But intervention will not be ordered where the original petition was on its face defective in number or amount;<sup>134</sup> nor will it be permitted, as a matter of right, after a hearing and a dismissal of the petition;<sup>135</sup> nor will intervention be permitted where the original petition was signed by creditors who were estopped from filing a petition.<sup>136</sup> But it has been held that an intervening petition seasonably and properly filed should not be dismissed where the intervening creditors were not aware of an estoppel against the principal petitioners, if the original petition was brought in good faith and was good upon its face.<sup>137</sup> A creditor cannot intervene to oppose a voluntary petition on the ground that the petitioner is not insolvent.<sup>138</sup>

think that the mere circumstance that their intervention come so long after the act of bankruptcy that they could not then have originated a proceeding bars them from intervening in a pending proceeding; their adoption of the original petition related back to the date it was filed because it was good and needed no amendment. Certainly the original proceeding cannot be held to be a void one, because facts may be shown in affirmative defense which may constitute an estoppel against the original petitioners taking advantage of the act of bankruptcy. No doubt any petitioner may be allowed to withdraw, in the court's discretion. If the original petitioners so withdraw, before others intervene, that ends the proceeding completely; there is nothing left to intervene in. But until they do withdraw there is a proceeding, in which others may intervene; and if others have done so, in the lifetime of the proceeding, subsequent withdrawal of the originators will leave the intervenors free to proceed. In *re Cronin* (D. C., Mass.), 3 Am. B. R. 552, 98 Fed. 584. If the opinion in *Despres v. Galbraith* (C. C. A., 8th Cir.), 32 Am. B. R. 170, 213 Fed. 190, in which the court seems to have held that the original petition was void, be construed to hold that intervention under a valid petition, four months after the act of bankruptcy and before the original proceeding was dismissed gives the intervenors no right to proceed, we cannot concur."

132. In *re Lacey*, Fed. Cas. 7,965.

133. In *re Sheffer*, Fed. Cas. 12,742. Consult, however, in *re Ryan* (D. C., Pa.), 7 Am. B. R. 562, 114 Fed. 373, holding that, where in an involuntary bankruptcy the aggregate amount of the claims of the original petitioners is, before adjudication, reduced below the statutory limit by payments made by the alleged bankrupt, and other creditors, holding claims to an amount sufficient to make the aggregate amount of all the claims \$500, petition to join in the proceedings, the court has jurisdiction to enter an order of adjudication.

A single intervening creditor may carry on a petition good on its face. *Matter of Culgin-Pace Contracting Co.* (D. C., Mass.), 35 Am. B. R. 375, 224 Fed. 245.

134. Joinder where petition is defective as to amount or number.—In *re Beddingfield* (D. C., Ga.), 2 Am. B. R. 355, 96 Fed. 190, in which Judge Newman said: "It would be necessary in every case, of course, that a petition in involuntary bankruptcy should, on the face of it, show that creditors participated to the amount of \$500, before a petition could be filed, or a rule obtained; and these, of course, would have to be participating in good faith. Then, if afterwards, and before adjudication, it should appear that for some reason one or more of the petitioning creditors did not have debts, or their debts were not provable, and other creditors came in sufficient to make the amount necessary, they could be allowed, and the proceedings stand. The court would never entertain a mere sham petition prepared originally with a view to doing this but it would be only where a petition was brought in good faith, and some such contingency as has been referred to occurred." See also *Robinson v. Hanway*, Fed. Cas. 11,953.

Intervention by a creditor who became such after the joinder of issue on an involuntary petition merely to supply an additional creditor will not be permitted. In *re Perry & Whitney* (D. C., Mass.), 22 Am. B. R. 780, 172 Fed. 752. In *Manning v. Evans* (D. C., N. J.), 19 Am. B. R. 217, 221, 156 Fed. 106, Judge Lanning says that: "To extend that rule to a case in which the petition shows on its face that the requisite number of creditors have not joined in it—a defect which every creditor is bound to observe—is equivalent to adjudging a petition valid in which the acts of bankruptcy charged were committed more than four months before the filing of the petition."

135. In *re Tribelhorn* (C. C. A., 2d Cir.), 14 Am. B. R. 492, 137 Fed. 3; *Trammell v. Yarbrough* (C. C. A., 5th Cir.), 42 Am. B. R. 727, 254 Fed. 686.

136. *Despres v. Golbraith* (C. C. A., 8th Cir.), 32 Am. B. R. 170, 213 Fed. 190.

137. *Matter of Freeman Cotting Coat Co.* (D. C., Mass.), 32 Am. B. R. 493, 212 Fed. 551.

138. In *re Carleton* (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246; *Matter of Pyatt* (D. C., Nev.), 42 Am. B. R. 462, 257 Fed. 362, citing *Collier on Bankruptcy* (11th Ed.) 856.

A creditor who fails to intervene in a proceeding wherein a demurrer to an involuntary petition is sustained, is in no more favorable position to maintain a new proceeding in another district than the creditors who did intervene.<sup>139</sup> The answer of a creditor, which is not sworn to as required by law, may be amended at any time before adjudication.<sup>140</sup> A creditor, by obtaining an order permitting it to intervene in a bankruptcy proceeding, submits itself to the jurisdiction of the bankruptcy court and must stay there so far as concerns any attack by it upon the orders of the bankruptcy court.<sup>140a</sup>

**b. Who may intervene.**—Generally speaking, any creditor who could have petitioned may join in a petition for intervention.<sup>141</sup> The assignee of a provable claim may intervene.<sup>142</sup> When an answer is filed, however, the rule seems different and may be expressed by submitting the words "party in interest" for "creditor." Thus, it is thought, any one who has a direct pecuniary interest in preventing the bankruptcy, even though that degree of good faith required of a petitioner in such a case is absent, may file an answer.<sup>143</sup> Thus, it has been held that an attaching creditor may resist an involuntary petition without surrendering his attachment,<sup>144</sup> and so may a judgment creditor whose judgment is unsatisfied,<sup>144a</sup> or, a secured creditor having a provable claim for the excess of the value of his securities.<sup>145</sup> Stockholders of a bankrupt corporation may be permitted to intervene in the proceedings upon a proper showing, notably that they had attempted to induce the directors or managers of the corporation to take remedial action.<sup>146</sup> The procedure after answer is considered elsewhere.<sup>147</sup>

**c. Practice.**—Whether creditors "join in the petition" or "file an answer," they should enter an appearance.<sup>148</sup> This is usually enough. If the application

<sup>139.</sup> *Matter of Culgin-Pace Contracting Co.* (D. C., Mass.), 35 Am. B. R. 375, 224 Fed. 245.

<sup>140.</sup> *In re Harris* (D. C., Ala.), 19 Am. B. R. 204, 156 Fed. 875.

<sup>140a.</sup> *Matter of Ohio Copper Mining Co.* (D. C., N. Y.), 39 Am. B. R. 284, 241 Fed. 711.

<sup>141.</sup> *Ayres v. Cone* (C. C. A., 8th Cir.), 14 Am. B. R. 789, 128 Fed. 778. See also Am. B. R. Dig., § 257.

**Claims purchased after petition filed.**—Creditors in order to intervene in an involuntary bankruptcy proceeding must be such at the time of the filing of the petition. Creditors who purchased claims after the filing of a petition should not be allowed to intervene. *Matter of Kehoe* (C. C. A., 2d Cir.), 36 Am. B. R. 891.

<sup>142.</sup> **Right to intervene on assigned claim liquidated after petition filed.**—Where at the time of the filing of a petition in bankruptcy, claimant's assignor held a bond of the alleged bankrupt secured by a mortgage, and thereafter foreclosed such mortgage, and about a month after the filing of the petition entered a deficiency judgment against the alleged bankrupt, he had at the time the petition was filed a claim which was provable, although not yet allowable, but which became liquidated, and in a condition to be allowed, by the foreclosure suit wherein the value of his security was ascertained and claimant was entitled to intervene in the pending bankruptcy proceedings. *Matter of Fitzgerald* (D. C., N. Y.), 26 Am. B. R. 773, 191 Fed. 96.

<sup>143.</sup> For illustrative cases, see *In re Heusted*, Fed. Cas. 6,449; *In re Jack*, Fed. Cas. 719; *In re Hatje*, Fed. Cas. 6,215; *In re Mendelsohn*, Fed. Cas. 9,420; *In re Austin*, Fed. Cas. 662; *In re Jones*, Fed. Cas. 7,442; *In re Vogel*, Fed. Cas. 16,981. *Contra*: *In re Boston, etc., Co.*, Fed. Cas. 1,679; and, under the law of 1841, *Dutton v. Freeman*, Fed. Cas. 4,210; *In re Tallmadge*,

Fed. Cas. 13,738; *Jackson v. Wauchula Manufacturing and Timber Co.* (C. C. A., 5th Cir.), 36 Am. B. R. 408, 230 Fed. 409.

<sup>144.</sup> *In re Moench* (D. C., N. Y.), 10 Am. B. R. 590, 123 Fed. 977.

<sup>144a.</sup> *Matter of Carey* (C. C. A., 2d Cir.), 42 Am. B. R. 553, 254 Fed. 688, rev'g 42 Am. B. R. 187.

<sup>145.</sup> *Johansen Bros. Shoe Co. v. Alles* (C. C. A., 8th Cir.), 28 Am. B. R. 299, 197 Fed. 274.

<sup>146.</sup> *Ogden & Jamison v. Gilt Edge Mines Co.* (C. C. A., 8th Cir.), 34 Am. B. R. 893, 225 Fed. 723; *In re Eureka Anthracite Coal Co.* (D. C., Ark.), 28 Am. B. R. 753, 197 Fed. 216.

<sup>147.</sup> See under Section Eighteen of this work.

<sup>148.</sup> For practice, compare *In re Taylor*, 1 N. B. N. 412. For forms, see "Supplementary Forms," *post*.

**Pleading in intervention.**—Creditors on a petition to intervene are only bound to allege facts establishing their right to intervene and to file an answer; they need not show facts constituting a good answer. *Matter of Gibney Tire & Rubber Co.* (D. C., Pa.), 39 Am. B. R. 355, 241 Fed. 879.

Where, after a bankrupt has answered an involuntary petition, admitting a preferential payment to a creditor and declaring his willingness to submit to adjudication, such creditor filed an answer denying the receipt of a preference, after which the petition was amended so as to charge another act of bankruptcy consisting of a preferential payment to another creditor, which the bankrupt likewise admitted and declared his willingness to submit to adjudication on that ground, the creditor's answer raises merely academic questions and the adjudication is properly entered upon the preference charged in the amended petition. *In re Cleary* (D. C., Pa.), 24 Am. B. R. 742, 179 Fed. 990.

is to "join in" the petition, it may be by a verified petition, and is usually heard *ex parte*. If granted, the applicant becomes as much a petitioning creditor as if he had joined in the original petition.<sup>149</sup> Whether a new act of bankruptcy can be alleged in such a petition is doubted. If such act was committed more than four months before, though within four months of the filing of the original petition, it certainly should not be.<sup>150</sup> In any event, a petition which thus changes the issue should not be made, save on notice to all parties. The better practice is to amend the original petition,<sup>151</sup> after the order of intervention is granted. All parties to the proceeding should be notified of the entry of the order; this is usually done by the intervenor's attorney. Professional courtesy suggests that such notice be accompanied by copies of the petition and order, if any. Any party to the proceeding may respond that the intervenor is not a creditor;<sup>152</sup> otherwise, a reply is usually unnecessary. If the order has been granted, such a response can be brought upon motion to vacate or an order to show cause. Notice should be given all parties who have appeared. Where the validity of the claim of a petitioning creditor is put in issue and the claim is adjudged valid, the adjudication is *res adjudicata* in the hearing of a subsequent objection to the allowance of the claim on the same ground.<sup>153</sup>

d. Notice to creditors.—The bankruptcy statute carefully selects and specifies the instances in which it intends to give the creditor the right to notice. The filing of a petition in involuntary proceedings by proper parties, making the jurisdictional allegations, operates as *lis pendens*, and is notice to all the world; and no other notice to creditors of the proceeding is necessary.<sup>154a</sup> The only instance in which any right to notice is given the creditor, as to the disposition of an involuntary petition, is when it is proposed to dismiss the proceedings by consent of the parties, or for want of prosecution.<sup>154</sup>

#### VII. AMENDMENTS OF PETITIONS.<sup>155</sup>

Amendments relating to the number of the petitioning creditors and the amount and nature of their claims can be made more than four months after the commission of the act of bankruptcy. When so made they relate back to the date of the filing of the original petition.<sup>156</sup> But where an alleged bankrupt fails to answer or plead to an involuntary petition filed against him, it may not thereafter be amended so as to allege acts of bankruptcy prior to the acts of bankruptcy set forth in a second petition.<sup>157</sup> And an application to amend by alleging an additional act of bankruptcy should be denied when

149. Compare *In re Beddingfield* (D. C., Ga.), 2 Am. B. R. 355, 96 Fed. 190.

150. For a sufficient reason, see *In re Lacy*, Fed. Cas. 7,965.

151. See under Section Eighteen of this work.

152. Compare *In re Taylor*, 1 N. B. N. 412.

153. *Ayres v. Cone* (C. C. A., 8th Cir.), 14 Am. B. R. 739, 138 Fed. 778.

153a. *Gratiot County State Bank v. Johnson* (U. S. Sup. Ct.), 43 Am. B. R. 357, 39 Sup. Ct. 263, rev'g 38 Am. B. R. 518, 160 N. W. 544; *Coppard v. Gardner* (Tex. Ct. of Civ. App.), 40 Am. B. R. 777, 199 S. W. 650, citing *Collier on Bankruptcy* (11th ed.) 858.

154. *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

155. See also discussion under § 18, *ante*, and Am. B. R. Dig., § 231.

156. *Doty v. Mason* (D. C., Fla.), 40 Am. B. R. 58, 244 Fed. 587; *Millan v. Bank of Manning-*

*ton* (C. C. A., 4th Cir.), 24 Am. B. R. 889, 183 Fed. 753; *State Bank v. Haswell* (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209; *Ryan v. Hendricks* (C. C. A., 7th Cir.), 21 Am. B. R. 570, 166 Fed. 94; *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000; *Matter of Haft* (C. C. A., 2d Cir.), 13 Am. B. R. 362, 68 C. C. A. 340, 136 Fed. 78; *Matter of Jones* (D. C., Tenn.), 31 Am. B. R. 603, 209 Fed. 717, holding that a petition to amend the original petition so as to allege a preference through legal proceedings, should be denied where it does not appear that the preference was made within four months prior to the filing of the original petition; *Matter of Condon* (C. C. A., 2d Cir.), 31 Am. B. R. 754, 209 Fed. 800, affg. 29 Am. B. R. 907, 198 Fed. 947.

157. *In re Harris* (D. C., Ala.), 19 Am. B. R. 204, 156 Fed. 875.

it does not appear when the act was committed or who was benefited thereby.<sup>158</sup> The discretion of the Bankruptcy Court in granting or refusing amendments in petitions will not be interfered with unless an abuse of discretion is shown.<sup>159</sup>

#### VIII. DISMISSALS OF PETITIONS.

A petitioning creditor cannot withdraw<sup>160</sup> and thus reduce the number to less than three. A proceeding once begun must result either in an adjudication or a dismissal. Subsection *g* has to do only with dismissals, other than on the merits. Dismissal for "want of prosecution" is not justified by the mere failure of creditors to present evidence in support of their petition, without notice to creditors, where it appears that the petitioning creditors and the alleged bankrupt agreed to such dismissal.<sup>161</sup> It is provided by the amendment of 1910 that before the court will entertain an application for a dismissal, the bankrupt must file a list of his creditors with the addresses, and will cause notices to be served on such creditors. A dismissal may be had on motion of bankrupt without notice to creditors who have not intervened where there is no suggestion of collusion.<sup>162</sup> Its close connection with § 58-a (8) should be noted; also a practical difficulty previously mentioned.<sup>163</sup> The fact that after adjudication the bankrupt appears to be solvent is not of itself sufficient grounds for dismissal.<sup>164</sup> It is clearly intended to prevent the use

158. *Matter of Lewis Shoe Co.* (D. C., Mass.), 38 Am. B. R. 134, 235 Fed. 1017.

159. *Sabin, Blake-McFall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501.

Discretion of court.—Amendments are freely allowed, but are within the discretion of the court, which discretion will not ordinarily be disturbed. The court should not permit the filing of an amended petition in which the petitioners swear to positive averments of facts, where they had testified that they had no such knowledge as would justify the averments. *Matter of Frank* (C. C. A., 3d Cir.), 38 Am. B. R. 674, affg. 37 Am. B. R. 19, 234 Fed. 665.

160. *In re Rosenfelds*, Fed. Cas. 12,061; *In re Philadelphia Axle Works*, Fed. Cas. 11,091. But see *In re Sargent*, Fed. Cas. 12,361. Three out of four petitioning creditors should not be permitted to withdraw on the claim that the other petitioner is not a creditor. See *In re Quincy Granite Quarries Co.* (D. C., Mass.), 16 Am. B. R. 833, 147 Fed. 279. Where one of three petitioning creditors has withdrawn and the other two are estopped from proceeding because of conduct in violation of their duty, the petition may be dismissed. *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507.

161. "Want of prosecution."—Where petitioning creditors follow up a petition in all formal matters, and duly attend before the referee, their failure to offer any evidence to sustain the petition does not constitute a "want of prosecution," within the meaning

of section 59-g of the Bankruptcy Act, providing that an involuntary petition shall not be dismissed "for want of prosecution or by consent of parties" until after notice to the creditors. *Matter of Chalfou* (D. C., Mass.), 35 Am. B. R. 257, 223 Fed. 379.

162. *Matter of Levi* (C. C. A., 2d Cir.), 15 Am. B. R. 294, 142 Fed. 902.

Dismissal of proceedings.—Where practically all of an alleged bankrupt's creditors assent to a dismissal of involuntary bankruptcy proceedings, either affirmatively or by failure to oppose, and the statutory three creditors are not found insisting on a continuance thereof, and no deception is suggested to have been practiced on creditors, the proceedings should be dismissed. *In re Rosenblatt & Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 401, 193 Fed. 638. Compare *Matter of Ortiz & Co.* (D. C., Porto Rico), 44 Am. B. R. 123.

Notice to creditors.—Section 59-g of the Bankruptcy Act, providing for notice to creditors of a motion to dismiss a petition, does not require service of notice upon all the creditors of the alleged bankrupt; notice to petitioning creditors who have appeared in the proceeding is sufficient. *Matter of Mason-Seaman Transportation Co.* (D. C., N. Y.), 37 Am. B. R. 677, 235 Fed. 974.

163. See *ante*, under this section, and also Bankr. Act, § 58-a (8). Where the dismissal is on the initiation of the court, notice to creditors is not required. *Matter of Crisp* (D. C., Tenn.), 38 Am. B. R. 538.

164. *In re Jamaica Slate Roofing & Supply Co.* (D. C., N. Y.), 28 Am. B. R. 763, 197 Fed. 240.

of the court as a means to compel a settlement with the petitioning creditor. It is in line with the principle that the filing of a petition confers jurisdiction as to all creditors as well as over all property; it guarantees them notice of the step which may end such jurisdiction.<sup>164a</sup> The cases under the present law and the practice have already been considered.<sup>165</sup>

164a. *Matter of Malkan* (C. C. A., 2d Cir.), 44 Am. B. R. 433, 261 Fed. 894.

165. See under Sections Eighteen and Fifty-eight of this work. See also Am. B. R.

Dig. §§ 271-274. For forms, see "Supplementary Forms," *post*; Hagar and Alexander's *Bankruptcy Forms* (2d Ed.).

## SECTION SIXTY.

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### PREFERRED CREDITORS.

§ 60. Preferred Creditors.—*a.* A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

*b* If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person.\* And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.†

*c* If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in

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\*Amendments of 1910 in italics.

†Amendment of 1903 added last sentence.



bankruptcy may be set off against the amount which would otherwise be recoverable from him.

*d* If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

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**Analogous provisions:** In U. S.: As to voidable preferences, Act of 1867, § 35, R. S., §§ 5128, 5130A; Act of 1841, § 2; Act of 1800, § 28; As to fraudulent conveyances, Act of 1867, § 35, R. S., §§ 5129, 5130A; As to transfers out of the ordinary course of business being presumptively fraudulent, Act of 1867, § 35, R. S., § 5130; As to fraudulent preferences being an objection to a discharge, Act of 1867, § 44, R. S., § 5110.

In Eng.: As to "fraudulent" preferences, Act of 1883, § 48; as to "undue" preferences being an objection to a discharge, Act of 1890, § (3) (i).

In Can.: Act of 1919, §§ 31, 32, 33.

**Cross-references:** To the law: Definition of transfer, § 1(25).

Suffering or permitting preference through legal proceedings, act of bankruptcy, § 3-a(3); transfer of property to prefer creditor, act of bankruptcy, § 3-a(2).

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Jurisdiction of suits for recovery of preferences, § 23-b.

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a. **Historical statement.**—A preference is a "conventional fraud;" the debtor merely prefers to pay one creditor more than, or to the exclusion of, others. At common law, such a payment or transfer was not even constructively fraudulent, though as early as 1635, preferential transfers were regulated by statute and, for more than a century, were punishable as crimes.

Our modern doctrine that preferences are wrongs on other creditors was first declared by Lord Mansfield.<sup>1</sup>

b. *Comparative legislation.*—(1) *IN ENGLAND.*—There was no statutory definition of a preference prior to the English act of 1869; though the insolvent debtor acts, beginning with that of 1824, contained clauses declaring what were preferences in cases where debtors other than traders sought the refuge of the courts.<sup>2</sup> Even now the English law explains, rather than defines what is a preference. Prior to these enactments, the courts had construed the word "preference" with considerable elasticity; the elements of proof varied from decade to decade, and many hair-splitting and sometimes inexplicable distinctions were made. The statutory definition in England is thus the result of more than a century of decisions, some of them by judges whose names have become household words. By § 48 of the act of 1883, the elements of a preference are: (1) A payment or transfer or conveyance, (2) by a person unable to pay his debts as they become due, (3) with a view to giving the person to whom it is made an advantage over other creditors, provided (4) such payment is made within three months of the bankruptcy. The English law specifically protects payments in due course of trade, and has since the middle of the eighteenth century;<sup>3</sup> hence, what are known as "protected transactions."

(2) *IN THE UNITED STATES.*—Our first definition of preferences in a bankruptcy law appears in that of 1841.<sup>4</sup> It is somewhat unscientific. That in the law of 1867 was identical with the present English definition, save in the time limit—four months instead of three—and the additional elements on the part of the creditor of (1) reasonable cause to believe that the debtor was insolvent, and (2) knowledge that the payment was in fraud of the act.<sup>5</sup>

(3) *IN CANADA.*—The elements of a preference in Canada are the same as those under the English Act of 1883 mentioned above, with the proviso that payments for an adequate consideration received without notice of the commission of an act of bankruptcy by the debtor, are protected.<sup>6a</sup>

c. *Definition of a preference under present law.*—Subsection *a* has been held to be a controlling definition of a preference.<sup>6</sup> We have already referred to the term as so defined under § 1. It has been doubted whether this is altogether accurate.<sup>7</sup> Certainly a preference which amounts to an act of bankruptcy must still show intent,<sup>8</sup> and the so-called definition does not exactly dovetail into another subsection.<sup>9</sup> It is, however, a definition when applied to a transaction voidable under subsection *b*.

The wide gap between the term as defined in subsection *a* and all definitions heretofore recognized should always be borne in mind. It makes many of the cases under the former law inapplicable. Briefly, it differs from the present English definition in (1) the elimination of "intent" and the substitution of "the result of the act," and (2) in making the preference period four months instead of three; while, when considered as an act that is voidable,

1. *Worsely v. de Mattos*, 1 Burr. 467; *Alderson v. Temple*, 4 Burr. 2235.

2. For historical review, see *In re Hall* (Ref. N. Y.), 4 Am. B. R. 671.

3. English Act of 1883, § 49.

4. Act of 1841, § 2.

5. Act of 1867, § 35, R. S., § 5128. The amendatory act of 1874 changed "belief" of a fraud on the act to "knowledge."

6a. Can. Bankr. Act of 1919, §§ 31, 32.

6. *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1; *In re Steers Lumber Co.* (C. C. A., 2d Cir.), 7 Am. B. R.

332, 112 Fed. 406; *Stern, Falk & Co. v. Louisville Trust Co.* (C. C. A., 6th Cir.), 7 Am. B. R. 305, 112 Fed. 501.

7. It has been held merely a "rule of evidence" (*In re Piper*, 2 N. B. N. Rep. 7) See also *Stern, Falk & Co. v. Louisville Trust Co.* (C. C. A., 6th Cir.), 7 Am. B. R. 305, 112 Fed. 501.

8. See Bankr. Act, § 3-a (2), and the cases cited.

9. Bankr. Act, § 67-c (1). Compare *In re McLam* (D. C., Vt.), 3 Am. B. R. 245, 97 Fed. 922.

it differs from that of our law of 1867, not only in substituting the result for the intent save in so far as the latter is an element of "reasonable cause to believe," but also in requiring the attacking trustee to show only that the creditor had reasonable cause to believe that a preference was intended instead of the more difficult elements of proof, indicated above. The present law, too, distinguishes between a mere preference in fact and one that is voidable.<sup>10</sup>

d. *Effect of definition prior to amendments of 1903.*—The controversy touching the effect of this new definition on transactions in due course of trade has now passed into history. In brief, the view that subsection *a* defined a preference led to the doctrine that payments on account after insolvency were preferences without either knowledge of insolvency on the part of the debtor, or reasonable cause to believe that a preference was intended on the part of the creditor; a doctrine that reversed the rule that good faith was the test and rendered cash transactions in business not only the safest course, but, in effect, essential.<sup>11</sup> As a consequence, the meaning of both subsection *b* and subsection *c* was greatly enlarged by judicial construction. Indeed, the very existence of the bankruptcy system was for a time put in jeopardy. The reports are full of cases bearing on these much-mooted questions. The amendatory act of 1903 has brought the statute back to what its framers intended it to say, and thus made most of these cases valueless. The principal evil to be corrected by the amendment of 1903 was that of secret preferences given by withholding from record instruments which by the whole policy of recording statutes should be recorded.<sup>12</sup> Section 60 as amended and § 3-a are to be construed in harmony.<sup>13</sup> Some of the numerous cases arising prior to the amendment of 1903 are cited in the foot-note.<sup>14</sup>

10. For an unusual case, see *In re Chaplin* (D. C., Mass.), 8 Am. B. R. 121, 115 Fed. 162.

11. "This was never intended by the framers of the law, and it works obvious injustice and is the source of 99 per cent. of the objections to the law." (House Judiciary Committee's Report accompanying amendatory bill, April 21, 1902.)

12. *In re Dundore* (D. C., Pa.), 26 Am. B. R. 100; *Loeser v. Savings Deposit Bank* (C. C. A., 6th Cir.), 17 Am. B. R. 628, 148 Fed. 978.

*Purpose of amendment.*—In the case of *In re Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962, the court said: "It is familiar history, in connection with the original Bankruptcy Act, that the giving of a preference might come within the definition of an act of bankruptcy, and so might by reason of the time provision for recording found in connection with this definition be the basis of an adjudication; and yet that same preference could not be set aside by the trustee under section 60, because more than four months' time had elapsed after the giving of the preference, and before the filing of the petition in bankruptcy. To meet this difficulty, the amendment of 1903 to section 60-b provided that, if the instrument of preferential transfer was one which by law was required or permitted to be recorded, the pref-

erence might be set aside if the bankruptcy petition was filed within four months after the day of recording. The court of appeals in this circuit has said that the purpose of this amendment was to bring the two sections into harmony, and that the provision concerning recording should receive the same construction in each section." Citing *In re Loeser v. Savings Bank*, 17 Am. B. R. 628, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233.

13. *In re Donnelly* (D. C., Ohio), 27 Am. B. R. 504, 193 Fed. 755. As to effect of failure to conform requirements of § 60, as to recording or filing transfers with those prescribed in § 3-b, see *Carey v. Donohue*, 240 U. S. 430, 36 Am. B. R. 704, 709.

14. That partial payments in due course of trade are "preferences": *In re Knost* (Ref., Ohio), 2 Am. B. R. 471; *affd.* as *Strobel v. Knost* (D. C., Ohio), 3 Am. B. R. 631, 99 Fed. 409; *In re Conhaim* (D. C., Wash.), 3 Am. B. R. 249, 97 Fed. 923; *In re Fort Wayne Electric Co.* (D. C., Ind.), 13 Am. B. R. 186, 96 Fed. 803; *affd.* as *Columbus Electric Co. v. Worden* (C. C. A., 7th Cir.), 3 Am. B. R. 634, 99 Fed. 400; *In re Fixen* (C. C. A., 9th Cir.), 4 Am. B. R. 10, 102 Fed. 296; *Carson, etc., Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, 45 L. ed. 1171, 21 Sup. Ct. 906; that they are not: *In re Piper*, 2 N. B. N. Rep. 7; *In re*

c. **Distinction between preference and fraudulent transfer.**—Conveyances may be fraudulent because the debtor intends to put his property beyond the reach of his creditors; or because he intends to hinder and delay them as a class; or by preferring one who is favored above the others. There is no necessary connection between the intent to prefer and that to defraud; but inasmuch as one of the common incidents of a fraudulent conveyance is the purpose on the part of the grantor to apply the proceeds in such a manner as to prefer favored persons, the existence of such intent to prefer is an important matter to be considered in determining whether there was an intent to defraud. But the two purposes are not of the same quality, either in conscience or in law, and one may exist without the other. The statute recognizes the difference between the intent to defraud and the intent to prefer, and also the difference between a fraudulent and a preferential conveyance. One is inherently and always vicious; the other innocent and valid, except when made in violation of express provisions of law.<sup>15</sup> One is *malum per se* and the other *malum prohibitum*, and then only to the extent that it is prohibited. A fraudulent conveyance is void, regardless of its date; a preference is valid unless made within the prohibited date.<sup>16</sup>

## II. ELEMENTS OF A PREFERENCE.

a. **In general.**—Since the amendatory act, a preference consists in a person, (1) while insolvent and (2) within four months of the bankruptcy, (3) procuring or suffering a judgment to be entered against himself or making a transfer of his property, (4) the effect of which will be to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class. Such a preference is voidable at the instance of the trustee, if (5) the person recovering it or to be benefited thereby has (6) reasonable cause to believe that the enforcement of the judgment or transfer will result in a

Smoke (D. C., N. Y.), 4 Am. B. R. 434, 104 Fed. 269; In re Hall (Ref., N. Y.), 4 Am. B. R. 671; In re Ratliff (D. C., N. Car.), 5 Am. B. R. 713, 107 Fed. 780. See, for a vigorous protest against the doctrine of Carson, etc., Co. v. Chicago Title & Trust Co., In re Dickson (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726. There are also numerous cases pro and con, (1) whether a payment which exactly cancels one of several obligations must be surrendered; for instance, see In re Conhaim (D. C., Wash.), 3 Am. B. R. 249, 97 Fed. 923; also In re Beswick (Ref., Ohio), 7 Am. B. R. 395, and Kimball v. Rosenham Co. (C. C. A., 8th Cir.), 7 Am. B. R. 718, 114 Fed. 185; In re Seay (D. C., Ga.), 7 Am. B. R. 700, 113 Fed. 969, and In re Beswick (Ref., Ohio), 7 Am. B. R. 403; and (2) whether a subsequent credit could be set off against a preference, some of which are cited later under this section. None of these cases are thought now applicable.

15. **Right to prefer.**—It is not a fraud at common law for a debtor in straitened circumstances to prefer one or more creditors, though payments so made render it impossible to pay other creditors. If the sole object of the transfer is to pay or secure the

payment of a debt, the transaction is valid at common law. *Lyon v. Wallace*, 35 Am. B. R. 688, 108 N. E. 1075; and see *Kentucky Bank & Trust Co. v. Pritchett* (Okla. Sup. Ct.), 33 Am. B. R. 190, 143 Pac. 338.

Until the commencement of bankruptcy proceedings a debtor has the right to dispose of his property, the right to receive and pay his debts with it and the right to receive and pay one of his creditors in preference to others, provided the payment or security is not violative of any act of Congress or law of the State. *Johnson, Baillie Shoe Co. v. Bardsley* (C. C. A., 8th Cir.), 38 Am. B. R. 492, 237 Fed. 763.

Before a bankrupt has been adjudicated as such he has the right to deal with his property as he may see fit, so long as he does not give a preference to any creditor or impair the value of his estate. *O'Connell v. City of Worcester* (Mass. Sup. Ct.), 38 Am. B. R. 918, 114 N. E. 201.

16. *Van Iderstine v. National Discount Co.*, 227 U. S. 575, 29 Am. B. R. 478, 57 L. ed. 652, 33 Sup. Ct. 343; *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338; *Watson v. Adams* (C. C. A., 6th Cir.), 39 Am. B. R. 473, 242 Fed. 441; *Smith v. Coury* (D. C., Me.), 41 Am. B. R. 219, 247 Fed. 168.

preference.<sup>17</sup> If any of these elements is wanting, a preference cannot be set aside if otherwise valid under the State law.<sup>18</sup> If the transfer was made or the judgment procured or suffered while the debtor was insolvent and the effect of such transfer or judgment was to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class, such transfer or judgment is a preference.<sup>19</sup> The burden of proving the existence

17. *Craig v. Sharp* (Mo. Ct. of App.), 45 Am. B. R. 137, 219 S. W. 95, citing *Collier on Bankruptcy* (11th Ed.) 867. No matter how devious the scheme (see *In re Belding* (D. C., Mass.), 8 Am. B. R. 718, 116 Fed. 1016), if it comes fairly within the purpose of the statute as evidenced by its words, it will be a voidable preference. See *Stern, Falk & Co. v. Louisville Trust Co.* (C. C. A., 6th Cir.), 7 Am. B. R. 305, 112 Fed. 501; *In re Beerman* (D. C., Ga.), 7 Am. B. R. 431, 113 Fed. 682; *Stern v. Mayer*, 16 Am. B. R. 763, 113 N. Y. App. Div. 181, 96 N. Y. Supp. 1028. For a case where nearly all the elements were lacking, see *Brown v. Gulchard*, 7 Am. B. R. 515, 37 N. Y. Misc. 78, 74 N. Y. Supp. 735. See Am. Bankr. Dig. § 492.

The amendment of 1910 makes "reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference" an essential element of a preference, instead of "reasonable cause to believe that a preference was intended."

Essential elements of preference.—In the case of *Sebring v. Wellington*, 6 Am. B. R. 671, 63 N. Y. App. Div. 498, 171 N. Y. Supp. 788, the court said: "It seems to be conceded that in order to render a preference voidable within the provisions of this section it is necessary to establish four facts, viz: (1) the insolvency of the transferor; (2) the obtaining by one creditor of a greater percentage of his debt than any other creditor of the same class; (3) the giving of a preference within four months before the filing of the petition in bankruptcy; and (4) reasonable cause on the part of the creditor to believe that a preference was intended." The same is held in *Matthews v. Hardt*, 9 Am. B. R. 373, 79 N. Y. App. Div. 570, 80 N. Y. Supp. 462. These cases were decided prior to the amendment of 1903. To this element must now be added those referred to in the text based upon the amendment of 1903. The text is cited with approval in the case of *Brown v. City National Bank* (N. Y. Supp. Ct.), 26 Am. B. R. 638, 72 N. Y. Misc. 201, 131 N. Y. Supp. 92. And see *Newman v. Tootle-Campbell Dry Goods Co.* (Mo. Kans. City Ct. of App.), 31 Am. B. R. 399, 160 S. W. 825, specifying the elements of a voidable preference; *Mayes v. Palmer* (C. C. A., 8th Cir.), 31 Am. B. R. 225, 208 Fed. 97; *Sparks v. Marsh* (D. C., Ark.), 24 Am. B. R. 280, 177 Fed. 739; *In re Starkweather & Albert* (D. C., Mo.), 30 Am. B. R. 743, 206 Fed. 797; *Heyman v. Third Nat. Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685; *Sheetz v. Walter Boyd Saddlery Co.* (Kan. Sup. Ct.), 33 Am. B. R. 32, 147 N. W. 897; *Russell's*

*Trustees v. Mayfield Lumber Co.* (Ky. Ct. of App.), 32 Am. B. R. 357, 164 S. W. 783; *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338; *Abele v. Beacon Trust Co.* (Mass. Sup. Jud. Ct.), 40 Am. B. R. 743, 117 N. E. 833; *Smith v. Coury* (D. C., Me.), 41 Am. B. R. 219, 247 Fed. 168.

The bankruptcy law recognizes two kinds of preferences—those which a creditor in good faith may accept, and retain, and those which are forbidden and therefore voidable. The constitutive elements of a preference of the latter class are: First, the insolvency of the debtor at the time of the preference; second, the giving of the preference within four months of the filing of the petition in bankruptcy; third, the effect of securing to the favored creditor a greater percentage of his debt than other creditors of the same class may obtain from the estate of the debtor; and, fourth, that the preferred creditor when he received the preference, knew, or had reasonable cause to believe, that it was the purpose of his debtor to give him a preference over other creditors of the same class. *Wolff Mfg. Co. v. Batheal Shoe Co.* (Mo. Kan. City Ct. of App.), 35 Am. B. R. 895, 180 S. W. 396.

Attempted compromise of claims.—In order to render void as preferences payments made to defendants in an attempted compromise of their claims, by the application to their claims of certain insurance moneys, it must be established (1) that bankrupt was insolvent at the time of the transfer; (2) that the defendants obtained a greater percentage of their indebtedness than other creditors of the same class; (3) that the preference was given within four months before the filing of the petition in bankruptcy; and (4) that defendants had reasonable cause to believe that a preference was intended. *Shultz v. Boyt Saddlery Co.* (Sup. Ct., Iowa), 33 Am. B. R. 32, 147 N. W. 897.

Recovery of transfer preferentially made where the elements specified in the text are shown to exist. *Grandison v. National Bank of Rochester* (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800; *Healy v. Wehrung* (C. C. A., 9th Cir.), 36 Am. B. R. 673, 229 Fed. 686.

18. *Russell v. Mayfield Lumber Co.* (Ct. of App., Ky.), 32 Am. B. R. 357, 164 S. W. 783.

19. *In re Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962. In the case of *Boswell National Bank v. Simmons* (C. C. A., 8th Cir.), 26 Am. B. R. 865, 190 Fed. 735, it was held that where a bankrupt, being insolvent, made payments within the four months' period to a creditor, in satisfaction of a then existing debt, under such circumstances as to

of the essential elements of a transfer is upon the trustee seeking to avoid it.<sup>20</sup>

b. While insolvent.—(1) IN GENERAL.—The word "insolvent" has the same meaning here as elsewhere in the act.<sup>21</sup>

(2) TIME OF INSOLVENCY.—If the debtor was not insolvent when the transfer was made it will not operate as a preference although made within four months before the filing of a petition in bankruptcy against him.<sup>22</sup> The question of solvency must be determined as of the date when the payments or transfers were made.<sup>23</sup> If the levy following the judgment causes the insolvency, it is not enough.<sup>24</sup>

enable the creditor to obtain a greater percentage of his debt than any other creditor of the same class, and the creditor had reason to believe it was being preferred, the payment constituted a voidable preference recoverable by the bankrupt's trustee; *Marsh v. Walters* (C. C. A., 6th Cir.), 34 Am. B. R. 86, 220 Fed. 605; *Peterson v. Nash Bros.* (C. C. A., 8th Cir.), 7 Am. B. R. 181, 112 Fed. 311; *Swartz v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1; *McElvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 169 Fed. 32.

Grossness of attack upon transfer.—By the express authority of the bankruptcy act, the trustee may attack any transfer alleged to be voidable as a preference if made within the period fixed by law. It is only when the trustee attacks a transfer or mortgage on other grounds that State laws and decisions apply as to the validity of a transfer. A trustee may attack a transfer as a voidable preference concededly valid on all other grounds. *Williams v. German American Trust Co.* (C. C. A., 8th Cir.), 33 Am. B. R. 600, 219 Fed. 507.

20. Burden of proving elements of voidable preference.—Under sections 60-a and 60-b of the Bankruptcy Act as amended in 1903, and prior to the amendment of 1910, the burden of proof is on a trustee in bankruptcy who seeks to avoid as a preference to show that the bankrupt (1) while insolvent, (2) within four months of the bankruptcy, (3) made the transfer in question; (4) that the creditor receiving the transfer will be thereby enabled to obtain a greater percentage of his debt than other creditors of the same class; and (5) that the creditor receiving the transfer had reasonable cause to believe that it was thereby intended to give a preference. *Kimmerle v. Farr* (C. C. A., 6th Cir.), 28 Am. B. R. 518, 189 Fed. 295. See also *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 200; *In re Neill-Pinckney-Maxwell Co.* (D. C., Pa.), 22 Am. B. R. 401, 170 Fed. 481; *Cauthorn v. Burley State Bank* (Idaho Sup. Ct.), 33 Am. B. R. 794, 144 Pac. 1608 (quoting entire paragraph of text); *Kentucky Bank & Trust Co. v. Pritchett* (Okla. Sup. Ct.), 33 Am. B. R. 190, 143 Pac. 338.

As to evidence and burden of proof in actions to recover preferences, see Am. Bankr. Dig. § 677; evidence of reasonable cause to believe preference was intended, Am. Bankr. Dig. § 514, and post under heading "Evidence of reasonable cause to believe."

21. See Bankr. Act, § 1 (15), and discussion thereunder. Compare *In re Alexander* (D. C., Ga.), 4 Am. B. R. 376, 102 Fed. 464; *Simpson v. Western H. & M. Co.* (Wash. Sup. Ct.), 40 Am. B. R. 213, 167 Pac. 113. For rule under former law, see *Toof v. Martin*, 13 Wall. 40; *Wager v. Hall*, 16 Wall. 584. *Marvin v. Anderson* (Sup. Ct., Wis.), 6 Am. B. R. 520, 87 N. W. 226, is, therefore more in line with the old definition than the new. See also *Benjamin v. Chandler* (D. C., Pa.), 15 Am. B. R. 459, 142 Fed. 217.

Sufficient means to satisfy debts.—Evidence that a bankrupt was not possessed of sufficient ready means to satisfy all his debts at the time of the execution of a chattel mortgage, alleged to constitute a preference, is insufficient; proof must be presented respecting the amount of the mortgagor's property at a fair valuation at the time of giving the mortgage as required by subdivision 15 of section 1 of the Bankruptcy Act. *Matter of Walker Starter Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 122, 235 Fed. 285.

22. *In re Leech* (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; *McAleer v. People's Bank* (Ala. Sup. Ct.), 42 Am. B. R. 581, 86 So. 94; *Farmers' National Bank v. Slaton* (Ky. Ct. of App.), 41 Am. B. R. 650, 203 S. W. 565; *Matter of Looschen Piano Case Co.* (D. C., N. J.), 43 Am. B. R. 733, 259 Fed. 931; *Hicks Company, Ltd. v. Moore* (C. C. A., 5th Cir.), 44 Am. B. R. 334, 261 Fed. 773, citing *Collier on Bankruptcy* (11th ed.) 860.

23. *De Laval Separator Co. v. Jones* (Mo. Sup. Ct.), 41 Am. B. R. 440, 102 Atl. 968; *Matter of Keller* (D. C., Mich.), 42 Am. B. R. 601, 252 Fed. 942; *In re Wittenberg, etc., Co.* (D. C., Wis.), 6 Am. B. R. 271, 108 Fed. 593; *Butler Paper Co. v. Goemmel* (C. C. A., 7th Cir.), 16 Am. B. R. 26, 143 Fed. 235; *Sabin v. Camp* (D. C., Oreg.), 3 Am. B. R. 578, 98 Fed. 974; *Sheppard-Strassheim Co. v. Black* (C. C. A., 7th Cir.), 33 Am. B. R. 574, 211 Fed. 643; *McNell v. Folk* (Sup. Ct., of App., W. Va.), 33 Am. B. R. 234, 83 S. E. 102; *Roseman v. Copard* (C. C. A., 5th Cir.), 35 Am. B. R. 786, 228 Fed. 114; *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166; *Matter of Bunch Commission Co.* (D. C., Kan.), 35 Am. B. R. 526, 225 Fed. 243; *In re Farmers' Supply Co.* (D. C., Ohio), 22 Am. B. R. 460, 170 Fed. 502. See Am. Bankr. Dig. § 494.

24. *Chicago Title & Trust Co. v. Roebbing's Sons* (C. C., Ill.), 5 Am. B. R. 308, 107 Fed. 71; *Matter of Chicago Car Equipment Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 617, 211 Fed. 638. See also *Clarion Bank v. Jones*, 21 Wall. 325. Compare *Matter of Sola* (C. C. A., 1st Cir.), 44 Am. B. R. 372, 261 Fed. 822.

25. *Kaufman v. Treadway*, 195 U. S. 271, 12 Am. B. R. 682, 49 L. Ed. 190, 25 Sup. Ct. 38; *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338; *Stephens v. Union Sav. Bank & Trust Co.* (C. C. A., 6th Cir.), 42 Am. B. R. 89, 250 Fed. 192.

26. *In re Chappell* (D. C., Va.), 7 Am. B. R. 608, 113 Fed. 545.

Burden of proof.—In an action by a trustee to recover a payment in discharge of a valid obligation from the bankrupt to a bank, the burden of proof is upon the plaintiff to show that the bank had reasonable cause to believe that a preference was intended. *Calhoun County Bank v. Cain* (C. C. A., 4th Cir.), 18 Am. B. R. 509, 152 Fed. 983. It must be alleged and proven that the bankrupt was insolvent at the time of the transfer. The burden of proving



(3) **PROOF OF INSOLVENCY.**—Whether or not a debtor is insolvent is a question of fact,<sup>25</sup> and the burden of showing insolvency is on him who alleges it.<sup>26</sup> The fact that a debtor is adjudged a voluntary bankrupt does not raise a presumption of insolvency prior to the filing of the petition,<sup>27</sup> but it is *res judicata* upon the question of the insolvency of the bankrupt at the time the petition was filed.<sup>27a</sup> But it has been held that an adjudication in an involuntary proceeding, that a judgment debtor was insolvent at the time of the recovery of certain judgments against him, is conclusive upon the question of insolvency.<sup>28</sup> But insolvency must be alleged and found as a fact; mere belief is not enough,<sup>29</sup> nor is danger of insolvency as a coming result.<sup>30</sup> The method of determining the question of insolvency has already been considered. The rules which are applicable generally in determining this question are also applicable in determining whether a transfer is preferential because made at a time when the bankrupt was insolvent.<sup>31</sup> The schedule of liabilities filed by the bankrupt is admissible on the issue of insolvency,<sup>32</sup> although this has been doubted.<sup>33</sup> The bankrupt's books of accounts,<sup>34</sup> the method of determining appraisement taken in the proceedings,<sup>34a</sup> and the amount realized from the sale of assets by the receiver or trustee,<sup>35</sup> are admissible upon the question of insolvency.

(4) **VALUATION OF PROPERTY.**—Where property is transferred in fraud of creditors the definition of insolvency contained in § 1 (15) contemplates that the bankrupt shall not have the benefit of its valuation in determining whether he is insolvent; but where property is transferred in payment of a just debt the mere fact that it involves a preference does not exclude the property from consideration in determining the debtor's solvency.<sup>36</sup> In determining insolvency

ing such facts is on the trustee. In re Leech (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; Simpson v. Western H. & M. Co. (Wash. Sup. Ct.), 40 Am. B. R. 213, 167 Pac. 113.

27. In re Chappell (D. C., Va.), 7 Am. B. R. 608, 113 Fed. 545; McNeil v. Folk (Sup. Ct. of App., W. Va.), 33 Am. B. R. 234, 83 S. E. 192; Simpson v. Western H. & M. Co. (Wash. Sup. Ct.), 40 Am. B. R. 213, 167 Pac. 113; Matter of Looschen Piano Case Co. (D. C., N. J.), 43 Am. B. R. 733, 259 Fed. 931.

27a. Matter of Star Spring Bed Co. (D. C., N. J.), 43 Am. B. R. 323, 257 Fed. 176.

28. De Graff v. Lang, 92 N. Y. App. Div. 564, 87 N. Y. Supp. 173; Simpson v. Western H. & M. Co. (Wash. Sup. Ct.), 40 Am. B. R. 213, 167 Pac. 113.

**Elimination of claims not proved or allowed.**—In determining the insolvency of a bankrupt at the time of an alleged preference all claims against the bankrupt are to be considered, and not merely those which are proved and allowed in the bankruptcy proceedings. Lytle v. Fifth National Bank (D. C., N. Y.), 39 Am. B. R. 690. 29. Wager v. Hall, 16 Wall. 584. Compare also In re Linton (Ref., Pa.), 7 Am. B. R. 676.

30. Beals v. Quinn, 101 Mass. 262.

31. See discussion under Bankr. Act, section 1 (15), *ante*, p. 12.

32. Lytle v. Fifth National Bank (D. C., N. Y.), 39 Am. B. R. 690, citing Collier on Bankruptcy (10th ed.), 792; Hackney v. Hargreaves, 13 Am. B. R. 164, 3 Neb. (Unoff.) 676; In re Docker-Foster Co. (D. C., Pa.), 10 Am. B. R. 584, 123 Fed. 190; Bank of N. Y. v. Southern Nat. Bank, 170 N. Y. 1, 62 N. E. 677. As to sufficiency of evidence of insolvency, see Benjamin v. Chandler (D. C., Pa.), 15 Am. B. R.

439, 142 Fed. 217; Ridge Av. Bank v. Sundheim (C. C. A., 3d Cir.), 16 Am. B. R. 863, 145 Fed. 798.

**Schedules filed by the bankrupt in the bankruptcy proceedings are proper evidence in an action against a creditor of the bankrupt to recover back an alleged preference obtained by such creditor when such schedules are properly identified, and the production and admission of secondary evidence of such schedules is governed by the same rules which govern the production and admission of such evidence in other cases, and the same is true with respect to the admission of duplicate originals.** Utah Ass'n of Credit Men v. Boyle Furniture Co. (Sup. Ct., Utah), 26 Am. B. R. 867, 117 Pac. 800.

33. Hackney v. Raymond Bros., Clarke Co. (Sup. Ct., Neb.), 10 Am. B. R. 213, 214, 68 Neb. 624.

34. In re Docker-Foster Co. (D. C., Pa.), 10 Am. B. R. 584, 123 Fed. 190.

34a. Hackney v. Hargreaves, 13 Am. B. R. 164, 3 Neb. (Unoff.) 676.

35. Matter of Star Spring Bed Co. (D. C., N. J.), 43 Am. B. R. 323, 257 Fed. 176.

36. In re Doscher (D. C., N. Y.), 9 Am. B. R. 547, 554, 120 Fed. 408. See also Lansing Boller & Engine Works (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701; Acme Food Co. v. Meier (C. C. A., 6th Cir.), 13 Am. B. R. 550, 153 Fed. 74, holding that if the evidence does not justify a finding that the conveyance had been made with intent to defraud, all the property of the alleged bankrupt is to be taken into account in determining the question of the bankrupt's insolvency;

property of the bankrupt which is exempt under the State law should be included.<sup>37</sup> The fair valuation of the bankrupt's property at the time of alleged preferential payments should be considered in determining his insolvency and intent to prefer, and not what the property brought in a lump at an auction sale by the trustee.<sup>38</sup> The test in determining insolvency under this section is as in other cases, whether the property of the bankrupt taken at a fair valuation is sufficient to pay his debts. Fair valuation is not what the property would bring at a forced sale.<sup>39</sup> The valuation used as a test must relate to the conditions existing in respect to the bankrupt's business as a going concern, at the time when preference was given.<sup>40</sup>

c. **Within four months.**—(1) **IN GENERAL.**—The words of the statute, "within four months before the filing of the petition," mean within four months of the inception of the proceedings. It is the date of filing the original petition which controls; and amendment of the petition does not extend the time because such amendment relates back to the date of filing the original petition.<sup>41</sup> The method of computing time is considered elsewhere.<sup>42</sup> If a transfer be made prior to the period of four months before the filing of the petition it cannot be attacked as a preference under this section, although clearly preferential.<sup>43</sup> And if the preference was given before the passage of the bankruptcy law, it cannot be disturbed.<sup>44</sup>

(2) **WHEN TIME BEGINS TO RUN.**—The period ordinarily begins to run from the moment the judgment or transfer takes effect.<sup>45</sup> And if recording is not

*Utah Ass'n of Credit Men v. Boyle Furniture Co.* (Sup. Ct., Utah), 26 Am. B. R. 867, 117 Pac. 800.

37. *Utah Ass'n of Credit Men v. Boyle Furniture Co.* (Sup. Ct., Utah), 26 Am. B. R. 867, 117 Pac. 800.

38. *Rutland County Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 168.

Fair valuation of alleged bankrupt's property is not the price obtained at a forced sale. *Chicago Title & Trust Co. v. Roebling's Sons* (C. C., Ill.), 5 Am. B. R. 368, 107 Fed. 71. The present market value, that is, what the property will probably bring, or is worth in the general market, where everybody buys, is a sure standard. *In re Hines* (D. C., Oreg.), 16 Am. B. R. 295, 144 Fed. 442; *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839.

Where the fair or market value of a debtor's property and the amount of his debts have not been established it cannot be said that he is insolvent, within the meaning of the bankruptcy act. *Jump v. Bernier* (Mass. Sup. Ct.), 35 Am. B. R. 591, 108 N. E. 1027.

39. *Chicago Title & Trust Co. v. Roebling's Sons* (C. C., Ill.), 5 Am. B. R. 368, 107 Fed. 71; *Rutland County National Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 168.

40. *Butler Paper Co. v. Goembel* (C. C. A., 7th Cir.), 16 Am. B. R. 26, 143 Fed. 295; *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 804, 141 Fed. 518, in which case the evidence was examined and it was held that the referee had erred in his finding as to the in-

solvency of the bankrupt based upon evidence of fair valuation of the property belonging to the bankrupt corporation as a going concern; *Dougherty v. First National Bank* (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241.

41. *First State Bank of Corinth v. Haswell* (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209.

42. See under Section Thirty-one of this work. See also *Whitley, etc., Co. v. Roach* (Sup. Ct., Ga.), 8 Am. B. R. 505, 115 Ga. 918.

In computing the four months before filing the petition in bankruptcy within which time a preference is voidable, the day on which the petition was filed must be excluded. *Dutcher v. Wright*, 94 U. S. 553, 24 L. ed. 130.

43. *Jackson v. Sedgwick* (C. C., N. Y.), 26 Am. B. R. 836, 189 Fed. 508; *Brown v. City National Bank* (N. Y. Sup. Ct., Trial), 26 Am. B. R. 638, 72 Misc. 201, 131 N. Y. Supp. 92.

44. *In re Terrill* (D. C., Vt.), 4 Am. B. R. 145, 100 Fed. 778. As to the effect of this doctrine on a case which would be a voidable preference under the law as amended, but which was not before, *quære*, and see "Supplemental Section to Amendatory Act," *post*.

45. See *Sawyer v. Turpin*, 91 U. S. 114, 23 L. ed. 235; *In re Foster*, Fed. Cas. 4,964; *Matter of Wilson* (D. C., Hawaii), 23 Am. B. R. 814.

An order on a creditor for the payment of money due the bankrupt is a transfer of the fund from the day of its presentation.

required the transfer takes effect from the date thereof and not from the time it is actually recorded.<sup>46</sup> It seems that the amendment to § 60-a is for the purpose of bringing it into substantial accord with § 3-a. These provisions should be read together, and when so read there can be no permissible question but that the date of the preference referred to in § 60 is the same as that referred to in § 3-b.<sup>47</sup> However, there is authority to the effect that Congress did not intend § 3-b and § 60-a to mean the same thing, but in fact, after due consideration, deliberately refused to make § 60-a as broad as § 3-b.<sup>48</sup> And this suggestion has now received the sanctioning approval of the Supreme Court.<sup>49</sup>

(3) PERFORMANCE OF AGREEMENT MADE PRIOR TO FOUR MONTHS' PERIOD.—

Any attempt to evade the act by agreement entered into prior to the prescribed period, consummated by the perfection of a lien within the period, is nugatory. Such a lien is ineffectual and is a voidable preference. Such a transaction will be subject to the same rules as though no such agreement had been made. Its validity will be determined in each instance as of the date when the preferential lien was sought to be perfected. A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a contract to do so made more than four months before the filing of the petition.<sup>50</sup> The same rule applies where a transfer in payment of

*Johnston v. Huff* (C. C. A., 4th Cir.), 13 Am. B. R. 287, 133 Fed. 704; *In re Hines* (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 142, 147, 543.

When "four months period" commences to run.—Where the mortgagee does not file a sworn statement required by the Colorado statute until seven months after the expiration of one year from the time the mortgage was recorded, the four months' period within which the trustee in bankruptcy of the mortgagor may attack the transfer must be figured from the date of taking possession of the property by the mortgagee and not from the date of record. *Williams v. German American Trust Co.* (C. C. A., 8th Cir.), 33 Am. B. R. 600, 219 Fed. 507.

46. *Matter of Boyd* (C. C. A., 2d Cir.), 32 Am. B. R. 548, 213 Fed. 774; *Hoshaw v. Cosgriff* (C. C. A., 8th Cir.), 40 Am. B. R. 694, 247 Fed. 22.

47. *Long v. Farmers' State Bank* (C. C. A., 8th Cir.), 17 Am. B. R. 103, 147 Fed. 360; *English v. Ross* (D. C., Pa.), 15 Am. B. R. 370, 140 Fed. 630.

48. *Matter of Boyd* (C. C. A., 2d Cir.), 32 Am. B. R. 548, 213 Fed. 774; *Matter of Harvey* (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340. See also *Marsh v. Leseman* (C. C. A., 2d Cir.), 40 Am. B. R. 97, 242 Fed. 484.

49. *Carey v. Donohue*, 240 U. S. 430, 36 Am. B. R. 704, 60 L. ed. 726, 36 Sup. Ct. 386 (revg. 31 Am. B. R. 210, 209 Fed. 328), in which the court comments upon the evident purpose of Congress in eliminating certain language as to requiring recording or registering transfers, from § 60 which was included in § 3-b.

50. *In re Great Western Mfg. Co.* (C. C.

A., 8th Cir.), 18 Am. B. R. 259, 264, 152 Fed. 123.

Effect of prior agreements.—A transfer of property within the four months' period to be applied on an antecedent debt, under an agreement made anterior to such period, is a preference. *Vitzthum v. Large* (D. C., Ia.), 20 Am. B. R. 666, 162 Fed. 685. In *Wilson v. Nelson*, 183 U. S. 191, 198, 7 Am. B. R. 142, 49 L. Ed. 147, 22 Sup. Ct. 74, the debtor had given an irrevocable power of attorney to the creditor to confess judgment many years before judgment was confessed under it within the four months, and the Supreme Court held it to be a voidable preference. See also *Page v. Rogers*, 211 U. S. 575, 21 Am. B. R. 496, 53 L. Ed. 332, 29 Sup. Ct. 159.

Mortgages executed within the four months' period in performance of agreements to give them made more than four months before the filing of the petitions in bankruptcy have been held to be voidable preferences. In *re Sheridan* (D. C., Pa.), 3 Am. B. R. 554, 98 Fed. 406; *In re Ronk* (D. C., Ind.), 7 Am. B. R. 31, 111 Fed. 154; *In re Dismal Swamp Co.* (D. C., Va.), 14 Am. B. R. 175, 135 Fed. 415; *Matter of White* (Ref., R. I.), 22 Am. B. R. 200; *In re Smith* (D. C., N. Y.), 23 Am. B. R. 864, 176 Fed. 426. And this view seems to be sustained by the terms of the bankruptcy act, by the more cogent reasons, and by the weight of authority. In *re Great Western Mfg. Co.* (C. C. A., 8th Cir.), 18 Am. B. R. 259, 265, 152 Fed. 123; *Lathrop Bank v. Holland* (C. C. A., 8th Cir.), 30 Am. B. R. 62, 205 Fed. 143.

an antecedent debt is made under such circumstances.<sup>51</sup> Where an insolvent corporation, within the four months' period, makes a partial payment on account of goods sold received under a contract entered into prior to its bankruptcy, such payment is preferential, though thereafter no more goods were furnished under the contract.<sup>52</sup> Where a claim secured by a chattel mortgage or an assignment, executed more than four months prior to bankruptcy, is waived by the acceptance of an offer of settlement, payment on such claim within the four months' period will constitute a voidable preference.<sup>53</sup>

(4) DATE OF CONTRACT GOVERNS.—Where a contract for the sale of the bankrupt's property which provided that the proceeds of the sale were to be applied in payment of certain claims against the bankrupt, the date of the contract rather than the date of payment under the contract governs in determining whether a preference was given within the four months' period.<sup>54</sup> If the contract gives rise to an equitable lien in favor of the creditor such lien will be presumed to exist as of the date of the contract, and the delivery of the property under such contract to the creditor within the four months' period will not make it a preference.<sup>55</sup> Whether or not such a lien takes effect as of the date of the contract or as of the date of the taking possession of the property will be governed by the State law.<sup>56</sup>

51. *Vitzthum v. Large* (D. C., Ia.), 20 Am. B. R. 666, 162 Fed. 685.

52. *In re Mayo Contracting Co.* (D. C., Mass.), 19 Am. B. R. 551, 157 Fed. 469.

53. *Schuetz v. International Harvester Co.* (Iowa Sup. Ct.), 34 Am. B. R. 708, 149 N. W. 855, in which case it appeared that a debtor, after property purchased by him had been destroyed by fire, gave an order on the insurance companies in favor of the vendor, and in order to avoid bankruptcy the vendor with other creditors agreed to accept the insurance money pro rata on their respective claims, it was held that the vendor thereby waived his claim under the order and also under notes secured by a chattel mortgage given more than four months prior to bankruptcy, and the trustee in bankruptcy may recover the payments from the insurance moneys as preferences.

54. *Fitch v. Bank of Grand Rapids* (Sup. Ct., Wis.), 26 Am. B. R. 879, 131 N. W. 1095.

55. *Sexton v. Kessler & Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 807, 172 Fed. 535, *affd.* 225 U. S. 80, 28 Am. B. R. 85, 56 L. ed. 995, 32 Sup. Ct. 667; *Godwin v. Murchison National Bank*, 22 Am. B. R. 708, 145 N. C. 820; *Hanson v. Blake* (D. C., Me.), 19 Am. B. R. 325, 155 Fed. 342; *Wildner v. Watts* (D. C., S. C.), 15 Am. B. R. 57, 138 Fed. 426; *Britton v. Union Investment Co.* (C. C. A., 8th Cir.), 44 Am. B. R. 531, 262 Fed. 111, *Wiener v. Union Trust Co.* (D. C., Mich.), 44 Am. B. R. 610, 261 Fed. 709; *Van Slyke v. Huntington* (C. C. A., 8th Cir.), 45 Am. B. R. 173, 265 Fed. 84.

Insurance payable to vendor.—*Sullivan v. Meyer* (Tenn. Sup. Ct.), 39 Am. B. R. 314, 193 S. W. 124.

Delivery to pledgee within four months' period not a preference.—Bankrupt had for many years drawn upon defendant, an English company, and in 1903, upon request that it set aside securities for its drawing credit, placed in its safe deposit vault, in a separate package, certain securities named designated them as held in escrow as security to defendant for drafts, and notified defendant of its action and of the particular securities so held. Bankrupt also entered the securities

and all substitutions on its loan book, and as substitutions were made from time to time, the English company was notified. The securities were always either negotiable by delivery or indorsed in blank. They were always marked and kept separate and never removed from the vault, except when taken to the office to be examined and checked off by a representative of the English company. Thereafter, within four months of defendant's bankruptcy, and at a time when it was insolvent, the escrow securities were delivered over to the defendant. It appeared that the transaction was entered into in good faith and that the transfer was not void as against bankrupt's creditors, irrespective of attachment. Held, that when defendant took the securities, it only exercised a right which had been created long before bankruptcy, and that the transaction could not be avoided by bankrupt's trustee as a preference under the bankruptcy act. *Sexton v. Kessler & Company, Ltd.*, 225 U. S. 90, 28 Am. B. R. 85, 56 L. ed. 995, 32 Sup. Ct. 657.

56. *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 49 L. ed. 577, 25 Sup. Ct. 306; *In re Chantler Cloak & Suit Co.* (D. C., R. I.), 18 Am. B. R. 498, 151 Fed. 952; *In re Automobile Livery Service Co.*, 23 Am. B. R. 799, 176 Fed. 792, in which it was held that under the Alabama law where there has been no delivery of pledged property, but in pursuance of a prior agreement such property upon the pledgor's default was delivered within the four months' period, the possession thus acquired relates back to the time of said agreement and constitutes a preference only as to claimants who had in the meantime perfected liens upon the property.

(5) **POSSESSION WITHIN FOUR MONTHS' PERIOD.**—Where possession is taken by the creditors of an insolvent debtor's property within four months before the filing of the petition, under an agreement, whereby a lien was created in favor of the creditors upon such property in case of a failure of the debtor to comply with the terms of such agreement, such assumption of possession will constitute an unlawful preference notwithstanding the fact that the agreement was made prior to the four months' period.<sup>57</sup> But where property is pledged or mortgaged for the benefit of creditors by a valid pledge or mortgage executed prior to the four months' period, such creditors may enter into possession of such property within the four months' period. In all such cases the rights of creditors in respect to the particular property will depend upon the validity of the pledge or mortgage under the laws of the state where made.<sup>58</sup> A pledge

57. *Matthews v. Hardt*, 9 Am. B. R. 373, 79 N. Y. App. Div. 570, 80 N. Y. Supp. 462; *Matter of Mandel* (D. C., N. Y.), 10 Am. B. R. 774, 127 Fed. 863. Compare *In re Chadwick* (D. C., Ohio), 15 Am. B. R. 528, 140 Fed. 674; *Christ v. Zehner*, 212 Pa. St. 188, 16 Am. B. R. 788, 61 Atl. 822. See Am. Bankr. Dig. § 488.

Trust receipts; assignment of accounts to release.—In an action by trustees in bankruptcy to set aside assignments of accounts and warehouse receipts to the defendant as an illegal preference and to recover the amount realized thereon it appeared that the defendant in lending money to the bankrupt took warehouse receipts and trust receipts more than four months prior to bankruptcy covering raw material taken from the warehouse by the bankrupt with the defendant's consent. These trust receipts stipulated that the material was to be held for the defendant with liberty to sell it and apply the proceeds to any indebtedness to the bank. The bankrupt, with the knowledge of the defendant, mingled the raw material so taken under the trust receipts with other material in its factory, and sold the manufactured product. The defendant claimed that the accounts assigned to it within four months of bankruptcy represented the raw material covered by the trust receipts. It was held that the assignment of accounts was a voidable preference, as constituting a transaction entirely apart from the trust receipts covering the raw material which entered, in part, into the manufacture of the articles for which the accounts accrued. *Merchants National Bank v. Corr* (C. C. A., 4th Cir.), 34 Am. B. R. 527, 221 Fed. 419.

58. *Sabin v. Camp* (D. C., Or.), 3 Am. B. R. 578, 98 Fed. 974; *In re Wolf* (D. C., Iowa), 3 Am. B. R. 555, 98 Fed. 74; *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 49 L. Ed. 577, 25 Sup. Ct. 306; *Sexton v. Kessler & Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 807, 172 Fed. 535. But compare *In re Sheridan* (D. C., Pa.), 3 Am. B. R. 554, 98 Fed. 406; *Kettenboch v. Walker* (Idaho Sup. Ct.), 44 Am. B. R. 619, 186 Pac. 912, citing *Collier on Bankruptcy* (11th ed.) 873; *Atherton v. Beaman* (C. C. A., 1st Cir.), 45 Am. B. R. 212, 264 Fed. 878.

In Massachusetts the taking of possession of mortgaged chattels by the mortgagor within the four months' period under an un-

recorded mortgage covering after-acquired property made more than two years before the bankruptcy of the mortgagor does not constitute a preference. *Humphrey v. Tattman*, 198 U. S. 91, 14 Am. B. R. 74, 49 L. Ed. 956, 25 Sup. Ct. 567. A mortgagee taking possession before the commencement of bankruptcy proceedings against his mortgagor of after-acquired property covered by the mortgage, is entitled under the law of Massachusetts to hold the property as against the trustee. *In re Hurley* (D. C., Mass.), 26 Am. B. R. 434, 185 Fed. 851.

Missouri statute.—In the case of *In re Ozark Cooperage & Lumber Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 835, 180 Fed. 105, the court speaking of the Missouri statute relating to change of possession said: "Some kinds of personal property may be readily delivered from hand to hand and interested persons may rightfully expect that method to be observed. In other cases, the character of the property and the circumstances of its situation preclude such a transfer; and other indicia of a change of ownership such as signs, brands and marks are generally accepted as sufficient. Each case, however, as it arises should be determined by its own peculiar facts and circumstances."

Taking possession of property within the four months' period.—In the case of *In re Bird* (D. C., Minn.), 25 Am. B. R. 24, 180 Fed. 229, it appeared that about two years before the petition in bankruptcy was filed, a bank had in its possession personal property belonging to the bankrupt which had been pledged to the bank to secure the payment of a debt owing to the bank by him; at the same time the bankrupt assigned to another creditor all his interest in the equity of such personal property, such equity to be determined after the bank should have been fully paid; at the time of the adjudication the property was still in the possession of the bank; it was held that the assignment of the equity in such property was a valid contract under the common law and under the law of Minnesota and that it was not void as a preference for failure to record or register the transfer as required by section 60-a, as such transfer was not required to be

of stock by a bankrupt to a bank, prior to the four months' period, which pledge was perfected at the time by the delivery of the certificates of stock without transfer on the books of the corporation, does not constitute a preference although such stock was sold pursuant to the pledge, within the four months' period.<sup>59</sup>

(6) **ASSIGNMENT OF PROPERTY WITHIN FOUR MONTHS.**—Where an assignment of personal property and book accounts was made by a bankrupt within the four months' period to secure to a bank the payment of notes, purchased by it from the bankrupt, under an agreement made more than four months prior to the filing of the petition, whereby the bankrupt agreed to maintain at all times a deposit equal to at least twenty-five per cent. of the notes so purchased, and against which the notes payable at maturity could be charged. Such assignment constitutes a voidable preference.<sup>60</sup> Collections made within the four months' period on accounts, which were assigned before that period commenced, do not constitute a preference which the trustee may recover.<sup>61</sup>

(7) **PRIOR TO THE AMENDMENTS OF 1903.**—The clause as to the period within which a preference shall not be given was in subdivision *b* in the original law. It led to the anomalous doctrine that mere preferences, as, for instance, *bona fide* payments, must be surrendered if since insolvency, no matter how many months or years back, but fraudulent preferences were good unless within the four months' period.<sup>62</sup> This dilemma was the direct result of *Carson v. Chicago Title & Trust Co.*,<sup>63</sup> and gave force to the demand for

recorded or registered under the Minnesota law, nor was it a preference for failure to take possession of the property within the four months' period.

Where the rights of a mortgagee under a chattel mortgage had been fixed more than four months prior to the bankruptcy of the mortgagor, by a contract good between the parties, his taking possession of the mortgaged property within the four months' period did not constitute the transaction a preference. In *re East End Mantel & Tile Co.* (D. C., Pa.), 29 Am. B. R. 793, 202 Fed. 275.

**Assignments of fire insurance policy under prior agreement.**—A transaction in which the owner of a mercantile business gives to a creditor an assignment of a fire insurance policy, in order that such creditor may collect the amount thereof and apply the same to the payment of a prior loan, and which is given in furtherance of a prior agreement by which the insurance policy was pledged to the said creditor as security for money loaned and for future advances, and under the understanding that in case of fire such authority to collect or assignment should be given, is not an unlawful preference even though made within four months of the act of bankruptcy; the money being loaned and the policy having been pledged prior to that time. *Hecker v. Commercial State Bank*, 37 Am. B. R. 800, 159 N. W. 97.

**Valid lien; possession within four months.**—Where a bankrupt has given an equitable lien on his property which according to the law of the state is enforceable against the bankrupt and purchasers with notice, the preference which results from the lienor tak-

ing possession of the property dates back to the date of the original lien, and therefore, although possession is taken within four months, it is not a voidable preference. *Davis v. Billings* (Pa. Sup. Ct.), 38 Am. B. R. 957, 99 Atl. 163.

<sup>59</sup> *First Nat. Bank of Lake Charles v. Lang* (C. C. A., 5th Cir.), 29 Am. B. R. 247, 253, 202 Fed. 117, 121.

<sup>60</sup> *Tilt v. Citizens' Trust Co.* (D. C., N. J.), 27 Am. B. R. 320, 191 Fed. 441, *affd.* 29 Am. B. R. 906, 200 Fed. 410.

<sup>61</sup> *Lowell v. International Trust Co.* (C. C. A., 1st Cir.), 19 Am. B. R. 853, 158 Fed. 781.

**Collection of accounts within four months.**—When an assignment of accounts is made more than four months prior to the bankruptcy, the fact that the accounts are not collected by the creditor until within four months does not make the transaction a preference. In *re Bird* (D. C., Minn.), 25 Am. B. R. 24, 180 Fed. 229.

<sup>62</sup> For instance, see the now inapplicable cases of *In re Jones* (D. C., Mass.), 4 Am. B. R. 563, 110 Fed. 763; *In re Abraham Steers Lumber Co.* (D. C., N. Y.), 6 Am. B. R. 315, 110 Fed. 738; *affd. s. c.*, 7 Am. B. R. 332, 112 Fed. 406; *In re Rosenberg* (Ref., N. Y.), 7 Am. B. R. 316; also the numerous cases *contra*, of which the following are characteristic: *In re Wise*, 2 N. B. N. Rep. 151; *In re Beswick* (Ref., Ohio), 7 Am. B. R. 395; *In re Siegel-Hillman, etc., Co.*, 2 N. B. N. Rep. 937; *In re Dickinson* (Ref., N. Y.), 7 Am. B. R. 679.

<sup>63</sup> 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1171, 21 Sup. Ct. 906.

amendment. The clause has now been restored to subsection *a*, where it was in the Torrey bill.<sup>64</sup> The effect of this transfer is to make the four months' limitation an element of the preference referred to in both subdivisions *a* and *b*.<sup>65</sup>

(8) **RUNNING OF TIME WHERE RECORDING IS REQUIRED.**—(I) *In general.*—The concluding sentence of subdivision *a* was inserted by the amendatory act of 1903. Its purpose is apparent—to meet the decisions that held the date of the delivery of a preferential instrument, rather than the date of the record, the beginning of the four months' period.<sup>66</sup> But the amendment did not change the date as to which such transfers are to be judged in determining their voidable character.<sup>67</sup> If the transfer was filed or recorded within the four months' period, where filing or recording is required, and at that time the bankrupt was insolvent, and the transferee had reasonable cause to believe it, and the effect was to give him a greater percentage of his debt than the other creditors, the transfer is a preference.<sup>68</sup> This clause as

64. See *In re Hall* (Ref., N. Y.), 4 Am. B. R. 671. Compare Report No. 1,698, 57th Congress, First Session, pp. 3, 8.

65. *Manning v. Evans* (D. C., N. J.), 19 Am. B. R. 217, 156 Fed. 106.

66. *In re Wright* (D. C., Ga.), 2 Am. B. R. 364, 96 Fed. 187; *In re Mersman* (Ref., N. Y.), 7 Am. B. R. 46; *In re Kindt* (D. C., Iowa), 4 Am. B. R. 148, 101 Fed. 107. Apparently *contra*: *In re Klingaman* (D. C., Iowa), 4 Am. B. R. 254, 101 Fed. 691; *Babbitt v. Kelly*, 9 Am. B. R. 335, 95 Mo. App. 529, 70 S. W. 384; *Davis v. Hanover Savings Fund Soc.* (C. C. A., 4th Cir.), 31 Am. B. R. 368, 210 Fed. 768; *Deupree v. Watson* (C. C. A., 6th Cir.), 32 Am. B. R. 407, 216 Fed. 483; *Gray & Dudley Hardware Co. v. Guthrie* (Ala. Sup. Ct.), 39 Am. B. R. 654, 75 So. 318.

As to splitting days into hours, see *In re Tonawanda Street Planing Mill* (Ref., N. Y.), 4 Am. B. R. 38, and cases cited.

67. *Deupree v. Watson* (C. C. A., 6th Cir.), 32 Am. B. R. 407, 216 Fed. 483.

68. *McElvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 169 Fed. 32; *Covington v. Bergman* (D. C., N. C.), 32 Am. B. R. 35, 210 Fed. 499; *Gray & Dudley Hardware Co. v. Guthrie* (Ala. Sup. Ct.), 39 Am. B. R. 654, 75 So. 318.

**Mortgage given before but recorded within four months' period.**—On November 26, 1909, when indebted to a large extent bankrupt gave to the claimant, his brother, a mortgage on real estate for the sum of \$1,300 to secure an alleged advance of a like amount. Claimant admitted that he knew bankrupt was pressed by creditors when the alleged loan was made. He did not at any time take possession of the mortgaged premises and did not record the mortgage until March 10, 1910, two weeks before the bankrupt filed a petition in voluntary bankruptcy, at which time bankrupt's liabilities three times exceeded his assets. Under the law of Pennsylvania, where the real estate is situate, a mortgage is a lien only from the date of recording. Held, that the giving of the mortgage was a transfer of property within the four months before the filing of the petition and constituted a voidable preference under subdivi-

sions "a" and "b" of section 60 of the Bankruptcy Act. *In re Dundore* (D. C., Pa.), 26 Am. B. R. 100.

**Conveyance based on present consideration.**—In the case of *In re Jackson Brick & Tile Co.* (D. C., Mo.), 26 Am. B. R. 915, 927, 189 Fed. 636, which arose prior to the amendment of 1910, the court said: "The provisions of the statute that 'where the preference consists in a transfer, such period of four months shall not expire until four months after the recording or registering of the transfer, if, by law, such recording or registering is required,' was intended to postpone the time within which a transfer is open to attack as a preference until four months after the date of the recording of the transfer, where such recording is required by the local law; but while the statute postpones the time within which the transfer can be attacked the statute cannot properly be so applied as to materially alter the essential character of the transaction. If the transfer is one which is required to be recorded, the four-month period during which it may be attacked does not begin to run until the conveyance is recorded, but if the transfer when made was based upon a present consideration, a delay in recording the instrument does not warrant us in treating the conveyance as if it were made as security for an antecedent debt, because to do so would be to create by construction a transaction different from the actual one. It is true that in certain cases where the conveyance has no force and validity whatever as to creditors until recorded, the courts have held that the transfer may be regarded as first coming into existence when it is recorded (*McElvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 169 Fed. 31; *In re Newton* (C. C. A., 8th Cir.), 18 Am. B. R. 567, 153 Fed. 841, 83 C. C. A., 23; *First Nat. Bank v. Connett* (C. C. A., 8th Cir.), 15 Am. B. R. 662, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. [N. S.] 148); but in my opinion these cases are inapplicable to the facts here presented, and, as the

amended only refers to transfer originally intended as preferences, or which, at their inception, constituted such as a matter of law.<sup>69</sup>

(II) *Registering or recording required by State law.*—The amendment of 1910 makes voidable a preferential transfer required by State law to be registered or recorded, if such transfer was so registered or recorded within the four months' period. The omission of words equivalent to "unless the petitioning creditors have received actual notice of such transfer or assignment," found in § 3-b should be noted.<sup>70</sup> The State law relative to registration or recording will determine as to whether or not a transfer is required to be registered or recorded.<sup>71</sup> The word "required" has reference to the character of the instrument of transfer required to be recorded by the State law rather than to the particular individuals who, by reason of adventitious circumstances, may or may not be affected by an unrecorded instrument.<sup>72</sup> It will sometimes be found difficult to determine whether the law actually requires the recording or registering of a transfer within the meaning of this subsection. For instance, under a statute requiring the recording of a chattel mortgage, it was held that a failure to register rendered the mortgage void only as against lien creditors, subsequent purchasers or incumbrancers in good faith, and that such recording was therefore not required to make the instrument valid as against the mortgagor's general creditors; it is this character of a requirement which is needed to bring the transaction within this subdivision.<sup>73</sup> It is now determined authoritatively that a provision in a State law

transfer here in question was for a present consideration, it cannot properly be treated as a voidable preference.

*Filing within four months' period.*—The validity of a chattel mortgage given by a bankrupt to a bank as security, must be determined as of the date of its execution; and where it was given in good faith and valid when executed, and neither preferential nor fraudulent under State law, because withheld from record, the fact that it was not filed until within four months of the bankruptcy proceedings, does not make it invalid under section 60a of the Bankruptcy Act, as amended in 1903. *Dougherty v. First National Bank of Canton* (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241.

<sup>69.</sup> *Bradley Clark Co. v. Benson*, 13 Am. B. R. 170, 93 Minn. 91, 109 N. W. 670.

<sup>70.</sup> On this general subject, the practitioner should consult the discussion of this subsection, found in Section Three. Note distinction made between language here used and that used in § 3-b, as discussed in *Little v. Holly Brooks Hardware Co.* (C. C. A., 5th Cir.), 13 Am. B. R. 422, 133 Fed. 874 and *Carey v. Donahue*, 240 U. S. 430, 36 Am. B. R. 704, revg. 31 Am. B. R. 210, 209 Fed. 328.

*Effect of actual notice.*—Notwithstanding a deed is not recorded until within four months of bankruptcy it will be effectual against all creditors having actual notice of the transfer more than four months prior to bankruptcy. *Staples v. Warren*, 39 Am. B. R. 289, 45 Wash. L. R. 262.

<sup>71.</sup> *Hawkins v. Dannenberg Co.* (D. C., Ga.), 37 Am. B. R. 262, 234 Fed. 752. See Am. Bankr. Dig. § 490.

*Maine Statute.*—Under the revised statutes of Maine, chapter 93, section 1, providing that "No mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded," a chattel mortgage is required to be recorded, within the meaning of section 60a of the Bankruptcy Act, as

amended in 1910. *Matter of Alden* (D. C., Me.), 37 Am. B. R. 611, 233 Fed. 160.

<sup>72.</sup> *First Nat. Bank v. Connett* (C. C. A., 8th Cir.), 15 Am. B. R. 662, 665, 142 Fed. 33.

*Necessity for recording lease.*—Where under the express terms of a lease, the property was to revert to the lessor upon default by the lessee, and the record title was in the name of the lessor, it is not necessary that the lease should be recorded so far as the creditors of the bankrupt lessee were concerned. *Hills v. Stimson Co.* (Wash. Sup. Ct.), 41 Am. B. R. 618, 172 Pac. 1181.

Under the law of Georgia, the failure to record a chattel mortgage does not render it void as between the parties and ordinary creditors, but only against lien creditors of the mortgagor, or subsequent purchasers and mortgagees or lienholders in good faith, and recording is not "required" within the meaning of this section. In re *Jacobson & Perrill* (D. C., Ga.), 29 Am. B. R. 603, 200 Fed. 812; *Martin v. Commercial Nat. Bank* (C. C. A., 5th Cir.), 36 Am. B. R. 25, 228 Fed. 651; *Johnson v. Barrett* (D. C., Ga.), 38 Am. B. R. 464; but see *Hawkins v. Dannenberg Co.* (D. C., Ga.), 37 Am. B. R. 262, 234 Fed. 752.

<sup>73.</sup> *Meyer Bros. Drug Co. v. Pitkin Drug Co.* (C. C. A., 5th Cir.), 14 Am. B. R. 477, 136 Fed. 390; In re *Chadwick* (D. C., Ohio), 15 Am. B. R. 523, 140 Fed. 674; *Martin v. Commercial Nat. Bank* (C. C. A., 5th Cir.), 36 Am. B. R. 25, 228 Fed. 651; *Staples v. Warren* (D. C., Ct. of App.), 39 Am. B. R. 289, 45 Wash. L. R. 262; *Jones v. Bank of Excelsior Springs* (Mo. Ct. of App.), 44 Am. B. R. 90, 213 S. W. 892.

*Recording required as against judgment creditors.*—In the case of *Matter of Hunt* (D. C., N. Y.), 14 Am. B. R. 416, 139 Fed. 283, it was held that, because under the laws of New York an unrecorded conveyance was good as against everybody except subsequent purchasers without notice, it was not required to be recorded in order to be



requiring the recording or registration of a transfer to make it valid as against subsequent *bona fide* purchasers does not constitute a requirement of recording or registering within the meaning of this section, so as to entitle the trustee to recover the preference for the benefit of creditors.<sup>74</sup> It was formerly held

effectual against a bankrupt trustee. But Judge Archbald, in *re English v. Ross* (D. C., Pa.), 15 Am. B. R. 370, 140 Fed. 631, and the circuit court of appeals for the eighth circuit, in *First Nat. Bank v. Connett* (C. C. A., 8th Cir.), 15 Am. B. R. 662, 142 Fed. 33, reached an opposite conclusion and held that a recording statute, which required a conveyance or transfer to be recorded to be effectual against a certain class or classes of persons, was a law which required the recording of the transfer in question within the meaning of section 60-a as amended. The same conclusion was reached in *Loesser v. Bank & Trust Co.* (C. C. A., 6th Cir.), 17 Am. B. R. 628, 148 Fed. 975, revg. 15 Am. B. R. 528, 140 Fed. 674. The circuit court of appeals in the seventh circuit have adopted the ruling declared in the fifth circuit, following the case of *Meyer Bros. Drug Co. v. Pitkin Drug Co.*, *supra*, and the case of *In re Sturtevant* (C. C. A., 8th Cir.), 26 Am. B. R. 574, 188 Fed. 196, in which the court held that where bankrupts more than two years before bankruptcy, being solvent, in good faith gave to claimant's testator a chattel mortgage to secure their note made for a present and valid consideration, but the mortgage was not recorded until fifteen days prior to the filing of a petition in bankruptcy, and under the law of Illinois such a mortgage, although unrecorded, is good as against the mortgagor and his general creditors, the recording of the mortgage within the four-month period did not create a preference within the meaning of section 60a of the Bankruptcy Act. The Supreme Court in *Carey v. Donahue* 240 U. S. 430, 38 Am. B. R. 704, 60 L. ed. 726, 38 Sup. Ct. 386, has overruled the *Loesser* case and other cases like it and has followed the *Sturtevant* case.

Revised Laws 1906 (Minn.), sec. 3502, providing that "every assignment of a debt, unless the same be in writing and be filed with the clerk of the town or municipality in which the assignor resides, shall be presumed to be fraudulent and void as against his creditors, unless those claiming thereunder make it appear that it was made in good faith and for a valuable consideration," does not "require" a "recording or registering" within the meaning of sections 60-a and b of the Bankruptcy Act. Hence, where a written assignment of a claim was actually made more than four months prior to the filing of a petition in bankruptcy by the assignor, it cannot be avoided by the trustee in bankruptcy as a preference although it was never filed. *Telford v. Hendrickson* (Minn. Sup. Ct.), 31 Am. B. R. 866, 139 N. W. 941.

Subsequent purchasers or lien creditors.—A chattel mortgage given to recover a debt and required to be recorded under the law

of Arkansas to be valid against subsequent purchasers or lien creditors, must be treated as executed when first filed for record, and is invalid as against the mortgagor's trustee in bankruptcy when not filed until within four months of the filing of the petition in bankruptcy, when the mortgagor was insolvent. *Matter of Bunch Commission Co.* (D. C., Kan.), 35 Am. B. R. 526, 225 Fed. 243.

74. *Marsh v. Leseman* (C. C. A., 2d Cir.), 40 Am. B. R. 97, 242 Fed. 484; *Matter of Anderson* (D. C., R. I.), 41 Am. B. R. 731, 252 Fed. 272.

Purpose of provision as to requirements of recording.—In the case of *Carey v. Donahue*, 240 U. S. 430, 38 Am. B. R. 704, the Supreme Court had under consideration the Ohio statute (Ohio Code, § 8543) relative to the recording of instruments conveying real property, which provided that until so recorded "they shall be deemed fraudulent so far as relates to a subsequent bona fide purchaser." It appeared that a deed conveying real property to a creditor was executed by the bankrupt more than four months prior to his bankruptcy, but it was recorded within the four months' period. The court through Mr. Justice Hughes said:—"As Congress did not undertake in § 60 to hit all preferential transfers (otherwise valid) merely because they were not disclosed either by record or possession, more than four months before the bankruptcy proceeding, the inquiry is simply as to the nature of the requirement of recording to which Congress referred. The character of the transfer itself, both with respect to what should constitute a transfer and its preferential effect, had been carefully defined. It is plain that the words are not limited to cases where recording is required for the purpose of giving validity to the transaction as between the parties. For that purpose, no amendment of the original act was needed, as in such a case there could be no giving of a preference without recording. But in dealing with a transfer, as defined, which, though valid as between the parties, was one which was 'required' to be recorded, the reference was necessarily to a requirement in the interest of others who were in the contemplation of Congress in enacting the provision. The natural, and, we think, the intended, meaning, was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take. This gives effect to the amendment and interprets it in consonance with the spirit and purpose of the bankruptcy act. See Senate Report, No. 691, Sixty-first Cong. 2d Sess., p. 8. In the present case, there was no requirement of recording in favor of creditors, either general creditors or lien creditors. The requirement of the

that where a State statute provides that every chattel mortgage not accompanied by immediate delivery and followed by continued change of possession "shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith" unless it, or a true copy thereof, be filed with the county clerk, registration is required within the meaning of this section of the bankruptcy act, and it is none the less so though the penalty for noncompliance is not invalid as to everybody and for all purposes.<sup>75</sup> This provision would appear, from the principle underlying the ruling of the Supreme Court, to be one requiring the recording or filing of the instrument to protect it as against the creditors of the bankrupt, who are represented by the trustee, so as to justify a recovery of the preference.<sup>76</sup> The cases in which it has been declared that if recording or registration is required for any purpose, even if not for all purposes, it is "required" within the meaning of the amendment,<sup>77</sup> are now nullified by the conclusion reached by the Supreme Court in the Carey case. The purpose of the amendment will be effectuated by construing it as referring to transfers which require recording or registration to make them valid as against general creditors.<sup>78</sup> Where the

applicable law was solely in favor of subsequent *bona fide* purchasers without notice. These subsequent purchasers are entirely outside of the purview of the bankruptcy act. The proceeding in bankruptcy is not, in any sense, in their interest, and the trustee does not represent them. We can find no ground for the conclusion that the clause 'if by law recording or registering thereof is required' had any reference to requirements in the interest of persons of this description. The limitation of the provision to those transfers which are 'required' to be recorded under the applicable law is not to be taken to be an artificial one by which the rights of creditors are made to depend upon the presence or absence of local restrictions adopted, *alio intuitu*, in the interest of others. Rather, as we have said, we deem the reference to be to requirements of registry or record which have been established for the protection of creditors,—the persons interested in the bankrupt estate, and in whose behalf, or in whose place, the trustee is entitled to act. And where, as in this case, there is no such requirement, and the transfer was made more than four months before the filing of the petition in bankruptcy, there can be no recovery under § 60."

75. *Mattley v. Giesler* (C. C. A., 8th Cir.), 26 Am. B. R. 116, 187 Fed. 790, revg. 23 Am. B. R. 673, 175 Fed. 619, which arose under the Nebraska statute; see s. c. 29 Am. B. R. 132, 202 Fed. 738. Compare *Fisher v. Zollinger* (C. C. A., 6th Cir.), 17 Am. B. R. 618, 149 Fed. 34, affg. 15 Am. B. R. 524, holding that under the laws of Ohio the taking possession of after-acquired property within the four-month period, under a chattel mortgage given and recorded prior to that time, does not constitute a voidable preference.

76. *Bunch v. Maloney* (C. C. A., 6th Cir.), 37 Am. B. R. 360, 233 Fed. 967 (affg. 35

Am. B. R. 526, 225 Fed. 243) holding that where the applicable registry statute provides generally that an unfiled or unrecorded transfer shall be void as to "creditors" or employs words of similar import as in Arkansas, the trustee in bankruptcy as the representative of general creditors may invoke the remedy of section 60b of the Bankruptcy Act, regardless of the local construction of the statute making a procedural distinction between creditors with a lien and those without. See also *National Bank of Bakersfield v. Moore* (C. C. A., 9th Cir.), 41 Am. B. R. 409, 247 Fed. 913.

77. *Ragan v. Donovan* (D. C., Ohio), 26 Am. B. R. 311, 189 Fed. 138, holding that where a State statute provides that deeds not recorded, although good as between the parties, are void as to *bona fide* purchasers for value without knowledge, the recording of a deed is "required" within the meaning of § 60-a; *In re Beckhaus* (C. C. A., 7th Cir.), 24 Am. B. R. 380, 177 Fed. 141; *Loesser v. Bank & Trust Co.* (C. C. A., 6th Cir.), 17 Am. B. R. 628, 148 Fed. 975; *In re Donnelly* (D. C., Ohio), 27 Am. B. R. 504, 193 Fed. 755.

78. *In re Sturtevant* (C. C. A., 7th Cir.), 26 Am. B. R. 574, 189 Fed. 138, in which the court said: "If the word 'required' in section 60-a is to be construed as referring to a transaction which would be invalid for all purposes, then it does not apply to the case in hand, for the recording of the mortgage is not required in that sense under the Illinois statute. The recording laws are only for the purpose of notice. *Dean v. Plane*, 195 Ill. 465-500, 63 N. E. 274. This construction of section 60-a does not strike at the object sought to be attained by the amendments of 1903. It would formerly have been an easy matter to make a preferential transfer prior to the beginning of the four-month period, and withhold the transfer instrument from record until after the period had begun to run, thus defeating the benefit contemplated

State law requires that failure to file or record will invalidate the transfer as against creditors, the word "creditors" will not be limited in its application, but will include creditors of all kinds, and under such law filing or recording is required.<sup>79</sup> The provision does not apply where the recording of an instrument is permissive only, and the grantee takes possession under a deed.<sup>80</sup> An assignment of a land contract which might have been recorded if executed with due formality, under the laws of a State, but in respect to which recording is not required to give it validity, is not "required" to be recorded.<sup>81</sup> If a chattel mortgage first comes into existence as against general creditors, under a State statute, when it is recorded, it is "required" to be recorded under this subdivision even though it is not absolutely void in all circumstances because not so recorded.<sup>82</sup>

(III) *Transfers prior to four months' period recorded within such period.*—Where a transfer in the nature of a preference was made more than four months before the petition in bankruptcy was filed, but was recorded within that period, the statute does not have the effect of making it voidable at the instance of a trustee, unless it was one required by law to be recorded or registered within the principles heretofore declared, and the invalidating circumstances existed when it was recorded or registered.<sup>83</sup> If an instrument has been made by a bankrupt, and recorded within the statutory period, it is a question of fact whether it was done with intent to give a preference.<sup>84</sup> The failure to record a deed until after the grantor's adjudication as a bankrupt is not sufficient to make it an unlawful preference, in the absence of a fraudulent agreement, where, under the State law, the unrecorded instrument is valid between the parties and against general creditors of the grantor.<sup>85</sup> Such fact will be corroborative of the general scheme to defraud, where it appears that

by the creation of that period. Manifestly Congress must have construed the law as it then stood as making the transfer to date from the time it was actually made, without regard to the date of filing for record. Therefore a transfer, though fraudulent, could not have been attacked, even though the instrument evidencing the transfer was recorded within the four months. In order to cure this, the amendment was added that no fraudulent transfer constituting a preference could escape the four-month provision unless the recording was effected prior to that period." See *Doughterty v. First National Bank* (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241, as to effect of amendment of 1906; *Martin v. Commercial National Bank* (U. S. Sup. Ct.), 40 Am. B. R. 765, 38 Sup. Ct. 176.

79. In re *Mission Fixture & Mantel Co.* (D. C., Wash.), 24 Am. B. R. 873, 180 Fed. 263.

80. *Getman v. Lippert* (N. Y. App. Div.), 36 Am. B. R. 806, 171 N. Y. App. Div. 533, 157 N. Y. Supp. 867.

81. In re *Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962.

82. *First Nat. Bank v. Connett* (C. C. A., 8th Cir.), 15 Am. B. R. 662, 142 Fed. 33; In re *Montague* (D. C., Va.), 16 Am. B. R. 18,

143 Fed. 428; In re *Noel* (D. C., Md.), 14 Am. B. R. 715, 137 Fed. 694.

83. *Martin v. Commercial Nat. Bank* (C. C. A., 5th Cir.), 36 Am. B. R. 25, 228 Fed. 651, aff'd, 40 Am. B. R. 165, 38 Sup. Ct. 176; *Getman v. Lippert* (N. Y. App. Div.), 36 Am. B. R. 806, 171 N. Y. App. Div. 533, 157 N. Y. Supp. 867; *Matter of Roberts* (D. C., Ga.), 36 Am. B. R. 137, 227 Fed. 177; *Johnson v. Barrett* (D. C., Ga.), 38 Am. B. R. 464, 237 Fed. 112; *Doughterty v. First Nat. Bank* (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241; *Marsh v. Leseman* (C. C. A., 2d Cir.), 40 Am. B. R. 97, 242 Fed. 484; *Bonner v. First National Bank* (C. C. A., 5th Cir.), 41 Am. B. R. 60, 248 Fed. 692; *De-Laval Separator Co. v. Jones* (Me. Sup. Ct.), 41 Am. B. R. 440, 102 Atl. 968.

*Mortgage by bankrupts to indorsers as security.*—The facts that a bank, when it took an assignment of a mortgage executed to indorsers by the maker of a note which it had discounted, had learned that the maker was then insolvent, and was insolvent when the mortgage was given, and that recording had been postponed pursuant to an agreement between the maker and the indorsers do not avoid or defeat the mortgage as a valid security in the possession of the bank, the holder of the note secured thereby. *Matter of Mosher* (D. C., N. Y.), 35 Am. B. R. 264, 224 Fed. 739.

84. *Matter of McKane* (D. C., N. Y.), 19 Am. B. R. 108, 158 Fed. 647. See *Anderson v. Chensault* (C. C. A., 5th Cir.), 31 Am. B. R. 349, 206 Fed. 400.

85. In re *McIntosh* (C. C. A., 9th Cir.), 18 Am. B. R. 169, 150 Fed. 546; In re *Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962.

It seems, that a mortgage for \$1,000 given by a bankrupt to secure a loan for

the deed was without consideration and in fraud of creditors.<sup>80</sup> Where a deed absolute on its face, but in effect a mortgage was given long prior to bankruptcy as security for a promissory note, but was withheld from recorded by agreement until the day before the petition in bankruptcy, the transfer constituted a preference, since it being in effect a mortgage it was "required" to be recorded to be valid as against creditors.<sup>87</sup>

d. *Procured or suffered a judgment.*—The words "procured or suffered a judgment to be entered against himself in favor of any person" seems an inheritance from the law of 1867.<sup>88</sup> They are not the same as those used in § 3-a (3). "Procuring" a judgment implies active agency on the part of the debtor. It is very different from "permitting" the same thing. But the disjunctive "or" is used, as is the word "suffered," and cases in point under § 3-a (3) are probably equally in point as to preferences which are voidable. Thus, *Wilson v. The City Bank*<sup>86</sup> is no longer controlling even here. The crucial element of intent is now unnecessary. The few decisions under the present law directly in point are to like effect.<sup>89</sup> Cases under the former law on the meaning of "suffer or procure" should be cited with caution.<sup>91</sup>

e. *Made a transfer of his property.*—(1) *IN GENERAL.*—The word "transfer," both by the express terms of the bankruptcy law and by authoritative decisions, includes "the sale and every other and different mode of disposing of, or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."<sup>92</sup>

(2) *METHOD OF TRANSFER.*—(I) *In general.*—The method of transfer is immaterial, and this was so under the former law.<sup>93</sup> Any method of transfer whereby the transferee, a creditor, receives property belonging to the bankrupt,

only \$700, and withheld from record until within four months of bankruptcy is preferential under section 60-a of the Bankruptcy Act, and might also be attacked for usury. *Butcher v. Werksman* (D. C., N. Y.), 30 Am. B. R. 332, 204 Fed. 330.

<sup>86.</sup> *Butcher v. Werksman* (D. C., N. Y.), 30 Am. B. R. 332, 204 Fed. 330.

<sup>87.</sup> *Dulany v. Morse* (Ct. of App., D. C.), 29 Am. B. R. 375, 41 Wash. L. Rep. 52.

<sup>88.</sup> Act of 1867, § 39.

<sup>89.</sup> 17 Wall. 473.

<sup>90.</sup> *In re Collins* (Ref., Ia.), 2 Am. B. R. 1; *In re Richards* (D. C., Wis.), 2 Am. B. R. 513, 95 Fed. 258; *Grant v. National Bank of Auburn* (D. C., N. Y.), 28 Am. B. R. 712, 197 Fed. 587; *Moore v. Smith & Sons* (D. C., N. Y.), 30 Am. B. R. 413, 205 Fed. 431. See Am. Bankr. Dig. § 521.

*Essential elements, where judgment is suffered.*—An analysis of the statute will reveal that, to establish a preference, the trustee must show: (1) That the debtor was insolvent at the time of the entry of the judgment; (2) that the debtor suffered the judgment to be entered within four months before the filing of the petition; (3) that the enforcement of the judgment obtains for the creditor a greater percentage of its debt than any other creditor of the same class; and (4) that the bank or its agent had reasonable cause to believe that the effect of such judgment was to give a preference within the meaning of the acts of Congress relating to bankruptcy. *Anderson v. Hayton State Bank* (Ore. Sup. Ct.), 33 Am. B. R. 4, 159 Pac. 1008.

*Confession of judgment.*—Where a corporation with knowledge of its insolvency and within two months of bankruptcy, not only suffers, but procures a judgment to be en-

tered against itself, the enforcement of which will give to the judgment creditor substantially everything it owns, and a greater percentage of its claim than any other creditor of the same class, said corporation will be deemed to have given a voidable preference. *Grant v. National Bank of Auburn* (D. C., N. Y.), 37 Am. B. R. 329, 232 Fed. 201.

A creditor who recovers a judgment, by consent or *in invitum*, and by execution sale collects his money within four months preceding bankruptcy, and with reasonable cause to believe, etc., receives a voidable preference which he must repay to the trustee. *Golden Hill Distilling Co. v. Logue* (C. C. A., 6th Cir.), 39 Am. B. R. 731, 243 Fed. 342.

The rights of a mortgagee under a valid chattel mortgage may be enforced by confession of judgment by the mortgagor as well as by an action to foreclose the mortgage; and where the mortgage itself did not constitute a preference, the confession of judgment thereon and a sale of the property does not constitute a preference. *Utah Ass'n of Credit Men v. Jones* (Utah Sup. Ct.), 39 Am. B. R. 723, 164 Pac. 1029.

<sup>91.</sup> The following are typical: *Little v. Alexander*, 21 Wall 500; *Tenth Nat. Bank v. Warren*, 96 U. S. 539, 24 L. Ed. 640; *Sage v. Wynkoop*, 104 U. S. 319, 24 L. Ed. 740; *In re Dunkle*, Fed. Cas. 4:160; *In re Baker*, Fed. Cas. 763.

<sup>92.</sup> Bankr. Act, § 1 (25). *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 145 Fed. 202, 152 Fed. 945, modifying 16 Am. B. R. 583, 145 Fed. 202, *affd.* 216 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436.

<sup>93.</sup> *Stern, Falk & Co. v. Louisville Trust Co.* (C. C. A., 6th Cir.), 7 Am. B. R. 305, 112 Fed. 501; *National Bank of Newport v. Herkimer Bank*, 226 U. S. 173, 23 Am. B. R. 213, 59 L. Ed. 1042, 32 Sup. 633.

and thereby obtains a preference over other creditors, will result in a preference.<sup>94</sup> It is the effect of the transfer, and not its form or method which controls.<sup>95</sup> So that a payment of money,<sup>96</sup> a conveyance of land or mortgage thereof as security for a payment of a debt,<sup>97</sup> the voluntary confession of judgment to a creditor<sup>98</sup> the retaking of goods which have been sold and delivered,<sup>99</sup> or any other device by means of which the bankrupt has disposed of any portion of his estate will constitute a transfer. Where a creditor secures a judgment against an insolvent debtor and procures an execution to be levied on his personal property, the execution sale of such property and payment of the proceeds to the creditor constitutes a transfer within the meaning of the bankruptcy act.<sup>100</sup> A trustee in bankruptcy who mingles the funds of the estate with his own, and afterward becomes bankrupt himself, cannot pay out of the funds deposited in his name, the amount due the estate of which he is trustee.<sup>101</sup> The mere renewal by a mortgagee of a chattel mortgage within the four month period is not a transfer of property within the meaning of this section.<sup>101a</sup>

(II) *Transfer by indirection.*—The other elements of a preference being present the fact that a payment was made to a creditor by the indirect method of passing the money through one or more intermediaries does not validate the payment.<sup>101b</sup> Where a debtor conveyed property to his wife without any consideration and she mortgaged it in favor of his creditors,

94. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814, 819, 60 L. Ed. 275, 36 Sup. Ct. 50. affg. 31 Am. B. R. 593, 209 Fed. 603.

95. *Rogers v. Fidelity Sav. Bank & Loan Co.* (D. C., Ark.), 23 Am. B. R. 1, 172 Fed. 735. In the case of *National Bank of Newport v. Herkimer County Bank*, 225 U. S. 178, 28 Am. B. R. 218, 222, 56 L. Ed. 1042, 32 Sup. Ct. 633, it is said: "It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and a creditor obtains an advantage over other creditors."

96. *Carson, etc., Co. v. Chicago, etc., Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1171, 21 Sup. Ct. 906; *Jaquith v. Alden*, 189 U. S. 78, 82, 9 Am. B. R. 773, 47 L. Ed. 717, 23 Sup. Ct. 649; *New York Co. Nat. Bank v. Massey*, 192 U. S. 138, 11 Am. B. R. 42, 48 L. Ed. 380, 24 Sup. Ct. 199; *In re Fixen & Co.* (C. C. A., 9th Cir.), 4 Am. B. R. 10, 102 Fed. 296; *In re Arndt* (D. C., Wis.), 4 Am. B. R. 773, 104 Fed. 234; *In re Sloan* (D. C., Ia.), 4 Am. B. R. 356, 102 Fed. 116; *West v. Bank of Laboma* (Sup. Ct., Okla.), 16 Am. B. R. 733, 16 Okla. 508, 86 Pac. 59; *In re Warner*, Fed. Cas. 17,177; *In re Clark*, Fed. Cas. 2,812.

**Payment of Money.**—In a suit by a trustee in bankruptcy to set aside an alleged preferential payment it appeared that the bankrupt while insolvent executed a mortgage to a realty company which delivered to him its check on defendant's bank; that one K, in exchange for the realty company's check gave the bankrupt's broker his own check on another bank; that the broker deposited K's check in his own bank and drew his check to the order of defendant for which he received notes of the bankrupt held by defendant; that defendant

had reasonable cause to believe that the bankrupt was insolvent, but did not have any interest in the realty company. It was held that a decree dismissing the complaint on the theory that there had been no real transfer of cash by the bankrupt to defendant, should be reversed. *Obermeier v. Kass* (C. C. A., 2d Cir.), 34 Am. B. R. 37, 219 Fed. 529.

97. *Sieg v. Greene* (C. C. A., 8th Cir.), 35 Am. B. R. 150, 225 Fed. 955.

98. *Grant v. National Bank of Auburn* (D. C., N. Y.), 28 Am. B. R. 712, 197 Fed. 581.

99. *Wolff Mfg. Co. v. Battreal Shoe Co.* (Mo. Kan City Ct. of App.), 35 Am. B. R. 895, 189 S. W. 396, holding that where a creditor, under an agreement with his debtor, takes goods from the debtor's store just prior to bankruptcy and with full knowledge of the debtor's insolvency, such transfer is a voidable preference under the bankruptcy act.

100. *Galbraith v. Whitaker* (Sup. Ct., Minn.), 32 Am. B. R. 113, 138 N. W. 772.

101. *Block v. Rice* (D. C., Pa.), 21 Am. B. R. 691, 167 Fed. 693.

**Payments on account of loans, made during insolvency and within the four months' period, constitute preferences.** *In re Colton Export and Import Co.* (C. C. A., 2d Cir.), 10 Am. B. R. 14, 121 Fed. 663. So held where payment was made from the general funds of the bankrupt, although the loan was made for a particular purpose but not used therefor. *In re Kearney* (D. C., Pa.), 21 Am. B. R. 721, 167 Fed. 995.

**The repayment of stolen money does not constitute a preference, the person to whom it is restored being in entire ignorance both of the theft and restoration.** *McNaboe v. Columbian Manufacturing Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 684, 153 Fed. 967. In the above case the president of a bankrupt corporation converted into cash a portion of its assets and repaid himself, as agent of another corporation, money which he had stolen from its funds and applied to the uses and purposes of the bankrupt and it was held that such repayment did not constitute a preference under the bankruptcy act.

101a. *Matter of Dagwell* (D. C., Mich.), 45 Am. B. R. 358, 263 Fed. 406.

101b. *First National Bank v. Blackburn* (C. C. A., 3d Cir.), 43 Am. B. R. 680, 256 Fed. 527.

it was held to be a preference by the debtor.<sup>102</sup> If a transaction was entered into for the purpose of indirectly evading the provisions of the act and procuring an undue preference to the creditor, it is voidable.<sup>103</sup> Any transfer whether direct to the creditor or for his benefit, whereby the estate was depleted and the creditor received an unfair advantage is sufficient.<sup>104</sup>

(III) *Partnership and individual assets.*—Any scheme or device resorted to by persons in contemplation of bankruptcy, for the purpose of charging the partnership assets with individual obligations is a violation of the act.<sup>105</sup> So, on the other hand, any scheme or device resorted to by a creditor for the purpose of charging the individual assets of a partner, with the co-partnership liabilities, would be unlawful.<sup>106</sup> So a transfer of the firm assets to one partner, for the purpose of enabling the individual creditors of the purchasing

102. *Gibson v. Dobie*, Fed. Cas. 5,394, 14 N. B. R. 156, 5 Biss. 198.

103. *Roberts v. Johnson* (C. C. A., 4th Cir.), 18 Am. B. R. 132, 151 Fed. 567; *Mason v. Nat. Herkimer Co. Bank* (D. C., N. Y.), 21 Am. B. R. 96, 163 Fed. 920, revd. on other grounds, 22 Am. B. R. 733, 172 Fed. 529; *In re Beerman* (D. C., Ga.), 7 Am. B. R. 431, 112 Fed. 663; *Frank v. Musliner*, 9 Am. B. R. 229, 76 N. Y. App. Div. 616, 78 N. Y. Supp. 369; *Block v. Academy Ball room*, (D. C., N. Y.), 34 Am. B. R. 675, 221 Fed. 1004; *McKnight v. Shadbolt* (Wash. Sup. Ct.), 40 Am. B. R. 615, 168 Pac. 473; *Farmers' State Bank v. Freeman* (C. C. A., 8th Cir.), 41 Am. B. R. 286, 249 Fed. 570; *MacHenry v. Dwelling Bldg. & Loan Assn.* (D. C., Pa.), 44 Am. B. R. 234, 250 Fed. 880.

*Payment or transfer by indirection.*—Upon the foreclosure of a mortgage upon firm property, there remained after satisfaction of the mortgage a considerable surplus belonging to the bankrupt firm. One of the partners directed the mortgagee to pay from the surplus in his hands a debt due a creditor, thereby creating a preference. In legal effect this transaction was the same as a direct payment by the firm to prefer a firm creditor. *Johnson v. Hanley, Hoyer & Co.* (D. C., R. I.), 26 Am. B. R. 748, 188 Fed. 752.

Where a bank received security for bankrupt's indebtedness by means of an assignment of a mortgage executed by the bankrupt to a third party, in determining whether the transaction constituted a preference, it must be determined by its effect and not by its form, as the court must look at results and not at the devious ways by which they are accomplished. In re *McDonald & Sons* (D. C., S. Car.), 24 Am. B. R. 446, 178 Fed. 487, affd. 25 Am. B. R. 948. And see *Walters v. Zimmerman* (D. C., Ohio), 30 Am. B. R. 776, 780, 208 Fed. 63, where mortgage to secure loan from president of bank for the payment of a debt due the bank was held a preference; modified by *Marsh v. Walters* (C. C. A., 1st Cir.), 34 Am. B. R. 85, 220 Fed. 805.

The payment of a bankrupt's note, which was secured by a chattel mortgage on his stock of goods, by the purchaser of said goods, who had assumed the mortgage as part of the purchase price, has the same legal effect, so far as the giving of a preference to the holder of the note is concerned, as if the payment had been made

by the bankrupt himself. *Wickwire v. Webster City Sav. Bank* (Sup. Ct., Ia.), 27 Am. B. R. 157, 133 N. W. 100.

*Acceptance of mortgage security.*—Where in an action by a trustee in bankruptcy against two directors of a bankrupt corporation to recover alleged preferential payments, it appeared that each of the defendants had advanced certain amounts to the corporation, that thereafter the wife of one of the directors advanced a certain amount to the corporation receiving a mortgage as security, with the understanding that \$3,500 of the amount advanced by each defendant should be included in the mortgage; that the mortgage advanced the amount less the sums paid to the defendants by checks of the corporation which they indorsed to her; it was held that the transaction did not constitute a preferential transfer to the defendants, and, therefore, no recovery should be allowed against them. *Withoft v. Andrews* (D. C., Calif.), 33 Am. B. R. 536, 217 Fed. 421.

*Sale of notes under judgment of State court.*—A sale of notes, belonging to a bankrupt, which had been attached in actions against him by creditors in another State, while he was insolvent, does not constitute a preference, where the bankrupt made no transfer of the notes and did not suffer or procure the judgment made in the actions against him. *De Friece v. Bryant* (D. C., Ky.), 37 Am. B. R. 275, 232 Fed. 233.

104. *Grandison v. Nat. Bank of Rochester* (C. C. A., 2d Cir.), 36 Am. Pr. R. 438, 231 Fed. 800; and see *National Bank of Newport v. National Herkimer County Bank*, 225 U. S. 178, 184, 28 Am. B. R. 218, 56 L. Ed. 104; 32 Sup. Ct. 633; *Smith v. Coury* (D. C., Me.), 41 Am. B. R. 219, 247 Fed. 168; *De Forest v. Crane & Ordway Co.* (Mont. Sup. Ct.), 43 Am. B. R. 340, 179 Pac. 291.

105. *In re Jones & Cook* (D. C., Mo.), 4 Am. B. R. 141, 100 Fed. 781. See Am. Bankr. Dig. § 479.

106. *Matter of Fraser* (D. C., N. Y.), 34 Am. B. R. 467, 221 Fed. 83, holding that where a creditor of a partnership knowing that the insolvency of the firm was imminent and having reasonable cause to believe that the effect of the indorsement of the firm notes by an individual partner, who was solvent, would be to constitute a preference, the payment of such note from the individual assets of the indorser will operate as a preference.

partner to obtain an advantage over firm creditors, constitutes a preference.<sup>107</sup> If an individual member of a firm, while the firm is insolvent, transfers his property in payment of a firm debt, it constitutes an unlawful preference, not by the firm, but by the individual member.<sup>108</sup>

(IV) *Contract of conditional sale.*—The lien which a vendor of personal property retains under a contract for the sale of such property on condition that the vendor retains title notwithstanding change of possession, is not a transfer of such property. The transfer to be within the statute must be of property belonging to the bankrupt.<sup>109</sup> A conditional sale, made for value, and filed as required by the statute is not a preference, though made within four months of the buyer's adjudication as a bankrupt.<sup>110</sup>

(3) *INTENT OR GOOD FAITH.*—A resultant inequality being now the essence of a preference, it makes no difference whether the transferee was coerced by his creditor.<sup>111</sup> The section prior to the amendment of 1910 provided that the person receiving the preference "shall have had reasonable cause to believe that it was *intended* thereby to give a preference;" and under this clause the intent of the bankrupt to prefer was required to be shown.<sup>112</sup> Under the section as it then existed the fact that the transfer was made in good faith was immaterial, if made within the prescribed period to secure an antecedent debt, and intended and accepted as a preference, and so resulted.<sup>113</sup> As the section now stands all that is required is "reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference," without regard to the intent of the bankrupt. The transfer itself shows the intent; the other elements of a preference being present, it will be presumed that when he made the transfer he intended a preference.<sup>114</sup> But

107. In re Waite, Fed. Cas. 17,044, 1 Low. 207.

*Mortgage on individual property.*—Based on the principle that each individual partner is liable for the entire partnership indebtedness, a preference is created in favor of a partnership creditor where one or more of the individual partners gives a mortgage on his individual property in favor of a partnership creditor or suffers a judgment to be taken against him individually. The rule stated applies as well where the several partners have not been individually adjudicated bankrupts as where they have been so adjudicated. Where individual partners have given a preference to a firm creditor the bankruptcy court has jurisdiction, although the partners individually have not been adjudicated bankrupts, to set aside such preference by virtue of its power under section 5-g of the Bankruptcy Act to "marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." Fort Pitt Coal & Coke Co. v. Diiser (C. C. A., 6th Cir.), 38 Am. B. R. 566.

108. Mayes v. Palmer (C. C. A., 9th Cir.), 31 Am. B. R. 225, 208 Fed. 97; Mills v. Fisher (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897, 87 C. C. A. 77.

109. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 35 Am. B. R. 814, affg. 31 Am. B. R. 593; 209 Fed. 603; Big Four Implement

Co. v. Wright (C. C. A., 8th Cir.), 31 Am. B. R. 125, 207 Fed. 535; In re Farmer's Cooperative Co. (D. C., N. Dak.), 30 Am. B. R. 187, 203 Fed. 1006; Matter of Anson Mercantile Co. (D. C., Tex.), 38 Am. B. R. 862, 208 Fed. 871; Matter of Terrel (C. C. A., 8th Cir.), 40 Am. B. R. 713, 246 Fed. 743.

110. Matter of Cohen (D. C., N. Y.), 20 Am. B. R. 796, 163 Fed. 444.

111. See Clarion Bank v. Jones, 21 Wall. 325; Giddings v. Dodd, Fed. Cas. 5,405; In re Batchelder, Fed. Cas. 1,098.

112. Kimmerle v. Farr (C. C. A., 6th Cir.), 26 Am. B. R. 818, 189 Fed. 295; Hardy v. Gray (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922, 75 C. C. A. 562; In re First Nat. Bank of Louisville (C. C. A., 6th Cir.), 18 Am. B. R. 766, 155 Fed. 100, 84 C. C. A. 16; Rutland County Nat. Bank v. Graves (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 168; Soule v. First Nat'l Bank (Sup. Ct., Idaho), 32 Am. B. R. 536, 140 Pac. 1098.

113. Morgan v. First Nat. Bank (C. C. A., 4th Cir.), 16 Am. B. R. 639, 145 Fed. 466, so held in respect to a trust deed executed in good faith by an insolvent to secure an antecedent debt. Brewster v. Goff Lumber Co. (D. C., Pa.), 21 Am. B. R. 106, 164 Fed. 127.

114. Hackney v. Raymond Bros. Clarke Co. (Sup. Ct. Neb.), 10 Am. B. R. 213, 214, 68 Neb. 624, citing Johnson v. Wald (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640; Frost v. Latham & Co. (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866; Patterson v. Baker Gro-

where a debtor pays and a creditor receives the amount of a just debt, the good faith of the transaction will be presumed, but upon proof that a voidable preference resulted the initial presumption is destroyed.<sup>115</sup> Good faith alone would not be sufficient to preserve the transfer, if it in fact constituted a preference.<sup>116</sup> It is conclusively presumed that a preference was intended when the effect of the transaction is to give one creditor a greater percentage of his debt than other creditors of the same class.<sup>117</sup>

(4) ESTATE MUST BE DIMINISHED.—(I) *In general*.—There can be no preferential transfer without a depletion of the bankrupt's estate.<sup>118</sup> A fictitious transaction not affecting the estate of the debtor or the rights of creditors cannot be deemed a transfer, although assuming the form of one.<sup>119</sup> If the property alleged to have been transferred is of no value to the trustee, representing the creditors, as where it consists of a revocable privilege, of personal value to the bankrupt, such transfer is not in any sense a preference.<sup>120</sup> Where the holder of an alleged preference actually returns the property to the bankrupt in good faith before bankruptcy proceedings, and nothing was paid therefor by the bankrupt, and his estate was not depleted by the transfer, the alleged holder of the preference is relieved from liability.<sup>121</sup> The transfer must consist of property belonging to the bankrupt; thus if an indorser on the bankrupt's note pay the debt and credit the amount thereof on an indebtedness due by the indorser to the bankrupt, the payment is not a preference.<sup>122</sup>

cery Co. (Sup. Ct., Ore.), 33 Am. B. R. 740, 144 Pac. 673; *Soule v. First Nat'l Bank* (Sup. Ct., Idaho), 32 Am. B. R. 536, 140 Pac. 1008.

115. *Wolff Mfg. Co. v. Battreal Shoe Co.* (Mo. Kan. City Ct. of App.), 35 Am. B. R. 895, 180 S. W. 396, holding that proof that a preference was voidable destroys the initial presumption of good faith on the part of a creditor in accepting payment of his just claim, and places him in the position of attempting to evade and defeat the application of the bankruptcy law to the estate of his insolvent debtor.

116. *Morgan v. First Nat. Bank* (C. C. A., 4th Cir.), 16 Am. B. R. 639, 145 Fed. 466; *Matter of Geras* (C. C. A., 9th Cir.), 16 Am. B. R. 672, 146 Fed. 734.

117. *In re McDonald & Sons* (D. C., S. Car.), 24 Am. B. R. 446, 173 Fed. 487, aff'd, 25 Am. B. R. 943, 184 Fed. 968.

118. *McKay v. Sperry Flour Co.* (Wash. Sup. Ct.), 39 Am. B. R. 295, 163 Pac. 377; *Potter v. American Ptg. & Litho Co.* (Ia. Sup. Ct.), 40 Am. B. R. 854, 165 N. W. 1044; *Matter of Schwab* (D. C., N. Y.), 44 Am. B. R. 185, 258 Fed. 772, citing *Collier on Bankruptcy* (11th ed.) 865. See also *Radford Grocery Co. v. Hayni* (C. C. A., 5th Cir.), 44 Am. B. R. 300, 261 Fed. 349; *Stearns Salt & Lumber Co. v. Hammond* (C. C. A., 6th Cir.), 33 Am. B. R. 484, 217 Fed. 559, holding that where a mortgage obligated the mortgagor to insure the property for the benefit of the mortgage trustee, "as a further security" for the mortgage indebtedness, and the mortgagor within twenty days of its bankruptcy authorized the trustee to pay a portion of the proceeds of the policies to the mortgagees to be applied upon an open unsecured account, such payments constituted preferences, within the meaning of section 60 of the Bankruptcy Act, as they operated to deplete the assets available to the general and unsecured creditors, and the trustee of the bankrupt mortgagor is entitled to a recovery thereof.

*Return of goods secured by fraud*.—A return to the seller of goods or payment to the extent of their value upon discovery that the sale has been induced by fraud, does not constitute a preference, even though the seller does not ex-

pressly assert a right of rescission. *Illinois Parlor Frame Co. v. Goldman* (C. C. A., 7th Cir.), 43 Am. B. R. 287, 257 Fed. 300.

119. *In re Steam Vehicle Co.* (D. C., Pa.), 10 Am. B. R. 385, 121 Fed. 839; *Continental & Com. Trust & Savings Bank v. Chicago Title & Trust Co.* (U. S. Sup. Ct.), 229 U. S. 435, 30 Am. B. R. 624, 57 L. Ed. 1268, 33 Sup. Ct. 829. The mere preferential transfer of a worthless claim does not come within the meaning of the act. *Matter of Hamilton Automobile Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 265, 206 Fed. 566; *Root Manufacturing Co. v. Johnson* (C. C. A., 7th Cir.), 34 Am. B. R. 247, 219 Fed. 397.

120. *In re Martin* (C. C. A., 3d Cir.), 29 Am. B. R. 623, 200 Fed. 940.

121. *Lucey v. Matteson* (D. C., N. Y.), 32 Am. B. R. 762, 215 Fed. 224.

122. *Payment by indorser of bankrupt's note*.—Bankrupt executed a note for certain machinery and supplies, and the payee indorsed it, discounted it at a bank and received the proceeds for its own use. Thereafter, the note was renewed from time to time, with like indorsement. The payee, in the meantime, had pledged to the bank all of its assets, intending to liquidate its business, and at the time of the last renewal secured the note by specific assignments of accounts, as collateral. Within four months of the maker's bankruptcy and before the maturity of the note, the payee, acting in its own behalf, took up the note and received back its collateral. The amount so paid was charged by the payee to bankrupt to which it was indebted in a large sum, and on bankrupt's books a corresponding credit was given to the payee, the charge against bankrupt, however, not being known to the bank. *Held*, that since the payment to the bank was not made by bankrupt, either directly or indirectly, so that its assets were thereby



(II) *Fair consideration for present loan.*—Where the transfer consists of the giving of a fair security for a present loan, and does not diminish the general fund,<sup>123</sup> or a pledge or payment for a consideration given in the present or to be given in the future, whether in money, goods, or services, no preference results.<sup>124</sup> Where a deed of trust is given to a bank to secure the payment of a present loan it is valid.<sup>125</sup>

(III) *Payments on account; net result rule.*—Where the net result of the transactions complained of was to increase rather than deplete the estate, there can be no preference. For instance where payments are made on a running account between the parties, in the regular course of business for goods sold and delivered within the four months' period, without knowledge on the part of the creditor of the debtor's insolvency, and the effect was to keep the account alive, with the result that new credits were extended and new

depleted, such payment did not constitute a preference, the amount of which could be recovered by the bankrupt's trustee. *National Bank of Newport v. National Herkimer County Bank*, 225 U. S. 90, 28 Am. B. R. 213, 56 L. ed. 995, 32 Sup. Ct. 657, affg. 22 Am. B. R. 733, 172 Fed. 529.

Where a partner negotiated loans from a bank on his own notes, indorsing them in the name of the firm, assumption of the payment of such notes to the bank by the firm within four months of the partner's bankruptcy and the subsequent payment thereof to the bank by the firm, did not constitute a preference to the bank, as the creditor did not receive any of the bankrupt's property. *Catchings v. Chatham Nat. Bank* (C. C. A., 2d Cir.), 24 Am. B. R. 843, 190 Fed. 103. See also *Aiello v. Crampton* (C. C. A., 8th Cir.), 29 Am. B. R. 1, 201 Fed. 891.

<sup>123</sup> *In re Wolf* (D. C., Ia.), 3 Am. B. R. 555, 98 Fed. 74; *First Nat. Bank v. Penn. Trust Co.* (C. C. A., 3d Cir.), 10 Am. B. R. 752, 124 Fed. 968; *Tiffany v. Boatman's Sav. Bank*, 18 Wall. 375; *In re Noel* (D. C., Md.), 14 Am. B. R. 715, 137 Fed. 694; *McDonald v. Clearwater Ry. Co.* (C. C., Idaho), 21 Am. B. R. 182, 164 Fed. 1007; *O'Connell v. City of Worcester* (Mass. Sup. Ct.), 88 Am. B. R. 913, 114 N. E. 201. See also *Payne v. Sehon* (W. Va. Sup. Ct. of App.), 40 Am. B. R. 462, 94 S. E. 84.

The surrender of a valid lien is of itself a present consideration to the extent of the security released. *Lake View State Bank v. Jones* (C. C. A., 7th Cir.), 40 Am. B. R. 148, 242 Fed. 821.

Notes representing an antecedent debt do not constitute a present fair consideration for a transfer by a bankrupt. *Mac Henry v. Dwelling Bldg. & Loan Assn.* (D. C., Pa.), 44 Am. B. R. 234, 259 Fed. 880.

*Transfer for present consideration.*—It is not every transfer by an insolvent within the four months' period that is voidable by his trustee in bankruptcy, but the transfer to be voidable must be on account of a pre-existing debt; and when one gives an insolvent present value for a transfer of property, or when he makes an exchange of property, there is no preference. *Ernst v. Mechanics' & Metals Nat. Bank* (C. C. A., 2d Cir.), 29 Am. B. R. 289, 201 Fed. 664, affd. 231 U. S. 50, 31 Am. B. R. 291, 58 L. Ed. 115, 34 Sup. Ct. 20.

*Loan by officer to insolvent corporation.*—A chattel mortgage, authorized by a corporation in financial difficulty, prior to, but actually executed after, the receipt of a loan of money by an officer and director, which was actually delivered to the corporation, is not a preference under the Bankruptcy Act or section 66 of the New York Stock Corporation Law. *Matter of*

*Metropolitan Dairy Co.* (C. C. A., 2d Cir.), 35 Am. B. R. 466, 224 Fed. 444.

*Transfer to secure present indebtedness.*—The maker of a note on the same day executed a mortgage on his real estate to indorsers as security and thereupon a bank discounted the note. The indorsers unknown to the bank agreed not to record the mortgage, and it was not recorded until twenty days before the bankruptcy of the maker. Thereafter the indorsers assigned the mortgage to the bank. It was held, that the mortgage was not a preference, as it was accepted by the indorsers in good faith as security. *Matter of Mosher* (D. C., N. Y.), 35 Am. B. R. 284, 224 Fed. 739.

<sup>124</sup> *Potter v. American Ptg. & Litho Co.* (Ia. Sup. Ct.), 40 Am. B. R. 834, 165 N. W. 1044; *Irwin v. Maple* (C. C. A., 6th Cir.), 41 Am. B. R. 532, 252 Fed. 10; *Furth v. Stahl*, 10 Am. B. R. 442, 205 Pa. St. 439. See also *Dressel v. North State Lumber Co.* (D. C., N. Car.), 9 Am. B. R. 541, 119 Fed. 571, holding that the return of money to a bankrupt advanced to the bankrupt upon a check under an agreement that it was to be used to obtain a loan, which was not made, is not a preferential payment to the bankrupt.

*Security for present and future loans.*—Where an assignment of security for present and future loans was made by a bankrupt while solvent, the loan and each advancement thereafter made were, in substantial effect, in exchange for present security and, under the rule that a security given for present loan is not a preference, even though the debtor be insolvent, such assignment did not constitute a preference. *In re Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962.

*Present and past consideration.*—Where a transfer is made for both a present and a past consideration to the extent that it was made for a present consideration it is not voidable, but the fact that a part of the consideration was present does not prevent the transfer from being voidable as to the consideration which was past. *Smith v. Coury* (D. C., Me.), 41 Am. B. R. 219, 247 Fed. 168.

<sup>125</sup> *In re Jackson Brick & Tile Co.* (D. C., Mo.), 26 Am. B. R. 915, 189 Fed. 686, (revd. on other grounds, 27 Am. B. R. 673, 195 Fed. 188), citing *In re Union Feather & Wool Mfg. Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 472, 112 Fed. 774, 50 C. C. A. 524; *City Bank v. Bruce* (C. C. A., 4th Cir.), 6 Am. B. R. 311, 109 Fed. 69, 48 C. C. A. 236; *Stedman v. Bank* (C. C. A., 8th Cir.), 9 Am. B. R. 4, 117 Fed. 237, 54 C. C. A. 269; *Farmers' Bank v. Carr* (C. C. A., 4th Cir.), 11 Am. B. R. 733, 127 Fed. 690, 62 C. C. A. 446; *Angle v. Bankers' Surety Co.* (C. C. A., 2d Cir.), 41 Am. B. R. 90, 244 Fed. 401.

goods placed in stock increasing the bankrupt estate, such payments are not voidable as preferences.<sup>126</sup> A transfer of property by a bankrupt which does not exceed in value the amount due the creditor on its mortgage and the amount of money actually paid by him to unsecured creditors by agreement with the bankrupt, does not constitute a preference.<sup>127</sup> Where a bankrupt within four months prior to bankruptcy pays a creditor with money that is exempt under the State law such payment does not constitute a preference.<sup>128</sup>

(IV) *Substitution of securities.*—The substitution of securities pledged for an old loan, as, for instance, the exchanging of accounts receivable between an insolvent debtor and one of his creditors, does not create a preference, because there is no diminution of the debtor's estate whereby the creditors may be injured,<sup>129</sup> unless the securities substituted are of greater value than the original ones.<sup>129a</sup> An absolute transfer of an account against an insolvent debtor made in good faith to a person who afterward purchases goods from the debtor and gives in payment therefor the account thus transferred to him, is not a transaction especially prohibited by the bankruptcy act.<sup>130</sup>

(5) *PAYMENT OF ANTECEDENT DEBTS.*—Any transfer within the statutory

126. *Chisholm v. First Nat. Bank* (Ill. Sup. Ct.), 35 Am. B. R. 598, 109 N. E. 657; *Jaquith v. Alden*, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. 649.

*Payments on a running account.*—Where a creditor has a claim on a running account for goods sold and delivered during the four months' period, the account being made up of debits and credits, leaving a net amount due from the bankrupt estate, payments made within such period without knowledge of the debtor's insolvency are not preferences. *Wild & Co. v. Provident Life & Trust Co.*, 214 U. S. 292, 22 Am. B. R. 109, 53 L. ed. 1003, 29 Sup. Ct. 619, revg. 18 Am. B. R. 506, 153 Fed. 562.

Where the account between the bankrupt's estate and the person charged with having received a preference is an account current, the balance of the account, when the transactions cease, is to be taken in the determination of whether there has been an advancement by the bankrupt's estate which would constitute a voidable preference. If the bankrupt's estate has not been diminished there has been no voidable preference. *Dunlap v. Seattle National Bank* (Wash. Sup. Ct.), 38 Am. B. R. 937, 161 Pac. 364.

127. *Russell's Trustee v. Mayfield Lumber Co.* (Ct. of App., Ky.), 32 Am. B. R. 357, 164 S. W. 783.

128. *First Nat. Bank of Cleveland v. Orten* (Sup. Ct., Okla.), 33 Am. B. R. 108, 142 Pac. 1006.

129. *Border Nat. Bank v. Coupland* (C. C. A., 5th Cir.), 39 Am. B. R. 105, 240 Fed. 355; *Marsh v. Leseman* (C. C. A., 2d Cir.), 40 Am. B. R. 97, 242 Fed. 484; *In re Reese-Hammond Fire Brick Co.* (C. C. A., 3d Cir.), 25 Am. B. R. 323, 181 Fed. 641, citing *Collier on Bankruptcy* (8th ed.), p. 657; *Lloyd v. Sickles* (Wash. Sup. Ct.), 38 Am. B. R. 785, 162 Pac. 979; *Clark v. Iselin*, 21 Wall. 309; *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *Birnhiel v. Firman*, 22 Wall. 170; *In re Weaver*, Fed. Cas. 17,307; *Butt v. Carter*, Fed. Cas. 1,844. See Am. Bankr. Dig. § 506.

*Exchange of securities.*—In *Cook v. Tullis*,

18 Wall. 332, the Supreme Court uses the following language: "A fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the bankruptcy act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealings be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealings with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealings will stand if it leave his estate in as good plight and condition as previously." The language was quoted by the Supreme Court in the case of *Stewart v. Platt*, 101 U. S. 818. The same principle may be found announced in *Jaquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 773, 47 L. ed. 717, 23 Sup. Ct. 649.

In the case of *Sawyer v. Turpin*, 91 U. S. 114, 120, 23 L. Ed. 235, the Supreme Court said: "It is too well settled to require discussion that an exchange of securities within the four months is not a fraudulent preference within the meaning of the Bankruptcy Law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it."

129a. *Matter of Star Spring Bed. Co.* (D. C., N. J.), 43 Am. B. R. 328, 257 Fed. 176.

130. *Hackney v. Raymond Bros. Clarke Co.* (Sup. Ct., Nebr.), 10 Am. B. R. 213, 214, 68 Nebr. 624; *Lyon v. Clark*, 124 Mich. 100, 105, 83 N. W. 1046; *North v. Taylor*, 6 Am. B. R. 233, 61 N. Y. App. Div. 253, 70 N. Y. Supp. 338.

time by way of payment on or security of an antecedent debt is a preference.<sup>131</sup> As a corollary to the proposition that only transfers which diminish the estate of the bankrupt are preferences, it may be stated that preferences arise only in the case of antecedent debts. The distinction between a security and a preference is determined in accordance with that corollary. Property transferred by a borrower at the time of receiving the loan, and for the purpose of making the lender safe, is a security. Its validity, if unaccompanied by positive fraud, is recognized and enforced in bankruptcy. But a transfer intended to enable one to secure payment of an antecedent debt is a preference, if its effect is to give that creditor an advantage over others. If that is not its effect, it is a valid payment.<sup>132</sup> Whether a debt secured by a

131. *In re Belding* (D. C., Mass.), 8 Am. B. R. 718, 116 Fed. 1016; *In re Cobb* (D. C., N. Car.), 3 Am. B. R. 129, 96 Fed. 821; *In re Wolf* (D. C., Ia.), 3 Am. B. R. 555, 98 Fed. 74; *In re Jones* (D. C., S. Car.), 9 Am. B. R. 262, 118 Fed. 673; *In re Montgomery*, Fed. Cas. 9,732; *Coggeshall v. Potter*, Fed. Cas. 2,955. But compare *Brooks v. Davis*, Fed. Cas. 1,950; *Adams v. Merchants' Bank*, 2 Fed. 174. It is suggested that in *re Sanderlin* (D. C., N. Car.), 6 Am. B. R. 384, 109 Fed. 837, is more reliable authority here than in *McNair v. McIntyre* (C. C. A., 4th Cir.), 7 Am. B. R. 638, 113 Fed. 113, that reversed it; *Fellbach Co. v. Russell* (C. C. A., 6th Cir.), 37 Am. B. R. 235, 233 Fed. 412; *Connors v. Brockport Nat. Bank* (D. C., Maine), 32 Am. B. R. 882, 214 Fed. 847; *Schener v. Kattsoff* (D. C., N. Y.), 37 Am. B. R. 476, 233 Fed. 473; *Matter of Mosher* (D. C., N. Y.), 35 Am. B. R. 284, 224 Fed. 739; *Irwin v. Maple* (C. C. A., 6th Cir.), 41 Am. B. R. 532, 252 Fed. 10; *Payne v. Sehon* (W. Va. Sup. Ct. of App.), 40 Am. B. R. 462, 94 S. E. 34.

**Security for antecedent debts and subsequent advances.**—The fact that a transfer of property by a bankrupt, made when insolvent and with knowledge by the creditor of the insolvency, was made to secure subsequent advances as well as antecedent debts does not deprive it of its preferential character, especially where such subsequent advances have been paid by the bankrupt. *Matter of Gottlieb & Co.* (D. C., N. J.), 40 Am. B. R. 247, 245 Fed. 139.

In Louisiana, a conveyance of real estate by an insolvent husband, within the four months' period, to his wife, does not constitute a preference, under section 60-b, where the subject-matter of the conveyance does not exceed in value the total property of the wife. *Gomila v. Wilcombe* (C. C. A., 5th Cir.), 18 Am. B. R. 143, 151 Fed. 470.

**Payment of rent within four months of bankruptcy.**—A payment by a bankrupt within four months of bankruptcy to be applied to rent not within the current year constitutes a voidable preference, where the landlord knew or had reasonable cause to know that the tenant was insolvent. *Matter of Bergdoll Motor Co.* (D. C., Pa.), 35 Am. B. R. 82, 225 Fed. 87.

132. *City National Bank v. Bruce* (C. C. A., 4th Cir.), 6 Am. B. R. 311, 109 Fed. 69, 48 C. C. A., 236, citing text.

The difference between preferences in payment of antecedent debts, and securities given at the time of incurring liabilities was clearly stated by Justice Davis of the United States Supreme Court in *Tiffany v. Boatman's Savings Inst.* (18 Wall. 376), who said: "Neither the terms or policy of the bankrupt act are violated if these collaterals be taken at the time the debt is incurred. His (the bankrupt's) estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the repayment of the money bor-

rowed. Nor in doing this does he prefer one creditor over another, which is one of the great objects of the bankrupt law to prevent. The preferences at which this law is directed can only arise in case of antecedent debts. To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property; and, therefore, the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred, if the creditor had good reason to believe the debtor to be insolvent. But the giving of securities when the debt is created is not within the law, and if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid. In the administration of the bankrupt law in England this subject has frequently come before the courts, who have uniformly held that advances may be made in good faith to a debtor to carry on his business, no matter what his condition may be, and that the party making these advances can lawfully take securities at the time for their repayment. And the decisions in this country are to the same effect. (*Hilliard on Bankruptcy*, 333, ch. 10, sec. 10; *Hutten v. Crutwell*, 1 El. & Bl. 15; *Harris v. Rickett*, 4 Hurl. & N. 1; *Brusteson v. Cooke*, 6 E. & B. 296; *Lee v. Hart*, 34 Eng. Law and Eq. 569; *Belle v. Simpson*, 2 H. & N. 410; *Hunt v. Mortimer*, 10 B. & C. 44; *Ex p. Shouse*, *Crabb R.* 482; *Wadsworth v. Tyler*, Fed. Cas. 17,032, 2 N. B. R. 101; quarto.)"

**Security for clearance loan.**—Where bankrupts, who were stockholders, obtained from defendant banks at the beginning of banking hours, day or clearance loans, and later in the same day, when bankrupts were insolvent and the banks had reasonable cause to believe them to be so, delivered to the banks, upon demand, a large quantity of collaterals as security, the transactions constituted preferences and the securities were recoverable by bankrupts' trustees. *Ernst v. Mechanics' & Metals Nat. Bank* (C. C. A., 2d Cir.), 29 Am. B. R. 289, 201 Fed. 664, *affd.* 231 U. S. 50, 31 Am. B. R. 291, 58 L. Ed. 115, 34 Sup. Ct. 20.

**Mortgage to secure funds to pay antecedent debt.**—A mortgage given by an insolvent within four months of being adjudicated to secure money borrowed at the time for the

transfer or lien is antecedent must be determined as of the date of the transfer or lien.<sup>133</sup> A transfer of goods within the four months' period in part payment of unsecured debts, constitutes a preference, and the trustee is entitled to the goods or their value, if possible.<sup>134</sup> The delivery of a horse either in payment of a debt or as security therefor, is a preference, and must be delivered to the trustee for the benefit of the estate.<sup>135</sup> The assignment of a policy of fire insurance, within the statutory period, as security for an antecedent debt, constitutes a preference.<sup>136</sup> A transfer of firm property in payment of an individual partner's antecedent debt is a preference,<sup>137</sup> but the firm must be adjudged bankrupt before a suit can be brought to avoid it.<sup>138</sup> But if the debt is secured by an inchoate statutory lien the payment thereof is not a preference.<sup>139</sup> Payments may be made in discharge of a valid lien, either legal or equitable.<sup>140</sup>

(6) MORTGAGE OF PROPERTY.—A transfer may include a mortgage of the bankrupt's property as well as an absolute conveyance.<sup>141</sup> Thus, a chattel mortgage, given on the verge of bankruptcy, may constitute an unlawful preference.<sup>142</sup> A mortgage is a security and a transfer, and subject to the provisions of subsections *a* and *b*. Such a mortgage or transfer as constitutes a preference under subsection *a* is not voidable under subsection *b* unless the creditor who receives it, or is benefited by it, or his agent, has

purpose of preferring a certain creditor, where the lender knew or had reasonable cause to believe that such was his purpose, is void. *Matter of Stone* (Ref., Mass.), 37 Am. B. R. 138.

133. *Matter of Mossler Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 604.

134. *In re Ansley Bros.* (D. C., N. Car.), 18 Am. B. R. 457, 153 Fed. 983.

135. *In re Nechamkus* (D. C., N. Y.), 19 Am. B. R. 189, 155 Fed. 867, holding that any claim of the creditor for stable hire, medical attendance, etc., for the horse in excess of the value of its use must be presented, and in a proper way may be considered as an expense of the receiver in bankruptcy.

136. *Hanson v. Blake & Co.* (D. C., Me.), 19 Am. B. R. 325, 350, 155 Fed. 342, holding that the assignee has no equitable lien upon the insurance money; *State Bank of Clearwater v. Ingram* (C. C. A., 5th Cir.), 38 Am. B. R. 447.

137. *In re Gillette et al.* (D. C., N. Y.), 5 Am. B. R. 119, 104 Fed. 769. See also *In re Beerman* (D. C., Ga.), 7 Am. B. R. 431, 112 Fed. 602.

138. *Withrow v. Fowler*, Fed. Cas. 17,919. Compare *Amsinck v. Bean*, 22 Wall. 395; *In re Hines* (D. C., Pa.), 16 Am. B. R. 405, 144 Fed. 142.

139. *In re Lynn Camp Coal Co.* (Cir. Ct., Ky.), 2 Am. B. R. 60, 163 Fed. 998.

140. A subcontractor under agreement to furnish materials to a contractor, which had agreed to construct certain buildings for a railway company, after the railway company had agreed to see that it was paid for materials delivered, filed a lien, and thereafter the railway company, the contractor, its sureties, and the subcontractor with other claim-

ants all entered into an agreement for the settlement of the differences which had arisen and for the payment of all legitimate reasonable claims, and the railway company and the sureties deposited a certain sum, more than six months prior to the commencement of bankruptcy proceedings against the contractor, for the payment of such claims, which had to be severally approved by the parties to the agreement. It was held that the fact that the bankrupt joined with his cotrustees in approving the settlement of the subcontractor's claim, within four months of his adjudication, does not constitute the payment a voidable preference; and that said agreement gave the subcontractor an equitable lien good as against the trustee in bankruptcy. *Root Manufacturing Co. v. Johnson* (C. C. A., 7th Cir.), 34 Am. B. R. 247, 219 Fed. 397.

141. *In re Coffey* (Ref., N. Y.), 19 Am. B. R. 148, 164, holding that the effect of a mortgage, being to enable the mortgagee to obtain a greater percentage of his debt than other creditors, renders it a voidable preference.

Mortgage prior to four months' period.—A real estate mortgage, given more than four months prior to the filing of a petition in bankruptcy against the mortgagor, can only be avoided for actual fraud, although not recorded until within four months of the filing of the petition in bankruptcy. *Matter of Mosher* (D. C., N. Y.), 35 Am. B. R. 284, 224 Fed. 739.

142. *Coder v. McPherson* (C. C. A., 8th Cir.), 18 Am. B. R. 523, 152 Fed. 951; *Rutland County Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 168; *In re Hickerson* (D. C., Idaho), 20 Am. B. R. 682, 162 Fed. 345; *Brooks v. Bank of Beaver City* (Sup. Ct., Kan.), 25 Am. B. R. 890, 109 Pac. 409. See Am. B. R. Dig. § 538.

reasonable cause to believe that it was intended to give a preference.<sup>143</sup> The receipt by the mortgagee, shortly before the bankruptcy, of certain specific property from the bankrupt, by virtue of a contract of purchase in connection with another and separate transaction does not constitute a preference, barring proof of the claim under the mortgage.<sup>144</sup> The taking of a chattel mortgage by a creditor to secure the payment of an overdue debt, shortly before the institution of proceedings in bankruptcy by or against him, is usually suggestive of insolvency, and should be carefully scrutinized.<sup>145</sup> A partnership mortgage given within the four months' period and while the partnership was insolvent, to secure the individual debt of a member of the firm, constitutes a voidable preference, upon the adjudication in bankruptcy of the partnership.<sup>146</sup> And the assignment of a mortgage given within the four months' period by an insolvent corporation has been held to constitute a preference.<sup>147</sup> If a mortgage be given partly for an antecedent debt and partly for a present consideration it is voidable as a preference to the

143. *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 152 Fed. 943, modifying 16 Am. B. R. 583, affd. 213 U. S. 223, 22 Am. B. R. 1. 53 L. ed. 772, 29 Sup. Ct. 436; *Stockgrower's State Bank of Mountain Home v. Corker* (C. C. A., 9th Cir.), 34 Am. B. R. 392, 220 Fed. 614; *Angle v. Banker's Surety Co.* (C. C. A., 2d Cir.), 41 Am. B. R. 90, 244 Fed. 401, affg. 32 Am. B. R. 71, 210 Fed. 289.

**Rights of bona fide transferees.**—Though a mortgage given by a bankrupt constitutes a preference as against the mortgagee, it is enforceable in the hands of a bona fide purchaser. *Matter of Ballard* (D. C., Tex.), 44 Am. B. R. 651.

**Chattel mortgage on entire stock in trade.**—The giving and receiving of a chattel mortgage on the entire stock in trade of an alleged bankrupt, is almost conclusive evidence of the intent of the mortgagor to give and of the mortgagee to receive a preference over other creditors, and therefore of an intent on the part of the mortgagor to hinder and delay the creditors other than the mortgagee. *Pierre Banking & Trust Co. v. Winkler* (S. Dak. Sup. Ct.), 40 Am. B. R. 622, 165 S. W. 2.

A mortgage given by an insolvent debtor within the four months' period is void under § 60-b where the creditor had reasonable cause to believe a preference intended. In *re Tindel* (D. C., S. Car.), 18 Am. B. R. 773, 155 Fed. 456. Or where the creditor received the mortgage with knowledge of the bankrupt's insolvency. *Pittsburg Plate Glass Co. v. Edwards* (C. C. A., 8th Cir.), 17 Am. B. R. 447, 148 Fed. 377. Where it does not appear whether the mortgagor was insolvent when the mortgage was given or not, but he was insolvent, and the mortgagee knew it when he took possession, the mortgage constitutes a preference. In *re Reynolds* (D. C., Ark.), 18 Am. B. R. 666, 153 Fed. 295. In *re Herman* (D. C., Iowa), 31 Am. B. R. 243, 207 Fed. 594, in which case a chattel mortgage was given immediately prior to the bankruptcy to secure a present loan, and also an antecedent loan, and it was held that the mortgage was a void preference, although it was made pursuant to an agreement made when the first loan was made, prior to the four months' period.

**Taking of chattel mortgage by bank; reasonable cause to believe.**—Where a banker finds that a customer, already in debt to the bank, is running behind; that his transactions indicate a loss in business; that his balances are becoming depleted; that his demands for additional loans are pressing and frequent; that his overdrafts are the subject of special attention, and that his credit is so overstrained

that the banker will not pay checks, even for very small amounts, it is fair to conclude that the taking of a chattel mortgage or any other lien by a bank upon all that the debtor has, must have been with reasonable cause to believe that foreclosure of the mortgage would create a preference. *Rosenthal v. Bronx National Bank* (D. C., N. Y.), 35 Am. B. R. 273, 222 Fed. 83.

**Present and past consideration.**—Where a debtor being indebted to a father and son and also to others, gives a mortgage to the father covering both debts and secures thereon money to pay the son, and the father fails to make reasonable inquiries as to the solvency of the debtor, such mortgage constitutes a preference. *Matter of Stone* (Ref., Mass.), 37 Am. B. R. 138.

144. *Mills v. Virginia-Carolina Lumber Co.* (C. C. A., 4th Cir.), 20 Am. B. R. 750, 164 Fed. 168, modg. 18 Am. B. R. 218, 151 Fed. 642.

145. *Hussey v. Richardson-Roberts Dry Goods Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 511, 148 Fed. 598.

**Mortgage as security for note.**—A bankrupt corporation, within four months of bankruptcy, purchased certain shares of stock from another corporation and gave its check in payment. The bank on which the check was drawn rejected payment three times for lack of funds, and the bankrupt finally gave its note secured by a deed of trust or mortgage, which the vendor accepted, without attempting to prevent the bankrupt from disposing of the stock. Evidence examined and held that the mortgage constituted a voidable preference which may be set aside by the trustee. *Security Trust and Savings Bank v. Staats Co.* (C. C. A., 9th Cir.), 37 Am. B. R. 547, 233 Fed. 514.

146. In *re W. J. Floyd & Co.* (D. C., N. Car.), 19 Am. B. R. 438, 156 Fed. 206.

147. In *re Mills Co.* (D. C., N. Car.), 20 Am. B. R. 501, 162 Fed. 42. See Am. B. R. Dig., § 520.

An assignee of a chattel mortgage, constituting a voidable preference, who forecloses and appropriates the proceeds, is liable to the trustee in bankruptcy of the mortgagor. *Neilbach Co. v. Russell* (C. O. A., 6th Cir.), 37 Am. B. R. 285, 233 Fed. 412.

extent of the antecedent debt.<sup>148</sup> A chattel mortgage given to secure a present loan, but which was really for the purpose of obtaining payment of an antecedent debt is a preference.<sup>149</sup> Where a mortgagee under a chattel mortgage, containing a provision covering after acquired property which is void under a State statute, takes possession of such property within the period of four months with full knowledge of the mortgagor's insolvency, the transaction constitutes a voidable preference.<sup>150</sup> The taking of possession of property covered by an unrecorded chattel mortgage within the four months' period constitutes a voidable preference.<sup>151</sup> A mortgage on exempt and non-exempt property may be avoided as preferential so far as it pertains to the non-exempt property.<sup>152</sup> The confession of a judgment on a valid chattel mortgage and a sale of the property does not constitute a preference.<sup>152a</sup>

(7) NOTES AND CHECKS.—It is not the giving of a note by the bankrupt to a creditor that constitutes a preference, but the payment thereof within the four months' period.<sup>153</sup> But the delivery of the note of a third person constitutes a preference.<sup>154</sup> Payments on a note or check even where there is an indorsement by a solvent party constitutes a preference.<sup>155</sup> A post-dated check constitutes a transfer at the time of its payment, and the question of preference under the statute is to be determined by the conditions existing

148. *Matter of Sutherland Co. Inc.* (D. C., Mass.), 40 Am. B. R. 305, 245 Fed. 663; *City National Bank v. Bruce* (C. C. A., 4th Cir.), 6 Am. B. R. 311, 109 Fed. 69, 48 C. C. A. 236. A mortgage made within the four months' period in good faith to secure a present loan is valid but cannot be sustained as a security for antecedent debts, although mortgagee believed mortgagor to be solvent. *Farmers' Bank v. Carr* (C. C. A., 4th Cir.), 11 Am. B. R. 733, 127 Fed. 690, 62 C. C. A. 446; *In re Hull* (D. C., Vt.), 8 Am. B. R. 302, 115 Fed. 858, holding that a chattel mortgage given within the four months' period to secure the purchase price of a present sale of goods is valid as to the goods sold, but is invalid as to other goods not included in the sale.

**Present consideration.**—Where the treasurer and stockholder of a corporation in order to enable it to complete contracts which it had undertaken within four months prior to his bankruptcy, mortgaged his real property to secure a loan from a surety company to which he was liable as indemnitor for bonds it had given for the performance of the contracts, such mortgage will be deemed to have been given for a present consideration, and, hence, is not a fraudulent transfer or a preference. *Angle v. Bankers' Surety Co.* (D. C., N. Y.), 32 Am. B. R. 71, 210 Fed. 289, aff'd 41 Am. B. R. 90, 244 Fed. 401.

149. The directors of a bank to which the bankrupt was indebted, after their bank had refused him a loan, induced another bank in which they were also directors, within four months before bankruptcy, to make a loan to the bankrupt secured by a note and chattel mortgage. The latter was foreclosed and the proceeds used in paying the first bank. At the time of the execution of the mortgage the bankrupt had other debts and the cashier of the first bank knew that his account was unsatisfactory. The enforcement of the chattel mortgage was held to be a voidable preference. *Stockgrower's State Bank of Mountain*

*Home v. Corker* (C. C. A., 9th Cir.), 34 Am. B. R. 392, 220 Fed. 614.

150. *Grimes v. Clark* (C. C. A., 4th Cir.), 37 Am. B. R. 142.

151. *Brooks v. Bank of Beaver City* (Sup. Ct., Kans.), 26 Am. B. R. 890, 895, 109 Pac. 409.

152. *In re Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 990.

**Mortgage of real estate exempt as homestead.**—A mortgage given by a bankrupt on real estate which is partly exempt as a homestead under State law, cannot operate as a preference to the extent of bankrupt's homestead exemptions, since the general creditors would not be entitled to the exempt property in any event. *First National Bank of Lake Charles v. Luns* (C. C. A., 5th Cir.), 29 Am. B. R. 247, 253, 202 Fed. 117, 121.

152a. *Utah Ass'n of Credit Men v. Jones* (Utah Sup. Ct.), 39 Am. B. R. 723, 164 Pac. 1029.

153. *In re Wolf & Levy* (D. C., Tenn.), 10 Am. B. R. 153, 122 Fed. 127.

**Payment on note.**—Where a debtor, within four months of bankruptcy, sells property and receives therefor two checks payable to a bank, with which a note held by the bank was paid, and the balance deposited to the credit of the debtor in its general account, the payment on the note is a voidable preference. *Chisholm v. First National Bank of Le Roy* (Ill. Sup. Ct.), 35 Am. B. R. 598, 109 N. E. 657.

154. *Dickinson v. Bank of Richmond* (C. C. A., 4th Cir.), 6 Am. B. R. 551, 110 Fed. 353.

155. *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1; *In re Lyon* (C. C. A., 2d Cir.), 10 Am. B. R. 25, 121 Fed. 723, affg. 7 Am. B. R. 412, 114 Fed. 326; *Landry v. Andrews*, 6 Am. B. R. 281, 21 R. I. 597; *In re Hill Co.* (C. C. A., 7th Cir.), 12 Am. B. R. 221, 130 Fed. 315; *In re Deutsche & Co.* (D. C., Pa.), 25 Am. B. R. 348, 182 Fed. 435.

at such time.<sup>156</sup> Payment on notes within the four months' period, although such notes were given for the support of the bankrupt's business, is a preference.<sup>157</sup> A payment on an indorsed note which relieves the indorser, who is good, of his liability, is a preference, although the creditor may not have received any benefit from such payment.<sup>158</sup> But if the indorser had no knowledge of the payment and did nothing to induce it, the payment may not be regarded as a preference; because having no knowledge of it he had no reasonable cause to believe that a preference would result.<sup>159</sup> If the indorser had knowledge of the bankrupt's condition, and procured the payments to be made so that he might be relieved from his obligation, the payment is a preference.<sup>160</sup>

(8) TRANSACTION OF BANKING BUSINESS.—The inhibition of preferential transfers by this section does not prevent the transaction of the business of banking in the ordinary way. As will be observed under section 68, relative to setoffs, a bank may set off against a claim against a depositor the amount of his deposit, and prove for the balance due.<sup>161</sup> A bank may take renewal notes in extension of credit and receive partial payment of the debt, and has the right during the continuance of their relations to presume that the debtor is solvent and carrying on business in the usual way; and if it turns out that the debtor was insolvent the creditor may receive payment without incurring the liability of having to restore such payment when bankruptcy intervenes. A restoration of preferential payments is required of the bank only when it has reasonable cause to believe that a preference will result from such payments made within four months of the bankruptcy.<sup>162</sup>

156. *In re Lyon* (C. C. A., 2d Cir.), 10 Am. B. R. 25, 121 Fed. 723, affg. 7 Am. B. R. 412, 114 Fed. 326. If the bank received the bankrupt's check for an amount to be applied on account of a matured note held by the bank, it constitutes a voidable preference. *Ridge Ave. Bank v. Sundheim* (C. C. A., 2d Cir.), 16 Am. B. R. 863, 145 Fed. 798; *In re Starkweather & Albert* (D. C., Mo.), 30 Am. B. R. 743, 206 Fed. 797.

157. *Ohio Valley Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155.

Where a bank received payment on a note from an indorser, a corporation, the maker, another corporation, being a bankrupt, the officers of both corporations being the same, it was not a preference. *Mason v. Nat. Herkimer County Bank* (C. C. A., 2d Cir.), 22 Am. B. R. 733, 172 Fed. 529, revg. 21 Am. B. R. 98, 163 Fed. 920, *affd. sub nom.* *National Bank of Newport v. Herkimer County Bank*, 225 U. S. 90, 28 Am. B. R. 218, 56 L. Ed. 995, 32 Sup. Ct. 657.

158. *Swarts v. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1.

Security transferred to an accommodation maker of a promissory note for the benefit of an insolvent debtor constitutes a preference. *In re Bailey & Son* (D. C., Pa.), 21 Am. B. R. 911, 166 Fed. 982; *Landry v. Andrews*, 6 Am. B. R. 281, 21 R. I. 597.

159. *Reber v. Schulman & Bro.* (C. C. A.,

3d Cir.), 26 Am. B. R. 475, 183 Fed. 564, affg. 24 Am. B. R. 792, 179 Fed. 574.

Payment to relieve indorser.—In the cases of *Kobusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660, 84 C. C. A. 372; *In re Sanderson* (D. C., Vt.), 17 Am. B. R. 871, 149 Fed. 273, and *Brown v. Streicher* (D. C., R. I.), 24 Am. B. R. 267, 177 Fed. 473, the party benefited by the payment made by the bankrupt either had control of the bankrupt or requested him to make the payment, so that in every instance the party benefited by the payment not only had knowledge thereof but actively participated therein.

160. *Brown v. Streicher* (D. C., R. I.), 24 Am. B. R. 267, 177 Fed. 473; *Kobusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660, 84 C. C. A. 372. See *post* under this section, subtitle "*Creditors only to be preferred.*"

161. See § 68, Set-offs and counterclaims, B(2), and cases cited.

162. *Grandison v. Robertson* (D. C., N. Y.), 34 Am. B. R. 609, 220 Fed. 985, citing *Studley v. Boylston Nat. Bank*, 229 U. S. 523, 30 Am. B. R. 161, 33 Sup. Ct. 806, 57 L. Ed. 1313; *Grant v. Nat. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Paper v. Stern* (C. C. A., 8th Cir.), 28 Am. B. R. 592, 198 Fed. 642, 117 C. C. A. 346; *In re Eggert* (C. C. A., 7th Cir.), 4 Am. B. R. 449, 102 Fed. 735, 43 C. C. A. 1; *Bank of Commerce v. Brown* (C. C. A., 4th Cir.), 40 Am. B. R. 591, 249 Fed. 37; *Fifth National Bank v. Lyttle* (C. C. A., 2d Cir.), 41 Am. B. R. 370, 250 Fed. 361.

(9) **DEPOSIT OF MONEY.**—A deposit of money in a bank, upon an open account, subject to check, is not a transfer constituting a preference, although the bank as a creditor has the right to set off its claim against the deposit.<sup>163</sup> A deposit here referred to is a deposit received in the usual course of banking business, and not one which is "built up" or deposited under unusual circumstances for the purpose of giving a preference to the bank.<sup>164</sup> The action of a bank in applying the deposit or any portion thereof upon the depositor's indebtedness to the bank does not constitute a preferential transfer,<sup>165</sup> if at the time the bank had no reason to believe that the depositor was insolvent, and there was no collusion.<sup>166</sup> If the deposit is made as a part of a scheme to pay the depositor's indebtedness to the bank after he became insolvent, and such insolvency was known to the bank, it is a voidable preference.<sup>167</sup> Where the bankrupt deposits money with a bank under an arrangement with it and other creditors that the money was to be received for the purpose of a *pro rata* distribution among such creditors, the trustee in bankruptcy has no enforceable interest in the arrangement.<sup>168</sup> But where a payment is made to a bank, the effect and purpose of which is to protect the bank on a loan made by it sometime before such payment, it will be regarded as a pref-

163. *Am. Bank of Alaska v. Johnson* (C. C. A., 9th Cir.), 40 Am. B. R. 502, 245 Fed. 312; *In re Hill Co.* (C. C. A., 7th Cir.), 12 Am. B. R. 221, 130 Fed. 315; *West v. Bank of LaHoma* (Sup. Ct., Okl.), 16 Am. B. R. 733, 16 Okla. 508, 86 Pac. 59. As to whether a payment of a clearing house check by a clearing house association is a preference, see *Rector v. City Deposit Bank Co.*, 220 U. S. 405, 15 Am. B. R. 336, 50 L. Ed. 527, 26 Sup. Ct. 289. As to effect of fraud or collusion between officers of bank and bankrupt, see *In re Wright-Dana Hardware Co.* (D. C., N. Y.), 31 Am. B. R. 192, 207 Fed. 636.

A deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time on the part of the bank an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift or security. *New York Co. Nat. Bank v. Massey*, 192 U. S. 138, 11 Am. B. R. 42, 48 L. Ed. 380, 24 Sup. Ct. 199; *Parker v. First Nat. Bank* (Sup. Ct., Vt.), 34 Am. B. R. 669, 94 Atl. 1, holding that a bank with knowledge that a debtor is about to file a petition in bankruptcy may apply on the debt money of the debtor in a "commercial or check account," where it appears that the deposit was general, subject to check in the usual course of business.

164. *Mechanics & Metals National Bank v. Ernst*, 231 U. S. 60, 31 Am. B. R. 302, 59 L. Ed. 121, 34 Sup. Ct. 22; *National City Bank v. Hotchkiss*, 231 U. S. 50, 31 Am. B. R. 291, 58 L. Ed. 115, 34 Sup. Ct. 20; *Fourth National Bank of Wichita v. Smith* (C. C. A., 8th Cir.), 38 Am. B. R. 771; *German-American State Bank v. Larimer* (C. C. A., 8th Cir.), 37 Am. B. R. 556, 235 Fed. 501; *In re National Lumber Co.* (C. C. A., 3d Cir.), 32 Am. B. R. 389, 212 Fed. 928.

165. *In re Elsasser* (Ref., Pa.), 7 Am. B. R. 215; *In re Little* (D. C., Ia.), 6 Am. B. R. 682, 110 Fed. 621; *In re Smith Thorndyke & Brown Co.* (C. C. A., 7th Cir.), 22 Am. B. R. 350, 170 Fed. 900; *Am. Bank of Alaska v. Johnson* (C. C. A., 9th Cir.), 40 Am. B. R. 502, 245 Fed. 312.

166. **Right of bank to apply deposits to indebtedness.**—Where bankrupt, being indebted to a bank upon past due notes, deposited to its credit in said bank a sum loaned to it upon a mortgage given by it to the wife of its secretary and treasurer, and paid the bank the amount of its indebtedness with interest from the money so deposited, but the evidence was not sufficient to show that at the time of the payment bankrupt was insolvent or that it acted in collusion with the bank, the transaction did not constitute a voidable preference, since, in the absence of collusion, fraud or insolvency of the bankrupt, the bank did not need a check to enable it to get the money, but had the right to apply so much of bankrupt's deposit as was necessary to the payment of its debt. *Walsh v. First Nat. Bank of Maysville* (C. C. A., 6th Cir.), 29 Am. B. R. 119, 201 Fed. 522.

167. *Johnson v. Gratoit County State Bank* (Mich. Sup. Ct.), 38 Am. B. R. 518, 160 N. W. 544; *First National Bank v. Harper* (C. C. A., 9th Cir.), 43 Am. B. R. 82, 254 Fed. 641.

**Acceptance by bank of check from depositor.**—Acceptance by a bank of a check of a depositor in payment of an overdue note, within four months of the bankruptcy of the depositor, and with reasonable cause to believe that the transaction would result in a preference, constitutes a payment, not a set-off, and effects an unlawful preference. *Knoll v. Commercial Trust Co.* (Pa. Sup. Ct.), 35 Am. B. R. 379, 94 Atl. 750.

168. *Lowell v. International Trust Co.* (C. C. A., 1st Cir.), 19 Am. B. R. 853, 158 Fed. 781.



erence,<sup>169</sup> and so also where a deposit is made with a bank after it had cause to believe that the depositor was insolvent.<sup>170</sup>

(10) **PAYMENT OF WAGES.**—The payment of wages by a bankrupt is not a preference.<sup>171</sup> The payment of checks given by a corporation to its president for present advances with which to pay its workmen their weekly wages is not a preference.<sup>172</sup>

(11) **TRANSFERS THAT ARE VOIDABLE.**—The practitioner should always have in mind that, under the present law, many transfers are preferences in name but not in fact. To be the latter, the remedy prescribed in subsection *b* must at least be available. The transfers must, in short, be voidable. Of the multitude of cases under the present law, only those including the element of reasonable cause to believe,<sup>173</sup> are, therefore, still in point. The others, since the changes made in § 57-g, are of value only by way of possible suggestion.

**f. Effect a greater percentage.**—(1) **PROVISIONS OF STATUTE.**—Clause *a* must be construed as making a judgment or transfer a preference when the effect of the enforcement thereof would be to enable one creditor of a class to obtain a greater percentage of his debt than any other creditor of the same class. Clause *b* as amended in 1910 authorizes a recovery of a preference if the creditor benefited has "reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference." So that if a creditor receiving a transfer within the four months' period had reasonable cause to believe that such transfer would give him a greater percentage of his debt than other creditors of the same class would receive, it constitutes a preference which may be recovered by the trustee.<sup>174</sup>

(2) **CLASS OF CREDITORS.**—While the statute does not define the word "class" nor state in terms what creditors are in the same class, there is recognition in the statute of certain classes of creditors who are to be treated alike in the distribution of the bankrupt estate; as for instance, creditors to

169. *Pratt v. Columbia Bank* (D. C., N. Y.), 19 Am. B. R. 406, 157 Fed. 137.

**Deposits after insolvency; set-off.**—Where an insolvent firm deposits securities and money with a bank after the cashier has refused payment of its checks and requested them to make further deposits, and a few hours thereafter an involuntary petition in bankruptcy is filed against them, a voidable preference is created, and the deposits cannot be allowed to the bank as a set-off in a suit by the trustee in bankruptcy to recover them. *Mechanics & Metals Nat. Bank v. Ernst*, 231 U. S. 60, 31 Am. B. R. 302, affg. 29 Am. B. R. 289, 201 Fed. 664.

**Deposits or checks by insolvent to bank.**—If an insolvent, within four months antecedent to bankruptcy, makes deposits or gives checks to a bank to enable it to secure a preference, the transaction will be held void as a preference. *American Bank & Trust Co. v. Coppard* (C. C. A., 5th Cir.), 35 Am. B. R. 742, 227 Fed. 597.

170. *Ernst v. Mechanics & Metals Nat. Bank* (C. C. A., 2d Cir.), 29 Am. B. R. 289, 201 Fed. 664, affd. *sub nom.* *National City Bank v. Hotchkiss*, 231 U. S. 50, 31 Am. B. R. 291, 58 L. Ed. 115, 34 Sup. Ct. 20.

171. *Matter of Read* (Ref., N. Y.), 7 Am.

B. R. 111; *In re Feuerlicht* (Ref., N. Y.), 8 Am. B. R. 550; *In re Abraham Steers Lumber Co.* (D. C., N. Y.), 6 Am. B. R. 316, 110 Fed. 738, affd. 7 Am. B. R. 332, 112 Fed. 406.

172. *In re Union Feather & W. Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 472, 112 Fed. 774. Compare *In re King Co.* (D. C., Mass.), 7 Am. B. R. 619, 113 Fed. 110.

173. See this subject, generally, under this section, *post*.

174. *Alexander v. Redmond* (C. C. A., 2d Cir.), 24 Am. B. R. 620, 180 Fed. 92; *In re Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962; *Heyman v. Third Nat'l Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685.

**Benefit of particular creditor.**—Section 60b of the Bankruptcy Act refers to an act on the part of the bankrupt whereby he surrenders or incumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate which the Bankruptcy Act seeks to apply for the benefit of all the creditors. *Bailey v. Baker Ice Machine Co.* (U. S. Sup. Ct.), 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275, 36 Sup. Ct. 50.

whom taxes are owing, employees holding claims for wages, and those who by the laws of the states or the United States are entitled to priority;<sup>175</sup> and so also certain claims secured by liens on the property of the bankrupt are entitled to special consideration.<sup>176</sup> Creditors holding such claims, and the general creditors of the estate, constitute the classes of creditors of which the act treats.<sup>177</sup> It is the relation of their claims to the estate of the bankrupt, the percentage their claims are entitled to draw out of the estate of the bankrupt, and these alone, that dictate the relations of the creditors of the estate, and fix their classification and their preferences.<sup>178</sup>

(3) WHO ARE CREDITORS OF THE SAME CLASS.—The “greater percentage” refers only to creditors of the same class. This is the reason why the payment of wages is not a preference.<sup>179</sup> If the effect of the transfer is to enable the creditor to receive out of the debtor's estate a larger percentage of his claim than other creditors of the same class, it constitutes a preference.<sup>180</sup> Thus a mortgage, which enables the mortgagee to get more than other creditors, is a preference.<sup>181</sup> But a part payment to one creditor is not a preference where the debtor is able to pay his other creditors the same percentage.<sup>182</sup> If the transaction results in the *pro rata* distribution of the debtor's estate among all his creditors it does not create a preference, although the creditors had notice of the debtor's insolvency.<sup>183</sup> Payments and sales in the general

175. Bankr. Act, § 64, *post*.

176. Bankr. Act, §§ 56b, 57e and 57h, *ante*.

177. *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 680, 117 Fed. 1.

A landlord who is not entitled to a preference by any statute must be classed as a general creditor in determining whether he has received a preference or not. *Slayton v. Dunn* (Vt. Sup. Ct.), 44 Am. B. R. 23, 107 Atl. 307.

178. *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1; *Matter of Star Spring Bed Co.* (D. C., N. J.), 43 Am. B. R. 328, 257 Fed. 176.

Joint notes signed by a partnership and also by its members and joint and several notes founded on a partnership debt and signed by the individual members of the firm only are both in the same class, and the enforcement of a judgment upon the joint and several notes will effect a preference. *Anderson v. Stayton State Bank* (Ore. Sup. Ct.), 38 Am. B. R. 4, 159 Pac. 1003.

**Bankrupt purchasing partnership assets.**—Creditors who became such after the bankrupt purchased the partnership business, though they were not aware of the purchase by the bankrupt, are in the same class with personal creditors of the bankrupt whose claims accrued prior to said purchase. *Wartell v. Moore* (C. C. A., 6th Cir.), 44 Am. B. R. 624, 261 Fed. 762.

179. *In re Keller* (D. C., Ia.), 6 Am. B. R. 634, 109 Fed. 118. Compare *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1; *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 241 159 Fed. 897.

180. *Brittain Dry Goods Co. v. Bertenshaw* (Sup. Ct., Kan.), 11 Am. B. R. 629, 68 Kan. 734; *Matter of Cotton Export, etc., Co.* (C. C. A., 2d Cir.), 10 Am. B. R. 14, 121 Fed. 663; *In re Douglass Coal & Coke Co.* (D. C., Tenn.), 12 Am. B. R. 539, 131 Fed. 769; *In re Mayo Contracting Co.* (D. C., Mass.), 19 Am. B. R. 551, 157 Fed. 469; *Mills v. J. H. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897, holding that it is not a preference to make a payment upon a running account of purchases and payments where the effect was not to diminish the fund to which the creditors

look for payment; *Harder v. Clark* (City Ct., N. Y.), 23 Am. B. R. 756, 66 Misc. 584, 123 N. Y. Supp. 1102.

A distress for rent by a landlord does not enable the landlord to obtain a greater percentage of his debt than other creditors of the same class, where there is but one landlord. *In re Belknap* (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646.

181. *In re Coffey* (Ref., N. Y.), 19 Am. B. R. 148, 165.

182. *Brittain Dry Goods Co. v. Bertenshaw* (Sup. Ct., Kan.), 11 Am. B. R. 629, 68 Kan. 734.

183. Payments to creditors share and share alike.—In the case of *In re Varley & Brauman Clothing Co.* (D. C., Ala.), 26 Am. B. R. 840, 191 Fed. 459, the court said: “If the reviewing creditors did in fact believe, and would as prudent business men reasonably have believed, from their correspondence with the bankrupt that the small payments were made to them, share and share alike with all the other creditors of the bankrupt, from the proceeds of the special sale, conducted by the bankrupt for that purpose, then the receipt of them by the creditors would not, in my opinion, constitute a voidable preference, even though the bankrupt was insolvent, had knowledge of its condition, and made them with intent to keep the creditors quiet, and not to distribute its assets equally among its creditors, and even though the creditors were charged with knowledge of its embarrassment or even of its insolvency. The usual inference to be drawn from a payment made by an insolvent of an intent to prefer the recipient would in that event be displaced by the assurance of the bankrupt that the payment was not exclusive, but was shared in by all creditors alike.”

course of business do not constitute preferences where the net result is to increase the bankrupt's estate.<sup>184</sup>

(4) **TEST A GREATER PERCENTAGE.**—The test of a preference, under the act, is the payment, out of the bankrupt's property, of a larger percentage of the creditor's claim than other creditors of the same class receive, and not the benefit or injury to the creditor preferred.<sup>185</sup> An intent to prefer, even prior to the amendment of 1910, was not required to be specifically proven, but was conclusively presumed from the effect of the transaction in giving one creditor a greater percentage of his debt than any other creditor of a like class.<sup>186</sup> The transfer must be such as to effectually dispose of the debtor's property; if it was originally and remained a nullity against the debtor's trustee in bankruptcy, it is not a preference.<sup>187</sup> It is the effect of the transaction which will control; if the transfer results in certain creditors being paid and others excluded, the other elements existing, it is preferential.<sup>188</sup> This requirement as to equal percentages does not affect the requirement as to belief that a preference will result at the time the payment was made; so that if a creditor accepts payment of a percentage of his claim believing that other creditors received the same percentage no preference will result.<sup>189</sup> The transfer of a homestead exemption is not a preference, since it is not subject to the demands of creditors.<sup>190</sup>

(5) **INTENT IMMATERIAL.**—The logical result of the amendment of 1903 was to make intent, save as evidence of a reasonable cause to believe, immaterial; it gave place to the new element, resultant inequity.<sup>191</sup> The amend-

184. *In re Sagor* (C. C. A., 2d Cir.), 9 Am. B. R. 361, 121 Fed. 658; *Jacquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 778, 47 L. Ed. 717, 23 Sup. Ct. 649.

185. *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 677, 117 Fed. 1; *Matter of Star Spring Bed Co.* (D. C., N. J.), 43 Am. B. R. 328, 257 Fed. 176; *Slayton v. Dunn* (Vt. Sup. Ct.), 44 Am. B. R. 23, 107 Atl. 307.

**Failure to show greater percentage.**—In an action by a trustee in bankruptcy to recover goods which were returned to the vendor under unrecorded conditional sale contract, and which were of less value than the amount due defendant under such contract, where the evidence failed to show what assets came into the trustee's hands and what creditors were entitled to participate therein so that it could not be determined whether the return of defendant's goods resulted in giving it a greater percentage of its debts than had or would be paid to other creditors, an essential element of a voidable preference was not proven. *Hart v. Emerson-Brantingham Co.* (D. C., Mo.), 30 Am. B. R. 218, 203 Fed. 60.

186. *Hackney v. Hargreaves Bros.*, 13 Am. B. R. 164, 168, 68 Neb. 624, rev'd, 10 Am. B. R. 213, 214, 68 Neb. 624; *In re McDonald & Sons* (D. C., So. Car.), 24 Am. B. R. 446, 176 Fed. 487, aff'd, 25 Am. B. R. 948, 184 Fed. 986; *In re Martin* (Ref., Tex.), 27 Am. B. R. 151, holding that where the logical outcome of a debtor's acts in securing a creditor is to give such creditor a greater per cent. on its debt than other creditors, intent on the part of the debtor to give a preference may be presumed without further proof.

187. *Rosenbluth v. De Forest & Hotchkiss Co.* (Sup. Ct., Conn.), 27 Am. B. R. 359, 81 Atl. 955.

188. *In re Shantz & Son Co.* (D. C., N. Y.), 30 Am. B. R. 552, 205 Fed. 425.

189. **Reasonable cause to believe that greater percentage was received.**—By the language of section 60b of the bankruptcy act, a payment must operate as a preference at the time it is made, or not at all, and the belief of the creditor as to whether it will constitute a preference or not, must be of the time the payment is made. This is true notwithstanding the clause of section 60a that "the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage," etc. Where it appears that the percentage of the total indebtedness of a bankrupt paid during the four months period amounted to about thirty per cent., which was about twenty-seven per cent. in excess of the percentage received by two creditors if each individual payment is considered alone, and about twelve per cent. in excess if the total payments made to the two creditors be considered, and it also appears that the estate of the bankrupt has been reduced to cash and will pay about thirty per cent. more of the total indebtedness, it cannot be held that the two creditors at the time they received the payments had reasonable cause to believe that a preference would result therefrom. *Peck & Co. v. Whitner* (C. C. A., 8th Cir.), 36 Am. B. R. 722, 231 Fed. 893.

190. *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897.

191. *Compare Crooks v. The People's Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604; *Lazarus v. Eagan* (D. C., Pa.), 30 Am. B. R. 287, 206 Fed 518

See Am. Bankr. Dig. § 517.

ment of 1910 obviated the requirement of proof of intent, by making it sufficient to prove reasonable cause to believe that the transfer would result in a preference. If the effect of the act was to create a preference, and such was its natural consequence, the debtor must be presumed to have intended to do that which was the necessary result of his act.<sup>192</sup>

**g. Creditors only may be preferred.**—(1) **IN GENERAL.**—Though the words “person” and “creditor” are used interchangeably in this subsection, it is clear that only a creditor can receive a preference.<sup>193</sup> A long line of decisions, many of them already referred to, are to the effect that the relief sought under this section extends only to an avoidance of a preference secured by the lender himself as a creditor, or as the practical agent of one who is a creditor.<sup>194</sup> A payment for transfer to anyone other than a creditor, unless for the latter’s benefit, falls within the remedies indicated in §§ 67-e and 70-e. This was also so under the former law though voidable preferences and fraudulent transfers were regulated by a single section.<sup>195</sup> Then, as now, the elements of these analogous transactions were somewhat different. The practitioner, therefore, should at the outset of a suit to recover decide whether the proposed defendant is a creditor or not. Pleading, proof, and possibly judgment will depend upon such decision. It appearing that when a mortgage was executed and filed the mortgagee was not a creditor, such mortgage may not be attacked.<sup>196</sup>

(2) **TRANSFER TO ANOTHER FOR BENEFIT OF CREDITOR.**—As already indicated, a transfer by indirection for the benefit of a creditor is preferential.<sup>197</sup> To constitute a transfer a preference it is not necessary that it be made direct to the creditor.<sup>198</sup> The language of section 60-b shows plainly that this is the

192. *In re Dorr* (C. C. A., 9th Cir.), 28 Am. B. R. 505, 196 Fed. 292, citing *Western Tie & Timber Co. v. Brown*, 196 U. S. 508, 13 Am. B. R. 447, 25 Sup. Ct. 339, 49 L. Ed. 571.

**Intent to prefer.**—Since the amendment of 1910 to section 60b of the bankruptcy act, if a creditor knows, or has reasonable cause to believe, that its debt will be satisfied in whole or in part by the confession of a judgment within four months of the bankruptcy of the debtor, and a levy and sale of all the personal property of the debtor, to the exclusion of other creditors of the same class, it constitutes the receipt of a preference regardless of any intent on the part of the creditor or the debtor. *Grant v. National Bank of Auburn* (D. C., N. Y.), 37 Am. B. R. 329, 232 Fed. 201.

193. *In re Kayser* (C. C. A., 3d Cir.), 24 Am. B. R. 174, 177 Fed. 383; *Heyman v. Third Nat'l Bank* (D. C., N. Y.), 32 Am. B. R. 716, 216 Fed. 685.

194. *Johnstone v. Babb* (C. C. A., 4th Cir.), 38 Am. B. R. 715.

195. Act of 1867, § 35. In the Revised Statutes this section was broken up into two, §§ 5128, 5129.

196. *In re Clifford* (D. C., Ia.), 14 Am. B. R. 281, 136 Fed. 475.

197. See *e. Made a transfer of his property*.—(2) Method of transfer, *ante*.

198. *Grandison v. Nat. Bank of Rochester* (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800.

**Transfer for benefit of creditor.**—In the case of *National Bank of Newport v. Herkimer Bank*, 225 U. S. 178, 28 Am. B. R. 218, 56 L. Ed. 1042, 32 Sup. Ct. C33, Mr. Justice Hughes said: “To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuitry of arrangement will not avail to save it. \* \* \* It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor’s claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors.”

**Persons to be benefited.**—Where a bankrupt contractor has given an assignment of money due under a building contract to a subcontractor, who has not filed a mechanic’s lien, the owners are not persons to be benefited, within the meaning of sections 60a and 60b of the bankruptcy act. *Jump v. Bernier* (Mass., Sup. Ct.), 35 Am. B. R. 591, 108 M. E. 1027.

purpose, where it declares that a preference is voidable if "the person receiving it or to be benefited thereby, or his agent acting therein," shall have reasonable cause to believe that a preference was intended.<sup>199</sup> To constitute a preferential transfer, it is immaterial to whom the transfer is made, if it be made for the purpose of paying the claims of one creditor in preference to those of others.<sup>200</sup> So where an assignment of accounts was made to the president of a bankrupt corporation and he indorsed the notes of the bankrupt which had been previously discounted at a bank, and collected the accounts and turned the proceeds over to the bank, the transfer was preferential and prohibited by the act.<sup>201</sup> If a transfer be made to a third person merely as an agent or cover for the creditor, who is in effect benefited thereby, it is a

199. *Western Tie & Timber Co. v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 111, 129 Fed. 728 (revd. on other grounds, 196 U. S. 502, 13 Am. B. R. 447, 49 L. Ed. 571, 25 Sup. Ct. 339); *Hackney v. Hargreaves Bros.*, 13 Am. B. R. 164, 94 N. W. 822, in which case it was held that a transaction the legal effect of which is to appropriate out of the assets of the bankrupt an amount required to settle with a creditor, and which was subsequently turned over to such creditor, is a preference; *Benjamin v. Chandler* (D. C., Pa.), 15 Am. B. R. 439, 142 Fed. 217; *Page v. Moore* (D. C., Pa.), 24 Am. B. R. 745, 179 Fed. 988.

Payment by indirection.—To effect a preference, it is immaterial to whom a transfer is made, if it be for the purpose of paying the claims of one creditor in preference to those of another; and a transfer made directly, or through a third person, is sufficient. In re *Harrison Bros.* (D. C., Pa.), 28 Am. B. R. 684, 202 Fed. 248.

200. *Hackney v. Hargreaves Bros.*, 13 Am. B. R. 164, 94 N. W. 822, revg. 10 Am. B. R. 218, 68 Neb. 624; *Bank of Wayne v. Gold* (N. Y. App. Div.), 26 Am. B. R. 722, 146 N. Y. App. Div. 296, 130 N. Y. Supp. 942 citing text; In re *Lynden Mercantile Co.* (D. C., Wash.), 19 Am. B. R. 441, 156 Fed. 713; In re *Beerman* (D. C., Ga.), 7 Am. B. R. 431, 112 Fed. 662; *First Nat. Bank v. Blackburn* (C. C. A., 3d Cir.), 43 Am. B. R. 680, 56 Fed. 527.

Transfer to one not a creditor.—Defendant, which was engaged in warehousing, sublet space in its plant to bankrupt, whose business was the blending of various kinds of flour, the greater part of which was delivered to defendant by various railroads. Upon shipment of the flour which bankrupt had purchased, bills of lading would be issued to the order of the shipper in care of defendant. The shipper would send a draft upon bankrupt with the bill of lading attached and upon payment of the draft the bill of lading would be delivered to bankrupt who would then surrender it to defendant, and receive a warehouse receipt of the goods. As the flour was received, it would be placed by defendant in various open compartments which were marked, numbered and tagged so as to be readily identified, and when bankrupt had paid a particular draft it would issue orders for the

amount of flour needed for blending, to be taken from the lot upon which it had lifted the bill of lading and to which it was entitled. It appeared bankrupt's employees besides taking flour to which the bankrupt had obtained title by paying the drafts, also removed flour for which no payment had been made and which was still in the custody of defendant as bailee of the shipper. Upon discovering these thefts, defendant called upon bankrupt to make good this shortage which it was unable to do. Thereupon, defendant paid to banks which held drafts and bills of lading, some of which covered flour that had been unlawfully withdrawn and some of which covered other flour, upwards of \$8,000 and bankrupt gave its note to defendant for that amount. As security for the note it turned over to defendant warehouse receipts for flour consigned to its care, thus effecting an actual transfer of so much of the flour covered by the bills of lading as had not been stolen, and also turned over certain other property. Held, that since bankrupt when it unlawfully took the flour from defendant's custody was the debtor solely of the shipper until the flour was paid for, the transfers as security made to defendant were not transfers to a creditor, and, therefor, could not be the subject of voidable preferences. *Keystone Warehouse Co. v. Bissell* (C. C. A., 2d Cir.), 30 Am. B. R. 213, 203 Fed. 652.

201. *Grandison v. National Bank of Commerce* (D. C., N. Y.), 34 Am. B. R. 497, 220 Fed. 981, (affd. 36 Am. B. R. 438, 231 Fed. 800), in which the court said: "To constitute a preference it was not necessary that the assignment of the accounts receivable should be made directly to the bank. It was enough that the transaction which resulted in the indorsement of the renewal notes and the subsequent collection of the accounts receivable were for the benefit of the bank. Alexander concededly received the assignment of accounts from the bankrupt to secure him as an indorser on the overdue promissory notes held by the defendant. Such a transfer made by an insolvent falls within the prohibition of the Bankruptcy Act. *Crooks v. People's Nat. Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604."

preference,<sup>202</sup> as where, for instance, a transfer made to an accommodation indorser, to protect him from loss on the note, is a preference.<sup>203</sup> It seems to follow, from the last words in the amendment to this subsection, that the suit can be brought not only against the creditor or his agent, but also against a transferee not a creditor.<sup>204</sup>

(3) **INDORSER OR SURETY.**—An indorser or a surety may be a creditor within the meaning of the bankruptcy law.<sup>205</sup> If an indorser permits or induces payment of a note, with knowledge or reasonable cause to believe that such payment will result in a preference, he receives the benefit of the payment and he is a creditor.<sup>206</sup> Thus, where the surety is the president of the bankrupt, and with knowledge of its insolvency directs the payment to the holder of the obligation with intent to relieve himself from liability and to secure an advantage over other creditors, a preference arises which may be recovered from him by the trustee.<sup>207</sup> Where the agent or officer of a bankrupt corporation

<sup>202.</sup> *Alexander v. Redmond* (C. C. A., 2d Cir.), 24 Am. B. R. 620, 180 Fed. 92; *Smith v. Coury* (D. C., Me.), 41 Am. B. R. 219, 247 Fed. 168. A transfer to a third person is invalid under this section as a preference only where that person was acting on behalf of the creditor. *Dean v. Davis* (U. S., Sup. Ct.), 88 Am. B. R. 664, 37 Sup. Ct. 30. In this case an insolvent debtor fearing arrest for forgery procured a loan and gave a mortgage within the four months' period to secure such loan, and the mortgagee took up the notes at a bank, and it was held that the mortgage was not voidable as a preference.

<sup>203.</sup> *Lazarus v. Eagan* (D. C., Pa.), 30 Am. B. R. 287, 206 Fed. 518.

<sup>204.</sup> *Walters v. Zimmerman* (D. C., Ohio), 30 Am. B. R. 776, 785, 206 Fed. 62, quoting text.

<sup>205.</sup> *Swarts v. Siegel* (C. C., Mo.), 8 Am. B. R. 220, 114 Fed. 1001; *Wood v. United States* (D. C., Mass.), 16 Am. B. R. 21, 143 Fed. 424; *In re Hines* (D. C., Pa.), 16 Am. B. R. 486, 144 Fed. 147; *Ludvig v. Umstadter* (D. C., N. Y.), 17 Am. B. R. 774, 148 Fed. 319; *In re Bailey & Son* (D. C., Pa.), 21 Am. B. R. 911, 166 Fed. 962; *Brown v. Streicher* (D. C. B. I.), 24 Am. B. R. 267, 177 Fed. 473; *Bank of Wayne v. Gold* (N. Y. App. Div.), 26 Am. B. R. 722, 146 N. Y. App. Div. 296, 130 N. Y. Supp. 943; *Smith v. Tostevin* (C. C. A., 2d Cir.), 41 Am. B. R. 212, 247 Fed. 102; *Smith v. Coury* (D. C., Me.), 41 Am. B. R. 219, 247 Fed. 168; *Chapman v. Hunt* (D. C., N. Y.), 41 Am. B. R. 462, 248 Fed. 160; *Cohen v. Goldman* (C. C. A., 1st Cir.), 42 Am. B. R. 85, 250 Fed. 599. See Am. Bankr. Dig. § 499.

Guarantors of the payment of a note are "creditors" within the meaning of section 60 of the act, relating to preferences. *Stern v. Paper* (D. C., N. Dak.), 26 Am. B. R. 451, 183 Fed. 228.

<sup>206.</sup> *Reber v. Shulman & Bro.* (C. C. A., 3d Cir.), 25 Am. B. R. 475, 183 Fed. 564, affg. 24 Am. B. R. 782, 179 Fed. 574; *Kobusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660; *Brown v. Streicher* (D. C., R. I.), 24 Am. B. R. 267, 177 Fed. 473; *Lazarus v. Eagan* (D. C., Pa.), 30 Am. B. R. 287, 206 Fed. 518; *Platt v. Ives* (Sup. Ct. of Errors, Conn.), 32 Am. B. R. 846, 86 Atl. 579, *Matter of Silvernail* (D. C., Kan.), 33 Am. B. R. 59, 218 Fed. 979; *Watchmaker v. Barnes* (C. C. A., 1st Cir.), 43 Am. B. R. 632, 259 Atl. 783.

Payment of note to release indorser.—Where the father of a bankrupt, who was the surety upon his notes given to secure loans, induced him to pay the notes within

the four months' period from the proceeds of his business, at a time when he was insolvent, the father is the person "to be benefited" by the preference within the meaning of section 60-b, and is liable to the trustee for the amount of the preferential payments. *In re Sanderson* (D. C., Vt.), 17 Am. B. R. 871, 149 Fed. 273.

The payment by a bankrupt, within four months of the bankruptcy, while insolvent, of his promissory note at its maturity, to a bank which has discounted it for the payee, who indorsed it to the bank, and who, at the time of such payment, was entirely solvent, so far inures to his benefit as that, there being evidence upon which it might be found that he had reasonable ground for belief of the bankrupt's solvency, so that if the payment had been made to him he would have had reasonable cause to believe that it was intended thereby to give him a preference, and his connection with the bankrupt's affairs being of so close a character as to warrant an inference that he, in some way, procured, suggested, or aided such payment, the same should be held to have been preferential, and its repayment to the trustee ordered before such indorser can be allowed to prove any claim against the estate. *Matter of Matthews & Rosenkranz* (Ref., Mass.), 15 Am. B. R. 721.

<sup>207.</sup> *Kobusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660; *Matter of McCord* (D. C., N. Y.), 22 Am. B. R. 204, 174 Fed. 72.

Right of director of bankrupt to prefer himself over other bondholders.—It would be inequitable and a fraud upon other bondholders of a bankrupt corporation to allow a director, also a bondholder, to prefer himself by appropriating property of the bankrupt to secure an antecedent debt on which he was liable, at a time when the bankrupt was insolvent. *Butterfield v. Woodman* (C. C. A., 1st Cir.), 34 Am. B. R. 510, 223 Fed. 956, modifg. 33 Am. B. R. 154, 216 Fed. 208.

is the indorser on a note of such corporation, payment of the note by his procurement constitutes an unlawful preference.<sup>208</sup> Any payment made by a bankrupt, under conditions constituting it a preference, to or for the benefit of an indorser, guarantor, or any other surety on the obligation of the bankrupt, is within the provisions of the section.<sup>209</sup>

(4) MISAPPROPRIATION OR CONVERSION OF FUNDS.—A person who has misappropriated or converted funds belonging to another may, at the election of the owner of the funds, be treated as a debtor, in which case the owner becomes a creditor, and if he receives a transfer of property to make good the loss occasioned by the misappropriation or conversion, under such circumstances as to constitute a preference, he is a person "to be benefited" by the transfer, and the property transferred may be recovered.<sup>210</sup> So where a trustee of a trust fund transfers from himself to the trust fund certain property, knowing that a shortage existed in such fund and that he was unable to meet the deficiency, such transfer constitutes a preference which may be recovered.<sup>210a</sup> A customer of a stockholder who deposits stock and security for

<sup>208</sup> *Arnold v. Knapp* (W. Va. Ct. of App.), 34 Am. B. R. 432, 84 S. E. 895.

<sup>209</sup> *Starn v. Paper* (C. C. A., 8th Cir.), 28 Am. B. R. 592, 198 Fed. 642, holding also that the fact that the guarantor or indorser did not pay or induce the payment of the debt, but the payment was made by the bankrupt, does not except the case from the operation of the rule. To the same effect see *Goldman v. Cohen* (C. C. A., 1st Cir.), 44 Am. B. R. 818, 261 Fed. 672.

*Richardson v. Shaw & Davidson*, 209 U. S. 865, 19 Am. B. R. 717, 52 L. Ed. 835, 28 Sup. Ct. 512, affg. 16 Am. B. R. 842, holding that where by agreement a stockbroker pledges his customer's stocks upon general loans, the customer for whom the stocks are carried on margin by the broker is not a creditor, and does not receive a voidable preference where within the four months' period he closes the transaction, pays the balance owing the broker and receives stocks worth more in the market than the sum paid to take them up: *Robinson v. Roe* (C. C. A., 2d Cir.), 38 Am. B. R. 26, 233 Fed. 836; *Smith v. Tostevin* (C. C. A., 2d Cir.), 41 Am. B. R. 212, 247 Fed. 102.

**Payment by broker of profits due from grain speculation.**—Where bankrupt purchased for appellant, who advanced a margin of 8%, options, or the right to buy grain for future delivery, it being his custom to enter into a contract with third parties for the future right to purchase, but under the contract, no grain was delivered to bankrupt and he made no advances thereon, but was accountable to appellant for balances in the latter's favor, if any there were after selling the grain and making such offsets as were chargeable against the appellant, it cannot be said that there was any such pledge, or contract of pledge, that payment made to appellant as profits due him from such transactions would not be the subject of a preference. *In re Dorr* (C. C. A., 9th Cir.), 28 Am. B. R. 505, 196 Fed. 292.

<sup>210</sup> **Transfer to pay for property converted by bankrupt.**—Where a bankrupt, as a private banker, received a note from defendant for collection, which he collected, but the proceeds of which he converted to

his own use or that of his bank, at a time when he was insolvent, and a few days thereafter the bank was closed, on which day the bankrupt and his wife executed and delivered to the defendant a conveyance of certain real estate which he had long theretofore owned, sending at the same time a letter requesting defendant's agent to hold the deed until he had definite notice of the closing of the bank, upon receiving notice of which the defendant, accepted the deed, such acceptance, with knowledge of the conversion and insolvency, was an election to treat the transaction as an indebtedness for which the conveyance was tendered by way of security of indemnity, the defendant becoming a creditor on a par with other general creditors of the estate, and the conveyance constituted a preferential security, voidable in a suit by the trustee. *Atherton v. Green* (C. C. A., 7th Cir.), 24 Am. B. R. 650, 179 Fed. 806.

<sup>210a</sup> **Transfer to restore embossed trust funds.**—Bankrupt, a testamentary trustee, at a time when insolvent, was discovered by the surety on his bond not to be in possession of some of the securities belonging to the trust estate. At the instigation of the surety and for the purpose of making good the shortage he purchased certain bonds with his own money and placed them, together with the securities belonging to this trust fund which had not gone out of his possession, in a deposit box which, upon his removal as trustee, passed to his successor in trust. Bankrupt was at the time of the transaction testamentary trustee for more than twenty-five other trust estates, in the case of each of which there was a shortage for which he was responsible. In an action by the trustee in bankruptcy to recover of bankrupt's successor the securities so deposited to make up the shortage,—*Held*, that the transfer of the substituted securities must, in equity, be deemed to have been made by bankrupt as an individual dealing with himself as trustee, and that, a contract obligation having existed by reason of bank-

the amount due thereon is not a creditor, and is not preferred when the broker transfers the stock to him upon the payment of the amount due thereon.<sup>210</sup>

**h. Illustrative cases.**—In addition to the cases already cited the cases in the foot-note may be referred to. These cases supplement the authorities already cited but do not readily admit of classification.<sup>211</sup>

rapt's default in his trust, the transaction constituted a voidable preference under the bankruptcy act. *Clarke v. Rogers* (C. C. A., 1st Cir.), 26 Am. B. R. 413, 183 Fed. 518, affd. 228 U. S. 534, 30 Am. B. R. 39, 57 L. Ed. 953, 33 Sup. Ct. 587. *Burgoyne v. McKillip* (C. C. A., 8th Cir.), 25 Am. B. R. 387, 182 Fed. 452, in which the court said: "Though a demand may be founded on a breach of trust, the entire estate of the recreant trustee is not thereby necessarily impressed with a trust. The holder of the demand cannot, as an ordinary creditor, take and hold transfers of property from the insolvent defaulter free from the provisions of the bankruptcy act respecting preferences."

<sup>210b.</sup> *Clarke v. Rogers*, 228 U. S. 534, 30 Am. B. R. 39, 57 L. Ed. 953, 33 Sup. Ct. 587.

<sup>211.</sup> Transaction held not to be preferences.—The following have been held not to be preferences, even within the four months' period: The removal of notes more than four months old, *Chattanooga Bank v. Rome Iron Co.* (C. C., Ga.), 4 Am. B. R. 441, 103 Fed. 755; the payment of interests on notes, *In re Keller* (D. C., Iowa), 6 Am. B. R. 621, 110 Fed. 348; the payment of installments of rent, *In re Barrett* (Ref., N. Y.), 6 Am. B. R. 199. Compare *In re Lange* (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 197; the avails of book accounts assigned as collateral to a present loan, *Young v. Upson* (C. C., N. Y.), 8 Am. B. R. 377, 115 Fed. 192; the collection and application of the avails of collateral security given before the period, *In re Little* (D. C., Iowa), 6 Am. B. R. 681, 110 Fed. 621; the proceeds of a pledged fire insurance policy, *In re West Norfolk Lumber Co.* (D. C., Va.), 7 Am. B. R. 648, 112 Fed. 759. See also *McDonald v. Daskam* (C. C. A., 7th Cir.), 8 Am. B. R. 543, 116 Fed. 276; a payment to an official successor under order of court, *Fry v. Penn Trust Co.* (Sup. Ct., Pa.), 5 Am. B. R. 51, 195 Pa. 343; a payment in pursuance of a valid executory contract more than four months old, *Sabin v. Camp* (D. C., Oreg.), 3 Am. B. R. 578, 98 Fed. 974. Apparently *contra*: *In re Sheridan* (D. C., Pa.), 8 Am. B. R. 534, 98 Fed. 406; payments to a surety who afterward pays the bankrupt's debt, *In re New* (D. C., Ohio), 8 Am. B. R. 566, 116 Fed. 116; where a sheriff still has in his hands money collected on an execution, *In re Kenney* (D. C., N. Y.), 3 Am. B. R. 353, 97 Fed. 554. Compare however, *In re Blair* (D. C., N. Y.), 4 Am. B. R. 220, 102 Fed. 987; and where a mortgage is taken as security by a lender who knows that the borrower is hard pressed, the latter using the money to pay his debts, *In re Pearson* (D. C., N. Y.), 2 Am. B. R. 482, 96 Fed. 623. See also *In re Harpke* (C. C. A., 7th Cir.), 8 Am. B. R. 535, 116 Fed. 295; payment of interest on dower, *In re Riddle's Sons* (D. C., Pa.),

10 Am. B. R. 204, 122 Fed. 559; surrender of leased premises, *Hills v. Stimson Co.* (Wash. Sup. Ct.), 41 Am. B. R. 818, 172 Pac. 1181; recovery of goods obtained by bankrupt under false pretenses, *Mulroney Mfg. Co. v. Weeks* (1st Sup. Ct.), 44 Am. B. R. 509, 171 N. W. 36; retaking property in possession of agent who had failed to comply with State law requiring public notice of agency, *Virginia Book Co. v. Sites* (C. C. A., 4th Cir.), 41 Am. B. R. 450, 254 Fed. 46.

Where a surety on a construction contract, in pursuance of the suretyship agreement, receives the property of the principal and completes the contract and pays debts amounting to more than the value of the property, the transfer is not preferential as to the surety. *Angle v. Bankers' Surety Co.* (C. C. A., 2d Cir.), 41 Am. B. R. 90, 244 Fed. 401.

Transactions held preferences.—The following have been held preferences: Attachments, *In re Burlington Maltng Co.* (D. C., Wis.), 6 Am. B. R. 369, 109 Fed. 777; *In re Schenkeln* (Ref., N. Y.), 7 Am. B. R. 162, 113 Fed. 421; though whether this will continue to be held under the changed conditions resulting from the amendments of 1903 may be doubted; a transfer of all the bankrupt's assets to a liquidator, *In re Wertheimer* (Ref., N. Y.), 6 Am. B. R. 187; a cash sale of all property to an outsider and payment in full of several creditors, *Boyd v. Lemon Gale Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 81, 114 Fed. 647; the taking back of goods, whether hypothecated or sold, and the application of their value on account or in full, *In re Klingaman* (Ref., Iowa), 3 Am. B. R. 44; *Silberstein v. Stal*, 4 Am. B. R. 636, 32 N. Y. Misc. 353, 66 N. Y. Supp. 646; a payment after insolvency by means of a postdated check, *In re Lyon* (D. C., N. Y.), 7 Am. B. R. 412, 114 Fed. 326; affd. 10 Am. B. R. 25, 121 Fed. 723; a loan by a banker to the bankrupt of the amount of the latter's deposit, *In re Cobb* (D. C., N. Car.), 3 Am. B. R. 129, 96 Fed. 821; a payment on the bankrupt's note after its sale to and discount by a bank, *In re Waterbury Furniture Co.* (D. C., Conn.), 8 Am. B. R. 79, 114 Fed. 228; the making of a lease, *Carter v. Goodykoots* (D. C., Ind.), 2 Am. B. R. 224, 94 Fed. 106; repayment of a loan out of a certain fund under an agreement entered into when the loan was made, *Torrance v. Winfield Nat. Bank* (Sup. Ct., Kan.), 11 Am. B. R. 185, 66 Kan. 177; agreement that chattel mortgage executed prior to four months shall be lien on certain specified articles made within said period, *First Nat. Bank of Holdredge v. Johnson* (Sup. Ct., Neb.), 10 Am. B. R. 208; transfer of book accounts, *Matter of Gottlieb* (D. C., N. Y.), 40 Am. B. R. 247, 245 Fed. 139; stopping payment of check by debtor of bankrupt who was also a creditor of the bankrupt, *Matter of Star Spring Bed Co.* (D. C., N. J.), 40 Am. B. R. 1, 243 Fed. 957. See also *In re Colton*, etc., Co. (D. C., N. Y.), 8 Am. B. R. 257, 115 Fed. 158; *In re Metzger*, etc. Co. (D. C., Ark.), 8 Am. B. R. 307, 114 Fed. 957; *Swarts v. Siegel* (C. C. A., 8th Cir.), 8 Am. B. R. 690, 117 Fed. 13.

The practitioner should, however, note that the provocation for many of these decisions—the necessity of surrender of "innocent" partial payments—is now gone. It will bear repetition that none of them are now valuable unless they show the all-essential element of voidable preferences; "reasonable cause to believe that a preference was intended."



### III. WHAT PREFERENCES ARE VOIDABLE. <sup>212</sup>

a. In general.—Prior to the amendment of 1903, this subsection was regarded as broad enough to include a preference according to subsection a, as construed by the Supreme Court in *Carson v. Chicago Title & Trust Co.*,<sup>213</sup> where the broad distinction was made between said subsections showing that under subsection b, a transfer from the bankrupt may be avoided by his trustee, subject to the limitation among others, that the creditor had reason to believe that a preference was intended, while under subsection a the intent of the bankrupt is not material.<sup>214</sup> But since the amendatory act of 1903, a preference is a name only, unless it may be avoided. Under the law of 1867, preferences were *per se* void.<sup>215</sup> This, however, seems often to have been a distinction without a difference. Strictly, the preference being void, no title passed to the creditor preferred, and the words "may recover the property," etc., in § 39 of that law, were surplusage. Preferences now are not void, but voidable, *i. e.*, title has passed and recovery must be had. This is doubtless in line with the policy of the law, as evidenced by § 70-a, to protect intervening innocent purchasers. The resultant distinctions have been somewhat discussed.<sup>216</sup> The fact to be noted here is, however, that this subdivision closely fits both in phrase and in purpose the corresponding clauses in the law of 1867. Cases under that law are thus still applicable, both as to what is "reasonable cause to believe" and the practice on and measure of damages in suits to recover.<sup>217</sup>

b. Reasonable cause to believe a preference will result.—(1) IN GENERAL.—The former law and the present are here not exactly equivalent; though the phrase "reasonable cause to believe" occurs in both. Its meaning is not easily explained. Each case will turn on its own facts.<sup>218</sup>

(2) TIME OF CAUSE TO BELIEVE.—It was held under the act of 1867 that reasonable cause to believe must exist at the time of the alleged preference.<sup>219</sup> The present section provides that "if at the time of the transfer, or of the

<sup>212</sup> See Am. Bankr. Dig. §§ 482-518.

<sup>213</sup> 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1171, 21 Sup. Ct. 906.

<sup>214</sup> In re Andrews (C. C. A., 1st Cir.), 10 Am. B. R. 387, 144 Fed. 922, *affd.* 14 Am. B. R. 247, 135 Fed. 599.

<sup>215</sup> *Atkins v. Spear*, 8 Metc. (Mass.), 490; *Zahn v. Fry*, Fed. Cas. 18,198; *Rison v. Knapp*, Fed. Cas. 11,861.

<sup>216</sup> See In re Phelps (Ref., N. Y.), 3 Am. B. R. 396; In re Cobb (D. C., N. Car.), 3 Am. B. R. 129, 96 Fed. 821.

**Lien of voidable preference.**—Notwithstanding the rule that a preferential transfer is avoidable, and not void, and that recovery must be had, it has been held that the lien of a trust mortgage, constituting a preference, is discharged by the bankruptcy, and that the creditors claiming thereunder have no priority over a claim arising under a prior unfiled chattel mortgage. *Rouse v. Ottenweiss & Huxoll* (C. C. A., 6th Cir.), 31 Am. B. R. 115, 208 Fed. 881.

<sup>217</sup> See cases cited later under this section.

<sup>218</sup> For instance: *North v. Taylor*, 6 Am. B. R. 233, 62 N. Y. App. Div. 631, 70 N. Y.

Supp. 359; *Crooks v. People's Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604; *Beck v. Connell* (Sup. Ct.), 8 Am. B. R. 500, *affg.* s. c., 6 Am. B. R. 93; *Levor v. Seiter*, 8 Am. B. R. 459, 69 N. Y. App. Div. 33, 74 N. Y. Supp. 499; *Matter of Bartheleme* (Ref., N. Y.), 11 Am. B. R. 67; *Baden v. Bertenshaw* (Sup. Ct., Kan.), 11 Am. B. R. 308, 74 Pac. 639; *Rytenberg v. Schefer* (D. C., N. Y.), 11 Am. B. R. 652, 131 Fed. 313; *Pratt v. Christie*, 12 Am. B. R. 1, 95 N. Y. App. Div. 282, 86 N. Y. Supp. 585; In re Coffey (Ref., N. Y.), 19 Am. B. R. 148, 165. Compare also In re Wyly (D. C., Tex.), 8 Am. B. R. 604, 116 Fed. 38, and In re Bullock (D. C., N. Car.), 8 Am. B. R. 646, 116 Fed. 667; *Long v. Farmers' State Bank* (C. C. A., 8th Cir.), 17 Am. B. R. 103, 147 Fed. 360; In re Burlage Bros. (D. C., Iowa), 22 Am. B. R. 410, 169 Fed. 1006; *Bergdall v. Harrigan* (C. C. A., 3d Cir.), 33 Am. B. R. 394, 217 Fed. 943. See Am. Bankr. Dig. §§ 509-518.

<sup>219</sup> In re Hunt, Fed. Cas. 6,881; *Crump v. Chapman*, Fed. Cas. 3,455; In re Oumette, Fed. Cas. 10,622.

entry of judgment, the bankrupt be insolvent" and the person receiving the preference "shall *then* have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable." The word "then" refers apparently to the time of the transfer or the entry of the judgment;<sup>220</sup> it would seem that a creditor may enforce a judgment entered at a time when he had no cause to believe his debtor insolvent, although at the time he enforces it by execution he has such cause to believe, or has actual knowledge that the enforcement of his judgment will give him a preference.<sup>221</sup>

(3) **INTENT TO PREFER; EFFECT OF AMENDMENT OF 1910.**—If there was reasonable cause to believe that a voidable preference will be effected by the transaction, the intent of the debtor is immaterial.<sup>222</sup> This rule was not firmly established prior to the amendment of 1910, as there were many cases holding that the intent of the debtor was an indispensable element.<sup>223</sup> Reasonable cause to believe a preference was *intended* is not now essential. Since the amendment of 1910 there must be a reasonable cause to believe that the transfer or judgment will *effect* a preference. The effect of the transaction becomes paramount, being substituted for the intent of the debtor. The change made by the amendatory act does not dispense with the necessity of proving "reasonable cause to believe."<sup>224</sup> But the proof of such "reasonable cause to believe" is now to be directed to the effect of the transfer, rather than the intent of the debtor in making it. If the creditor knows or has "reasonable cause to believe" that his debt will be satisfied in whole or in part by the transfer to the exclusion of any of the other creditors of the same class, it is a preference,

<sup>220</sup> *Rosenman v. Coppard* (C. C. A., 5th Cir.), 35 Am. B. R. 786, 228 Fed. 114; *Shppard-Strassheim Co. v. Black* (C. C. A., 7th Cir.), 33 Am. B. R. 574, 211 Fed. 643; *Stern v. Paper* (C. C. A., 8th Cir.), 28 Am. B. R. 592, 198 Fed. 642; *In re Leach* (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; *Kentucky Bank & Trust Co. v. Pritchett* (Okla. Sup. Ct.), 33 Am. B. R. 190, 143 Pac. 338; *Matter of Ballard* (D. C., Tex.), 44 Am. B. R. 651.

The words "shall then have reasonable cause to believe that the enforcement of a judgment or transfer would effect a preference" not only refer to the time when the transfer is made, that is when the mortgage is given, but mean that the creditor taking it must then have had reasonable cause to believe that the *then* financial condition of the debtor was such that the enforcement of the security would work a preference. *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234.

<sup>221</sup> *Galbraith v. Whitaker* (Sup. Ct., Minn.), 32 Am. B. R. 113, 138 N. W. 772.

<sup>222</sup> *Schmidt v. Bank of Commerce* (Sup. Ct., N. Mex.), 25 Am. B. R. 904, 110 Pac. 613; *In re Andrews* (D. C., Mass.), 14 Am. B. R. 247, 135 Fed. 599; *Brewster v. Goff Lumber Co.* (D. C., Pa.), 21 Am. B. R. 106, 164 Fed. 124; *Western Tie & Lumber Co. v. Brown*, 196 U. S. 502, 13 Am. B. R. 447, 25 Sup. Ct. 339, 49 L. Ed. 571, aff. 12 Am.

B. R. 111, 129 Fed. 728, 64 C. C. A. 256; *Benedict v. Deshel*, 11 Am. B. R. 20, 177 N. Y. 1, 63 N. E. 999; *Richardson v. Germania Bank* (C. C. A., 2d Cir.), 45 Am. B. R. 351, 263 Fed. 320; *Cohen v. Goldman* (C. C. A., 1st Cir.), 42 Am. B. R. 85, 250 Fed. 599.

**Intent to prefer.**—In the case of *Alexander v. Redmond* (C. C. A., 2d Cir.), 24 Am. B. R. 620, 180 Fed. 92, the court said: "But it is surely enough to show that he had reasonable cause to believe that there was such intent, without inquiring into the actual mental attitude of the person from whom he receives the property transferred. If he has reasonable cause to believe that that person is insolvent and has also reasonable cause to believe that the effect of the transfer will be to enable the transferee to obtain a greater percentage of his debt than any other creditor of the same class, the requirements of the concluding part of section 60 are fully met."

<sup>223</sup> *Hardy v. Gray* (C. C. A., 1st Cir.), 16 Am. B. R. 367, 144 Fed. 922, 75 C. C. A. 562; *In re First Nat. Bank of Louisville* (C. C. A., 6th Cir.), 18 Am. B. R. 766, 155 Fed. 100, 84 C. C. A. 16; *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; *Kimmerle v. Farr* (C. C. A., 6th Cir.), 26 Am. B. R. 818, 189 Fed. 295.

<sup>224</sup> *Rogers v. American Halibut Co.* (Mass. Sup. Ct.), 31 Am. B. R. 576, 103 N. E. 689; *Saule v. First Nat'l Bank* (Sup. Ct., Idaho), 32 Am. B. R. 536, 140 Pac. 1098.

regardless of the intent of the debtor.<sup>225</sup> As the section now stands there must be proof, both of insolvency of the bankrupt at the time of the transfer and reasonable cause to believe on the part of the transferee that such transfer would effect a preference, in order to set aside the transfer as a preference.<sup>226</sup> On the other hand, when a debtor is in failing or insolvent circumstances, he has a right to prefer one creditor in preference to another, and if accepted by the creditor in good faith such preference will be sustained, even though it has the effect to delay, hinder or defeat other creditors.<sup>227</sup> And where a petition in bankruptcy alleged the insolvency of the bankrupt at the time of the execution of a chattel mortgage, the adjudication is not *res judicata* upon the issue as to whether the mortgage constituted a voidable preference.<sup>228</sup> Many, if not all the rules as to proof of intent are applicable to proof of effect; the cases bearing upon what constitutes "reasonable cause to believe that a preference was intended," decided prior to the amendment of 1910, are still in force.<sup>229</sup>

(4) **ACTUAL KNOWLEDGE NOT REQUIRED.**—The cases under the act of 1867 and the present law, as amended, permit the statement that "reasonable cause to believe," does not require proof either of actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to conclude that the transfer will result in a preference.<sup>230</sup> The

225. *Patterson v. Baker Grocery Co.* (Sup. Ct., Ore.), 33 Am. B. R. 740, 144 Pac. 673; *Heyman v. Third National Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685; *Ogden v. Reddish* (D. C., Ky.), 29 Am. B. R. 531, 200 Fed. 977; *Abele v. Beacon Trust Co.* (Mass. Sup. Jud. Ct.), 40 Am. B. R. 743, 117 N. E. 833; *Matter of Campion* (D. C., N. Y.), 43 Am. B. R. 625, 256 Fed. 902; *Watchmaker v. Baines* (C. C. A., 1st Cir.), 43 Am. B. R. 633, 259 Fed. 783.

**Intent to prefer immaterial.**—In the case of *Herron Co. v. Moore* (C. C. A., 9th Cir.), 31 Am. B. R. 221, 208 Fed. 134, the court said: "Under the bankruptcy act, section 60, as amended by the act of 1910, it is no longer necessary in order to establish a preference, to prove the existence of the debtor's intent to prefer. It is sufficient if it is shown that the creditor receiving the alleged preferential payment had at the time when it was made, reasonable cause to believe that the bankrupt was insolvent, and that in accepting and retaining the same he would receive a larger per cent. of his debt than the other creditors of the same class."

Under the amendment of 1910, the test of a preferential payment is, whether the person receiving the payment, or to be benefited thereby, or his agent acting therein, at the time the payment was made, had reasonable cause to believe that in accepting and retaining said payment he would receive a larger percentage of his debt than any other creditor of the same class. In *re Harrison Bros.* (D. C., Pa.), 28 Am. B. R. 654, 202 Fed. 243.

Notwithstanding the amendment of 1910, the element of reasonable cause to believe remains as a fact necessary to be alleged and proven. *Carey v. Donohue* (C. C. A., 6th Cir.), 31 Am. B. R. 210, 209 Fed. 328, *revd.* on other grounds,

240 U. S. § 430, 36 Am. B. R. 704, 60 L. Ed. 739, 36 Sup. Ct. 386.

226. *Matter of Chicago Car Equipment Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 617, 211 Fed. 638; *Sheppard-Strassheim Co. v. Block* (C. C. A., 7th Cir.), 33 Am. B. R. 574, 211 Fed. 643; *Beall v. Bank of Bowden* (D. C., Ga.), 34 Am. B. R. 186, 219 Fed. 316; *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234; *Canthorn v. Burley State Bank* (Sup. Ct., Idaho), 33 Am. B. R. 794, 144 Pac. 1608; *Batchelder v. Home Nat'l Bank* (Sup. Jud. Ct., Mass.), 32 Am. B. R. 555, 105 N. E. 1052; *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338; *Abele v. Beacon Trust Co.* (Mass. Sup. Jud. Ct.), 40 Am. B. R. 743, 117 N. E. 833; *Brown v. First State Bank of Weimar* (Tex. Civ. App.), 41 Am. B. R. 151, 199 S. W. 895; *Williams v. Davidson* (Wash. Sup. Ct.), 42 Am. B. R. 595, 176 Pac. 334; *Brittain v. Buerger Comm. Co.* (Wis. Sup. Ct.), 43 Am. B. R. 144, 170 N. W. 947; *De Forest v. Crane & Ordway Co.* (Mont. Sup. Ct.), 43 Am. B. R. 249, 179 Pac. 291.

227. *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338; *Watson v. Adams* (C. C. A., 6th Cir.), 39 Am. B. R. 473, 242 Fed. 441.

228. *Sheppard-Strassheim Co. v. Block* (C. C. A., 7th Cir.), 33 Am. B. R. 574, 211 Fed. 643.

229. *Debus v. Yates* (D. C., Ky.), 30 Am. B. R. 823, 193 Fed. 427, in which case the court exhaustively discusses the subject of preferences prior to and since the amendment of 1908.

230. *Hussey v. Richardson-Roberts Dry Goods Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 511, 128 Fed. 598; *Rosenman v. Coppard* (C. C. A., 5th Cir.), 35 Am. B. R. 766, 228 Fed. 114; *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234; *Heyman v. Third National Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685; *Arthur v. Harrington* (D. C., N. Y.), 32 Am. B. R. 216, 211 Fed. 215; *In re Jacobs* (Ref., La.), 1 Am. B. R. 518; *In re Richards* (D. C., Wis.), 2 Am. B. R. 518, 95 Fed. 253; *Crittenden v. Barton*, 5 Am. B. R. 775, 59 N. Y. App. Div. 555, 69 N. Y. Supp. 559; *Sebring v. Wellington*, 6 Am. B. R. 671, 63 N. Y. App.

Div. 498 71 N. Y. Supp. 788; Hackney v. Raymond Bros. Clarke Co. (Sup. Ct., Neb.), 10 Am. B. R. 213, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Sundheim v. Ridge Ave. Bank (D. C., Pa.), 15 Am. B. R. 132, 138 Fed. 951; In re Hines (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 543; In re Virginia Hardwood Mfg. Co. (D. C., Ark.), 15 Am. B. R. 135, 139 Fed. 209; In re Armstrong (D. C., Iowa), 16 Am. B. R. 583, 145 Fed. 202; Stevenson v. Miliken-Tomlinson, 13 Am. B. R. 201, 99 Me. 320, 59 Atl. 472; Suffel v. McCartney Nat. Bank, 16 Am. B. R. 259, 127 Wis. 208, 106 N. W. 837; In re Mills Co. (D. C., N. Car.), 20 Am. B. R. 501, 162 Fed. 42; Rogers v. Fidelity Sav. Bank & Loan Co. (D. C., Ark.), 23 Am. B. R. 1, 172 Fed. 735; Rogers v. American Halibut Co. (Mass. Sup. Ct.), 31 Am. B. R. 576, 216 Mass. 227, 108 N. E. 699; Matter of The Sutherland Co., Inc. (D. C., Mass.), 40 Am. B. R. 305, 245 Fed. 663; Walter v. National Fire Ins. Co. (Neb. Sup. Ct.), 40 Am. B. R. 339, 164 N. W. 569; Abele v. Beacon Trust Co. (Mass. Sup. Jud. Ct.), 40 Am. B. R. 743, 117 N. E. 833; Bossett v. Evans (C. C. A., 8th Cir.), 42 Am. B. R. 587, 253 Fed. 532; Underwood v. Winslow (Mass. Sup. Jud. Ct.), 42 Am. B. R. 714, 121 N. E. 624; Cohen v. Tremont Trust Co. (D. C., Mass.), 43 Am. B. R. 522, 256 Fed. 399; Matter of Camplin (D. C., N. Y.), 43 Am. B. R. 625, 256 Fed. 902; Schuette & Co. v. Swank (Pa. Sup. Ct.), 45 Am. B. R. 373, 109 Atl. 531; Craig v. Sharp (Mo. Ct. of App.), 45 Am. B. R. 137, 219 S. W. 96, citing Collier on Bankruptcy (11th Ed.), 904.

Cases under Act of 1907.—Buchanan v. Smith, 16 Wall. 277; Rison v. Knapp, Fed. Cas. 11,861; In re McDonough, Fed. Cas. 8,775; Webb v. Sachs, Fed. Cas. 17,325.

Absolute knowledge of insolvency is not required. All that is necessary is the possession by the creditor, at the time, of such information relative to the debtor's affairs as should lead a reasonably prudent person to conclude that the property of the debtor at a fair valuation would not be sufficient to pay his debts. In re Pfaffinger (D. C., Ky.), 18 Am. B. R. 807, 154 Fed. 528; Getts v. Janesville Grocery Co. (D. C., Wis.), 21 Am. B. R. 5, 163 Fed. 417.

Knowledge is not necessary, nor even belief, but only reasonable cause to believe, which is a very different thing. Pratt v. Columbia Bank (D. C., N. Y.), 18 Am. B. R. 406, 415, 157 Fed. 137. Neither knowledge nor actual belief are required to be shown. In re Neill-Pinckney-Maxwell Co. (D. C., Pa.), 22 Am. B. R. 401, 170 Fed. 481; Dulany v. Waggaman (Sup. Ct., Dist. Col.), 22 Am. B. R. 36, 37 Wash. L. Rep. 370.

Inquiry by ordinarily prudent man.—It is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of "an ordinarily intelligent man" (Grant v. Bank, 97 U. S. 80, 24 L. ed. 971); "a prudent business man" (Bank v. Cook, 95 U. S. 343; Toof v. Martin, 13 Wall. 40); "a person of ordinary prudence and discretion" (Wager v. Hall, 16 Wall. 584; In re McDonald [D. C., So. Car.], 24 Am. B. R. 446, 178 Fed. 487, aff'd. 25 Am. B. R. 948, 184 Fed. 936); "an ordinarily prudent man" (In re Eggert [C. C. A., 7th Cir.], 4 Am. B. R. 449, 102 Fed. 735; McElvain v. Hardesty [C. C. A., 2 Cir.], 22 Am. B. R. 320, 169 Fed. 320); "a prudent man" (Dutcher v. Wright, 94 U. S. 553, 24 L. ed. 130); "an ordinarily intelligent and prudent business man" (Wright v. Sampter [D. C., N. Y.], 18 Am. B. R. 355, 358, 152 Fed. 196).

"He who deliberately shuts his eyes and ears to means of knowledge, and as to matters which he says 'he is not interested in,' has reasonable ground to believe that ordi-

narily diligent inquiry could ascertain." In re Coffey (Ref., N. Y.), 19 Am. B. R. 148, 166.

Failure to inquire.—A preference may result although the creditor had no actual knowledge of the insolvency of his debtor. All that is necessary under section 60-b is that the facts surrounding and attending the transfer are such that an ordinary business man having knowledge of the same facts, would have believed that the bankrupt was insolvent. In such a case the creditor's conclusion that he had no ground to believe the bankrupt was insolvent is not controlling and indeed, is of little if any weight. If a transfer is made under such circumstances that an ordinarily intelligent man would have been put on inquiry to make an investigation which, if made, would have shown insolvency, then the transferee is chargeable with such knowledge as the investigation would have disclosed, and the transfer will amount to an unlawful preference. Failure actually to investigate will afford no excuse under such circumstances. Matter of States Printing Co. (C. C. A., 7th Cir.), 38 Am. B. R. 526, 238 Fed. 776.

Instances of reasonable cause to believe.—It has been held that a creditor, who receives a check of \$4,000 on the day before the filing of an involuntary petition against his debtor, a corporation, has reasonable cause to believe that a preference was intended. Wright v. Skinner Manufacturing Co. (C. C. A., 2d Cir.), 20 Am. B. R. 527, 162 Fed. 315; Morris v. Tannenbaum (Ref., N. Y.), 26 Am. B. R. 368.

Where an agent of the two largest creditors of the bankrupt company had knowledge that a financial statement made by the president of the bankrupt might not be true, and received payments in cash on the express condition that such statement should be surrendered, he will be held to have received the money with reasonable cause to believe that there was an intent to prefer. Matter of Cramer & Rogers Co. (C. C. A., 3d Cir.), 42 Am. B. R. 283, 252 Fed. 112.

An indirect repurchase by a creditor of goods to the amount of \$1,475 from an insolvent debtor within the four months' period, and a resale of the same for about \$1,000 is a preference, and the creditor will be held to have had reasonable cause to believe that such was the intention. In re Andrews (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922, aff'd. 14 Am. B. R. 247, 135 Fed. 699.

Where a creditor takes a transfer of the residence of one partner within the four months' period and a short time before had taken a like transfer of the residence of the other partner he will be deemed to have had reasonable cause to believe that the firm was insolvent. Brewster v. Goff (D. C., Pa.), 21 Am. B. R. 239, 164 Fed. 124.

Where creditors of bankrupt accepted in full of their claims in an attempted settlement of bankrupt's affairs a dividend amounting to \$.6364 on the dollar, derived from certain insurance moneys having been previously informed by letter that other claims on notes amounting to \$4,900 would be paid by the proceeds of personal property, represented to be worth \$2,500, but actually worth less than half that amount, they had reasonable cause to believe that a preference was intended. Shultz v. Boyt Saddlery Co. (Sup. Ct., Iowa), 33 Am. B. R. 32, 147 N. W. 897.

Facts and circumstances disclosed by inquiry.—If the facts and circumstances

creditor must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency.<sup>231</sup> Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.<sup>232</sup> It is to

proved to have been within the knowledge and observation of the creditor or as to which he was actually put on inquiry, and inquiry would have disclosed, were such as would naturally cause a business man of ordinary care and intelligence—an ordinarily careful and prudent man of intelligence and reasonable experience in business matters—to believe, then it should be held, that the creditor had reasonable cause to believe the debtor was insolvent, and that the taking and enforcement of the security or transfer "would effect a preference." *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234.

<sup>231</sup> *Kuttig Manufacturing Co. v. Edwards* (C. C. A., 8th Cir.), 20 Am. B. R. 349, 160 Fed. 619; *In re Houghton Web Co.* (D. C., Mass.), 26 Am. B. R. 202, 185 Fed. 213; *Shale v. Farmers' Bank* (Sup. Ct., Kans.), 25 Am. B. R. 888, 109 Pac. 408, citing text; *Jacobs v. Saperstein* (Mass. Sup. Ct.), 38 Am. B. R. 405, 114 N. E. 360.

<sup>232</sup> *Coder v. McPherson* (C. C. A., 8th Cir.), 18 Am. B. R. 523, 152 Fed. 951; *Pittsburg Plate Glass Co. v. Edwards* (C. C. A., 8th Cir.), 17 Am. B. R. 447, 148 Fed. 377; *In re Leader* (D. C., Ark.), 26 Am. B. R. 668, 190 Fed. 624; *Collet v. Bronx Nat. Bank* (D. C., N. Y.), 29 Am. B. R. 454, 211 Fed. 111; *Herron Co. v. Moore* (C. C. A., 9th Cir.), 31 Am. B. R. 221, 208 Fed. 134; *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234; *First Bank of Mayville v. Alexander* (Okla. Sup. Ct.), 36 Am. B. R. 132, 153 Pac. 646, quoting text; *Matter of Miller* (D. C., Ohio), 34 Am. B. R. 275, 221 Fed. 471; *Matter of Edwards* (D. C., Ga.), 33 Am. B. R. 530, 217 Fed. 102; *Connors v. Brockport Nat'l Bank* (D. C., Maine), 32 Am. B. R. 882, 214 Fed. 847; *Heyman v. Third Nat'l Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685; *Russell's Trustee v. Mayfield Lumber Co.* (Ct. of App., Ky.), 32 Am. B. R. 357, 164 S. W. 783; *Galbraith v. Whitaker* (Sup. Ct., Minn.), 32 Am. B. R. 113, 133 N. W. 772; *Lyttle v. Fifth National Bank* (D. C., N. Y.), 39 Am. B. R. 690, quoting *Collier on Bankruptcy* (10th ed.), 821; *Matter of The Sutherland Co., Inc.* (D. C., Mass.), 40 Am. B. R. 305, 245 Fed. 663; *Walter v. National Fire Ins. Co.* (Neb. Sup. Ct.), 40 Am. B. R. 339, 164 N. W. 569; *Farmers State Bank v. Freeman* (C. C. A., 8th Cir.), 41 Am. B. R. 286, 247 Fed. 579; *National Bank of Bakersfield v. Moore* (C. C. A., 9th Cir.), 41 Am. B. R. 409, 247 Fed. 913; *Smith v. Powers* (D. C., N. Y.), 43 Am. B. R. 303, 255 Fed. 582; *Slayton v. Dunn* (Vt. Sup. Ct.), 44 Am. B. R. 23, 107 Atl. 307.

**Extent of inquiry.**—Facts which would put an intelligent business man upon inquiry constitute "reasonable cause to believe," if intent to prefer would be discovered by following up the inquiry. *Stern v. Paper* (D. C., N. Dak.), 25 Am. B. R. 451, 183 Fed. 228; *Tilt v. Citizens' Trust Co.* (D. C., N. J.), 27 Am. B. R. 320, 191 Fed. 441, *affd.* 29 Am. B. R. 906, 200 Fed. 410.

**Letters and telegrams sent by a debtor to its creditors,** which merely show that it is in embarrassed circumstances and not able to meet its obligations as they matured, do not constitute notice of insolvency within the meaning of that term as used in the bankruptcy act, but, when unaccompanied by qualifying circumstances are sufficient

to put the creditor upon inquiry. *In re Varley v. Bauman Clothing Co.* (D. C., Ala.), 26 Am. B. R. 840, 191 Fed. 459.

**Suggested critical embarrassment of debtor.**—Within the four months prior to bankruptcy, payments had been made by the bankrupts on notes for a lumber account which had frequently gone to protest and been the subject of constant complaint. Notwithstanding this, the claimants had accepted an order for more lumber and were about to fill it, when they learned that the bankrupts were in difficulty and did not do so. They were also advised, on inquiry of a bank where the bankrupts were in business, that their condition had improved and it was thought that they would pull through. *Held*, that this suggested critical embarrassment was enough to put claimants on inquiry and that their claim for the balance due on the notes could not be allowed without surrendering the payments received during the four months' period which constituted voidable preferences. *In re Deutsche* (D. C., Pa.), 25 Am. B. R. 348, 182 Fed. 435.

**Assignment of accounts by corporation to officer.**—Assignments of accounts, made from time to time, as security for antecedent debts, by a corporation to its president who knew or should have known that the company was then insolvent, the assignee permitting the company to collect the accounts so assigned and use the proceeds as it saw fit, constitute voidable preferences under section 60 of the Bankruptcy Act. *In re Richards, Inc.* (D. C., Sup. Ct.), 28 Am. B. R. 636. But see *Grandison v. Robertson* (D. C., N. Y.), 34 Am. B. R. 609, 220 Fed. 985 (*affd.* 36 Am. B. R. 452, 231 Fed. 785), where it was held that in the absence of evidence showing that the bank receiving the benefit of the assignment had knowledge of the effect thereof upon the affairs of the corporation, the bank did not have reasonable cause to believe that the corporation was insolvent.

**Mortgage given as security for renewal note.**—Where bankrupt borrowed a sum of money from a bank on his own note, which was renewed from time to time, and a few days after the note finally became due at a time when he was in financial distress which was then quite generally known executed a mortgage to the bank for the amount thereof, in the absence of satisfactory explanation that the note had been paid at the time, it will be presumed that the mortgage was given as security for the old loan, so as to indicate a knowledge on the part of the bank of bankrupt's financial uncertainty and an intent to secure a preference. *In re Hirshowitz* (D. C., Pa.), 28 Am. B. R. 571, 199 Fed. 202.

be remembered, however, that the same circumstances which to some minds would merely give ground for suspicion may afford evidence which to other minds would carry conviction, that they not only showed reasonable cause to believe, but actually had created a belief.<sup>233</sup> If a creditor accepts a transfer under circumstances which would lead a man of ordinary prudence and sagacity to believe that he was being preferred by the debtor, over other creditors of the same class, without making investigation, he will be charged with all the knowledge which he would have acquired had he performed his duty in this regard.<sup>234</sup> A creditor is not chargeable with knowledge such as could only be disclosed by the bankrupt's books of account to which the creditor had no access.<sup>235</sup>

(5) **MERE GUESS OR SUSPICION INSUFFICIENT.**—There must be something more than a mere guess or suspicion.<sup>236</sup> Reasonable cause to believe is not the

**233.** *Batchelder v. Home Nat'l Bank* (Sup. Jud. Ct., Mass.), 32 Am. B. R. 555, 105 N. E. 1052.

**234.** *In re McDonald* (D. C., So. Car.), 24 Am. B. R. 446, 453, 178 Fed. 437, affd. 25 Am. B. R. 949; *Russell's Trustee v. Mayfield Lumber Co.* (Ct. of App., Ky.), 32 Am. B. R. 357, 164 S. W. 788; *Lyttle v. Fifth National Bank* (D. C., N. Y.), 39 Am. B. R. 690, quoting *Collier on Bankruptcy* (10th ed.), § 21; *Matter of the Sutherland Co., Inc.* (D. C., Mass.), 40 Am. B. R. 305, 245 Fed. 663; *Smith v. Coury* (D. C., Me.), 41 Am. B. R. 219, 247 Fed. 168; *Bassett v. Evans* (C. C. A., 8th Cir.), 42 Am. B. R. 587, 253 Fed. 532.

**Loss of stock by fire to put creditor on inquiry.**—In the case of *In re Leader* (D. C., Ark.), 26 Am. B. R. 608, 674, 190 Fed. 624, the court said: "But a creditor cannot entirely close his eyes and stop his ears in order to keep himself in ignorance. Payment in the ordinary course of business by a going concern is very much different from payment by a concern that has suspended business and is in course of liquidation. This difference is emphasized when the suspension has been caused by fire. Anderson knew facts which forced upon him the conviction that the partnership was insolvent, and he could not avoid the belief that the payment of the order would constitute a preference. It is idle to declare a belief in opposition to an obvious fact. Dogmatic assertion cannot stand in the face of positive demonstration. The fact that the entire stock of goods of the partnership had been destroyed was in itself sufficient to put a reasonably prudent creditor on notice. Anderson knew there would at least be a loss amounting to the difference between the cash value of the goods destroyed which was about \$13,000.00 and the amount of the insurance, which was \$7,000.00. He knew, as a result of the fire, that there was a depreciation of assets in the neighborhood of \$6,000.00. He also knew that the loss had not been adjusted, and must have realized that it was within the probabilities that the amount collected would be less than \$7,000.00, as it afterwards turned out."

**Notice from financial agency of debtor's financial condition.**—A creditor, which, after receiving notice from a commercial agency as to the financial condition of a debtor, immediately sent its agent to interview the debtor who, without making inquiries except of the debtor, procured a mortgage as security for a pre-existing debt and, with knowl-

edge that the debtor would soon become a bankrupt, had it recorded, will be deemed to have had "reasonable cause to believe that the enforcement of such \* \* \* transfer would effect a preference," within the meaning of section 60a of the Bankruptcy Act. *Matter of Edwards* (D. C., Ga.), 33 Am. B. R. 530, 217 Fed. 102.

**235.** *In re Wolf Co.* (D. C., Pa.), 21 Am. B. R. 73, 164 Fed. 449, affd. *sub nom.* *Sharpe v. Allender* (C. C. A., 3d Cir.), 22 Am. B. R. 431, 170 Fed. 589.

**Examination of books.**—Where at the time a bank received a chattel mortgage on hotel equipment as security from bankrupt, its cashier, after personally inspecting the hotel equipment and bankrupt's books, checking up the greater part of bankrupt's liabilities and the bills of cost for the property, was satisfied that bankrupt was solvent, the bank became entitled to the benefit of the rule that reasonable cause to believe that a transfer and the effect of its enforcement will operate as a preference does not exist where the creditor examines the debtor's books which do not reveal insolvency. *Dougherty v. First National Bank of Canton* (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241.

**236.** *Off v. Hakes* (C. C. A., 7th Cir.), 15 Am. B. R. 696, 142 Fed. 364; *Carey v. Donohue* (C. C. A., 6th Cir.), 31 Am. B. R. 210, 209 Fed. 238, *revd.* on other grounds, 240 U. S. 430, 36 Am. B. R. 704, 60 L. Ed. 728, 36 Sup. Ct. 856; *Heyman v. Third National Bank* (D. C., N. Y.), 32 Am. B. R. 716, 216 Fed. 685; *Batchelder v. Home Nat'l Bank* (Sup. Jud. Ct., Mass.), 32 Am. B. R. 555, 105 N. E. 1052; *Matter of Salmon* (C. C. A., 2d Cir.), 41 Am. B. R. 45, 249 Fed. 300.

**Knowledge inferred.**—Whether or not there was reasonable cause to believe that a preference was intended may be inferred from all the facts and circumstances of the case, but their determination must be something more than a guess, and the transferee must have had more than reasonable cause to suspect. *Forbes v. Howe*, 102 Mass. 427.

The court in *In re Eggert* (C. C. A., 7th Cir.), 4 Am. B. R. 449, 102 Fed. 735, affg. 3 Am. B. R. 541, 98 Fed. 843, reviews the authorities very exhaustively and comes to

equivalent of reasonable cause to suspect.<sup>237</sup> The creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debt, or from circumstances, which give rise to mere suspicion in his mind of possible insolvency.<sup>238</sup> If the bankrupt was concededly unbusinesslike

the following conclusion, per Jenkins, J.: "The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debt, or from circumstances, which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of a belief in his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose." This case was followed and approved in *Stuart v. Farmers' Bank of Cuba City* (Sup. Ct., Wis.), 21 Am. B. R. 403, 177 N. W. 820.

In the case of *Newman v. Tootle-Campbell Dry Goods Co.* (Mo. Ct. of App.), 31 Am. B. R. 399, 160 S. W. 825, the court said: "Judicial expressions on the subject of what will and what will not constitute constructive knowledge emphasize the distinction between notice of facts and circumstances which would incite a man of ordinary prudence to an inquiry under similar circumstances and notice of circumstances that would merely excite suspicion. The former is equivalent to notice of all facts which a reasonably diligent inquiry would disclose (*Coder v. McPherson* [C. C. A., 8th Cir.], 18 Am. B. R. 123, 152 Fed. 951, 82 C. C. A. 99), while the matter is deemed insufficient to constitute reasonable cause to believe that a preference is intended, and will not put the creditor upon inquiry."

**Suspicion and fear alone insufficient.**—Proof of knowledge or notice of facts which give a creditor, or a person to be benefited by a preference, reasonable cause to believe at the time of the transfer that it is intended to give a preference thereby, is indispensable to the establishment of a voidable preference. Suspicion, fear and facts that arouse suspicion and fear in the mind of the creditor, or the party to be benefited, but give no reasonable ground for him to believe that a preference is intended by the transfer, do not make such a preference voidable. *Stern v. Paper* (C. C. A., 8th Cir.), 28 Am. B. R. 592, 198 Fed. 642.

<sup>237</sup> *Putnam v. U. S. Trust Co.* (Mass. Sup. Ct.), 36 Am. B. R. 658, 111 N. E. 969, in which it was held that it is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of the facts as to induce a reasonable belief of his debtor's insolvency.

Mere suspicion is not sufficient to charge creditors with knowledge of, or reasonable cause to believe their debtor insolvent at the time of receipt of payments from him. There must be evidence of facts sufficient to put a reasonably prudent person upon inquiry, which if pursued would show that the debtor was insolvent and that a preference would result from the payments. *Nichols v. Elken et al.* (C. C. A., 8th Cir.), 35 Am. B. R. 365, 225 Fed. 689.

<sup>238</sup> *First Nat. Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 853; *Arthur v. Harrington* (D. C., N. Y.), 32 Am. B. R. 216, 211 Fed. 215; *Beall v. Bank of Bowden* (D. C., Ga.), 34 Am. B. R. 186, 219 Fed. 316.

**Suspicion that preference will result.**—The well-settled rule of law is that mere grounds of suspicion that a debtor is insolvent or that a payment made by him is intended to create a preference are insufficient to establish the fact that the creditor who received it has reasonable cause to believe that a preference was intended thereby. There must be substantial evidence of reasonable grounds for such belief. *Sparks v. Marsh* (D. C., Ala.), 24 Am. B. R. 280, 177 Fed. 739; *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971; *Stucky v. Masonic Savings Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; *Huesey v. Richardson-Roberts Dry Goods Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 511, 148 Fed. 598, 78 C. C. A. 370; *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 300, 21 L. R. A. (N. S.) 960; *First National Bank v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 852, 91 C. C. A. 538; *Bank of Commerce v. Brown* (C. C. A., 4th Cir.), 40 Am. B. R. 591, 249 Fed. 37; *Smith v. Powers* (D. C., N. Y.), 43 Am. B. R. 303, 253 Fed. 582.

In *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971, Mr. Justice Bradley, speaking of the provision "having reasonable cause to believe such person insolvent" in the Bankruptcy Act of 1867, said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. . . . A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further. He may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the Act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. . . . Hence the Act, very wisely, as we think, instead of making a payment or a security

and slovenly in his business transactions, a failure to maintain his credit by prompt payments and a shortness of cash and absence of free capital, continuing for a long period without insolvency are not of themselves sufficient to put on inquiry all who deal with him.<sup>239</sup> If the suspicion is based upon facts which would incite an intelligent business man to an inquiry which would have disclosed that the transfer would effect a preference, it is equivalent to "reasonable cause to believe," within the meaning of the section.<sup>240</sup>

(6) **KNOWLEDGE OF INSOLVENCY.**—(I) *Effect of amendment of 1910.*—Prior to the amendment of 1910, to make a transfer such a preference as is voidable under § 60-b it must have been actually intended on the debtor's part, or there must have existed what the law regards as the equivalent of such an actual intent on his part, and such an intent is not to be conclusively presumed from the mere fact that the debtor knows himself to be insolvent.<sup>241</sup> The amendment of 1910 obviates the requirement of proof of intent on the part of the debtor, but retains the requirement of insolvency.

(II) *Presumption where fact of insolvency is known.*—If insolvency is known to exist, or if the creditor had reasonable cause to believe that it existed, he will be presumed to have "reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference." While proof of belief in insolvency is not now necessary,<sup>242</sup> the element of insolvency should appear, for it will be impossible to show that there is a reasonable cause to believe that a preference will be effected by the transaction, unless it is shown that

void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

Suspicion and fear, and facts that arouse suspicion and fear in the mind of the creditor, but give no reasonable ground for him to believe that the debtor intends a preference by his payment or security, do not make such a preference voidable. *Powell v. Gates City Bank* (C. C. A., 8th Cir.), 24 Am. B. R. 316, 178 Fed. 609; *Kimmerle v. Farr* (C. C. A., 6th Cir.), 26 Am. B. R. 818, 189 Fed. 295.

It is not enough that a creditor have some cause to suspect the insolvency of his debtor, but he must have such a knowledge of fact as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debts. In *re Carlile* (D. C., N. Car.), 29 Am. B. R. 373, 199 Fed. 612.

The mere failure to meet a note promptly is not sufficient in itself to place a creditor on inquiry especially when the bankrupt had a good business and was apparently making money. *Voorhees v. Nat'l Shawmut Bank* (Sup. Ct., Mass.), 32 Am. B. R. 400, 105 N. E. 382.

<sup>239</sup> *Brookheim v. Greenbaum* (C. C. A., 2d Cir.), 34 Am. B. R. 686, 225 Fed. 636, in which it was sought to set aside a payment by the bankrupt of \$1,200 a few weeks before bankruptcy, upon the ground that it con-

stituted a voidable preference; it appeared that the bankrupt was doing a large business during the time in question and was most of the time in financial difficulty owing to the slipshod manner in which he transacted his business; that he kept no complete books, was always borrowing and requesting defendant to endorse his checks; that he had dealt with the defendant for many years; that the payment in question was on a note which had run for about twenty months, and that such payments had frequently been made before. It was held that the evidence was insufficient to charge the defendant with notice of the bankrupt's insolvency.

<sup>240</sup> *Stern v. Paper* (D. C., No. Dak.), 25 Am. B. R. 451, 188 Fed. 228; *Matter of Sutherland Co. Inc.* (D. C., Mass.), 40 Am. B. R. 305, 245 Fed. 663.

*Effect of failure to make inquiry.*—If the degree of knowledge is such as to engender fear that the transfer will effect a preference, so strong that the preferred creditor refrains from availing himself of the means at hand for ascertaining the truth, in order to keep himself in the dark in regard thereto and to be in a position to claim that he did not have reasonable cause to believe that the transfer to him would work to a preference, the case is covered by the statute. *Ogden v. Reddish* (D. C., Ky.), 29 Am. B. R. 531, 200 Fed. 977.

<sup>241</sup> In *re Mayo Contracting Co.* (D. C., Mass.), 19 Am. B. R. 551, 157 Fed. 469.

<sup>242</sup> In *re H. C. King Co.* (D. C., Mass.), 7 Am. B. R. 619, 113 Fed. 110. But see *Des Moines Sav. Bank v. Morgan Co.*, 18 Am. B. R. 781, 123 Iowa 432.



the person receiving it had reasonable cause to believe that the debtor was insolvent.<sup>243</sup>

(III) *Proof of reasonable cause to believe insolvency.*—Knowledge of insolvency is not necessary, nor even a belief, but simply reasonable cause to believe that the debtor was insolvent when the preference was given.<sup>244</sup> Reasonable cause to believe a preference intended will be imputed where the circumstances are such that the creditor must have known the purpose and effect of the transfer.<sup>245</sup> It has been held sufficient that a transfer of the insolvent's property is made, which has the effect to give a preference, and that the party who receives it has reasonable cause to believe that it is intended by the party who procures the transfer, or who gives to the transfer the effect of a preference, that it should have that effect, although the insolvent is innocent of that intention.<sup>246</sup> It is not necessary for a creditor to know or have reasonable cause to believe that the debtor was insolvent, where a mortgage or pledge is made, within the four months' period, to secure an antecedent debt.<sup>247</sup> The reasonable cause to believe must have existed either before or at the time the

<sup>243.</sup> *Ex post facto* knowledge that the debtor was, at the time of the preference, insolvent is not material, nor does it matter, *per se*, what knowledge the debtor had on the subject. The test is whether the creditor who is charged with having received a voidable preference had at the time of receiving it such information as ought to have led a reasonably prudent man to the conclusion that a preference was thereby intended. *In re Pfaffinger* (D. C., Ky.), 18 Am. B. R. 807, 154 Fed. 528; *Hewitt v. Boston Straw Board Co.* (Mass. Sup. Ct.), 31 Am. B. R. 652, 101 N. E. 424; *First Nat'l Bank of Cleveland v. Orten* (Sup. Ct., Okla.), 33 Am. B. R. 108, 142 Pac. 1086; *Matter of Looschen Piano Case Co.* (D. C., N. J.), 43 Am. B. R. 733, 259 Fed. 931.

<sup>244.</sup> *Merchants' National Bank v. Cook*, 95 U. S. 346, 24 L. Ed. 412; *In re McDonald* (D. C., So. Cal.), 24 Am. B. R. 446, 178 Fed. 487, *affd.* 25 Am. B. R. 948; *Shale v. Farmers' Bank* (Sup. Ct., Kans.), 25 Am. B. R. 888, 109 Pac. 408; *In re Gibson* (D. C., So. Dak.), 27 Am. B. R. 401, 181 Fed. 685; *Dougherty v. First Nat. Bank* (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241; *Walter v. National Fire Ins. Co.* (Neb. Sup. Ct.), 40 Am. B. R. 339, 164 N. W. 569; *Matter of Salmon* (C. C. A., 2d Cir.), 41 Am. B. R. 45, 249 Fed. 300. See Am. B. R. Dig. § 513.

*Reasonable cause to believe insolvency.*—Where a preference is given, the transaction is voidable by the trustee, if there are sufficient facts and circumstances having significance in reference to the debtor's financial condition, brought home to the preferred creditor or which he must or ought to have seen or known, to put him on inquiry, which, followed up, would inform him of the insolvency. *Spencer v. Nekemoto* (D. C., Hawaii), 24 Am. B. R. 517.

A creditor cannot be said to have had reasonable cause to believe a preference is effected unless the evidence shows that he knew, or ought to have known, the substantial truth as to the bankrupt's financial condition. *In re Houghton Web Co.* (D. C., Mass.), 26 Am. B. R. 202, 185 Fed. 213.

It is not enough that the creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debt. *Donohue v. Dykstra* (D. C., Mich.), 41 Am. B. R. 278, 247 Fed. 503.

"Reasonable cause to believe" is usually inferred from inability to pay bills in the usual course of business as they mature, from poor business, and from transactions of a character not ordinarily resorted to by solvent traders. *Matter of Sutherland Co. Inc.* (D. C., Mass.), 40 Am. B. R. 305, 245 Fed. 663.

*Inquiry of debtor as to financial condition.*—Where the duty of inquiry as to his debtor's solvency is imposed upon a creditor, it is not met by inquiry alone of the debtor whose answer, in the circumstances of the case, could readily have been found to be untrue. *McGirr v. Humpheys Grocery Co.* (D. C., Ohio), 26 Am. B. R. 518, 192 Fed. 55; *Schuelte & Co. v. Swank* (Pa. Sup. Ct.), 45 Am. B. R. 373.

Merely cursory inquiries made of the bankrupt as to his financial condition do not meet the requirement as to investigation. *Gering v. Leyda* (C. C. A., 8th Cir.), 26 Am. B. R. 137, 186 Fed. 110.

<sup>245.</sup> *Wilson v. Mitchell-Woodbury Co.* (Mass. Sup.), 31 Am. B. R. 837, 102 N. E. 119; *Russell's Trustees v. Mayfield Lumber Co.* (Ct. of App., Ky.), 32 Am. B. R. 357, 164 S. W. 783; *Abele v. Beacon Trust Co.* (Mass. Sup. Jud. Ct.), 49 Am. B. R. 743, 117 N. E. 833; *Fifth National Bank v. Lytle* (C. C. A., 2d Cir.), 41 Am. B. R. 370, 250 Fed. 361; *Egner v. Parahelsky* (D. C., N. Y.), 43 Am. B. R. 113, 254 Fed. 907; *Matter of Star Spring Bed Co.* (D. C., N. J.), 43 Am. B. R. 328, 257 Fed. 176; *Gooch v. Stone* (C. C. A., 6th Cir.), 44 Am. B. R. 86, 257 Fed. 631.

A bank must be held to knowledge of such facts as were evident from its own books. *Cohen v. Tremont Trust Co.* (D. C., Mass.), 43 Am. B. R. 522, 256 Fed. 399.

The treasurer of a corporation is presumed to know its true financial condition. *Matter of Silvernail* (D. C., Kan.), 33 Am. B. R. 59, 218 Fed. 979.

*Subsequent discovery of insolvency.*—The receipt of a chattel mortgage as security for an existing debt, within four months of the bankruptcy of the mortgagor, does not constitute a voidable preference, where the mortgagee after due inquiry thought the mortgagor solvent although it was subsequently found that he was insolvent. *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234.

<sup>246.</sup> *Benedict v. Deshel*, 11 Am. B. R. 20, 177 N. Y. 1, 68 N. E. 999; *Parker v. Black* (D. C., N. Y.), 16 Am. B. R. 202, 143 Fed. 560. Compare *In re Andrews* (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922, holding in effect that it is necessary to show that the debtor actually intended to give a preference, unless there exists what the law regards as the equivalent thereof; otherwise the reasonable cause to believe that there was such intention cannot exist.

<sup>247.</sup> *In re Mills Co.* (D. C., N. Cal.), 20 Am. B. R. 501, 162 Fed. 42; *In re Bailey & Son* (D. C., Pa.), 21 Am. B. R. 911, 166 Fed. 982; *Pierre Banking & Trust Co. v. Winkler* (S. Dak. Sup. Ct.), 40 Am. B. R. 622, 165 S. W. 2.

payment was made; so where a note payable at a bank was "certified" as paid out of the bankrupt's deposits in the bank on the day of maturity, and the same day the creditor was informed as to the bankrupt's insolvency, evidence showing that the note was certified prior to receiving such information will disprove the intent to prefer.<sup>248</sup>

(IV) *Belief of insolvency question of fact; burden of proof.*—Whether or not the creditor has reasonable cause to believe the debtor insolvent is a question of fact<sup>249</sup> for the jury, and where the evidence justified a submission of the question, the finding of the jury is not reviewable.<sup>250</sup> Direct evidence of the creditor's knowledge of his debtor's insolvency, or of cause to believe that a preference will result from the transfer, is not essential; the creditor comes within the inhibition where the substantial and material facts are of such significance that the creditor knew or ought to have known of the bankrupt's financial condition.<sup>251</sup> Where the referee and bankruptcy court have considered the conflicting evidence as to the reasonable cause to believe that a preference was intended, their finding should not be disturbed, unless it clearly appears that they have fallen into some error of law or have committed some serious mistake of fact in reaching their conclusion.<sup>252</sup> The burden of showing that the person receiving the preference had knowledge or reasonable cause to believe that the debtor was insolvent is upon the trustee.<sup>253</sup>

248. *Matter of Frasin and Oppenheim* (C. C. A., 2d Cir.), 29 Am. B. R. 214, 201 Fed. 86.

Time of belief as to insolvency.—The question of insolvency and knowledge thereof is to be determined as of the date when a chattel mortgage, alleged to be a preference was filed for record, and this date is to be adopted for the purpose of determining the four months' period and the legality of the preference. *Matter of Bunch Commission Co.* (D. C., Kan.), 35 Am. B. R. 526, 226 Fed. 243. In a suit by a trustee in bankruptcy to recover alleged preferential payments and transfers, the solvency or insolvency of the bankrupt must be determined as of the date of the payments and transfers. *Rosenman v. Coppard* (C. C. A., 5th Cir.), 35 Am. B. R. 786, 228 Fed. 114.

249. *Hackney v. Raymond Bros. Clarke Co.* (Sup. Ct., Nebr.), 10 Am. B. R. 213, 214, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; *Laundry v. First Nat. Bank* (Sup. Ct., Kan.), 11 Am. B. R. 233, 66 Kan. 750, 71 Pac. 259; *Deland v. Miller & Cheney Bank*, 11 Am. B. R. 744, 119 Iowa 368, 93 N. W. 304; *In re Andrews* (D. C., Mass.), 14 Am. B. R. 247, 135 Fed. 599; *Thomas v. Adelman* (D. C., N. Y.), 14 Am. B. R. 510, 136 Fed. 973; *Upson v. Mount Morris Bank*, 14 Am. B. R. 6, 103 N. Y. App. Div. 367, 92 N. Y. Supp. 1101; *Wetstein v. Francis* (C. C. A., 2d Cir.), 13 Am. B. R. 326, 133 Fed. 900; *Turner v. Fisher* (D. C., Cal.), 13 Am. B. R. 248, 133 Fed. 564; and is not reviewable by the Supreme Court; *Kaufman v. Tredway*, 195 U. S. 271, 12 Am. B. R. 602, 49 L. Ed. 190, 25 Sup. Ct. 33; *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 388; *Jacobs v. Saperstein* (Mass. Sup. Ct.), 38 Am. B. R. 405, 114 N. E. 360; *Walter v. National Fire Ins. Co.* (Neb. Sup. Ct.), 40 Am. B. R. 339, 164 N. W. 569; *Putney Shoe Co. v. Dashiell* (C. C. A., 4th Cir.), 40 Am. B. R. 375, 246 Fed. 121; *Marshall v. Nevins* (C. C. A., 9th Cir.), 40 Am. B. R. 85, 242 Fed. 476; *Donohue v. Dykstra* (D. C., Mich.), 41 Am. B. R. 278, 247 Fed. 593; *Bassett v. Evans* (C. C. A., 8th Cir.), 42 Am. B. R. 587, 258 Fed. 532.

250. *Ridge Ave. Bank v. Sundheim* (C. C. A., 3d Cir.), 16 Am. B. R. 863, 145 Fed. 798; *Coleman v. Decatur Egg Case Co.* (C. C. A., 8th Cir.), 26 Am. B. R. 248, 251, 136 Fed. 136; *Utah*

*Assn. of Credit Men v. Boyle Furniture Co.* (Sup. Ct., Utah), 26 Am. B. R. 867, 117 Pac. 800; *Shale v. Farmers' Bank* (Sup. Ct., Kans.), 26 Am. B. R. 888, 109 Pac. 408.

251. *Jacobs v. Saperstein* (Mass. Sup. Ct.), 38 Am. B. R. 405, 114 N. E. 360.

252. *Brookheim v. Greenbaum* (C. C. A., 2d Cir.), 34 Am. B. R. 686, 225 Fed. 635; *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 388; *Coder v. Arts* (C. C. A., 2d Cir.), 18 Am. B. R. 523, 152 Fed. 943; *First Nat. Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 853; *Putney Shoe Co. v. Dashiell* (C. C. A., 4th Cir.), 40 Am. B. R. 375, 246 Fed. 121; *Brown v. First State Bank of Weimar* (Tex. Civ. App.), 41 Am. B. R. 151, 199 S. W. 895; *Farmers' State Bank v. Freeman* (C. C. A., 8th Cir.), 41 Am. B. R. 286, 249 Fed. 579; *Whitmore v. Swank* (C. C. A., 4th Cir.), 41 Am. B. R. 378, 252 Fed. 135; *Matter of Campion* (D. C., N. Y.), 43 Am. B. R. 625, 256 Fed. 902; *Tremont Trust Co. v. Cohen* (C. C. A., 1st Cir.), 44 Am. B. R. 564, 263 Fed. 81.

Findings of fact as to an alleged voidable preference by a trial court, after consideration of conflicting evidence, will be presumed to be correct, and this presumption is materially strengthened by the master's prior findings to the same effect. *Boswell National Bank v. Simmons* (C. C. A., 8th Cir.), 26 Am. B. R. 865, 190 Fed. 735; *Nichols v. Eiken et al.* (C. C. A., 8th Cir.), 35 Am. B. R. 365, 225 Fed. 680.

253. *Clifford v. Morrill* (D. C., Mass.), 36 Am. B. R. 805, 230 Fed. 190; *Baxter v. Ord* (C. C. A., 6th Cir.), 39 Am. B. R. 273, 239 Fed. 503; *Bank of Commerce v. Brown* (C. C. A., 4th Cir.), 40 Am. B. R. 591, 249 Fed. 87; *Matter of Campion* (D. C., N. Y.), 43 Am. B. R. 625, 256 Fed. 902.

The burden is on the trustee to show that the defendant had reasonable cause to believe that the payment to it would effect a preference. Where what is shown would merely create in the defendant a suspicion that bankrupt was merely unable to pay his debts, the fact that it had "reasonable cause to believe" is not proved. *Beall v. Bank of Bowden* (D. C., Ga.), 34 Am. B. R. 186, 219 Fed. 316; *Marshall v. Nevins* (C. C. A., 9th Cir.), 40 Am. B. R. 85, 242 Fed. 476; *Simpson v. Western H. & M. Co.*

(V) *Payments by insolvent in ordinary course of business.*—Payments made by the debtor, even while insolvent, and received by the creditor, without any intent to injure the other creditors is not a voidable preference.<sup>254</sup> Payments received by a creditor on promissory notes or on account, in the ordinary transaction of business with an insolvent, are not necessarily voidable, even if the creditor did not make inquiry as to the financial standing of his debtor. The acceptance of such payments with no special purpose of obtaining an advantage over other creditors and in accordance with the creditor's general method of collecting outstanding accounts, will not subject him to liability; in such a case there may well be an absence of knowledge or reasonable cause to believe that the debtor was insolvent, or that a preference was effected by such payments.<sup>255</sup> Thus, where a bankrupt, prior to adjudication makes small payments on outlawed debts for the purpose of reviving them, the persons receiving such payments having no reasonable cause to believe that preferences would result, such payments are not fraudulent as to the other creditors and may not be avoided as preferences.<sup>256</sup>

(VI) *Knowledge of debtor's financial difficulties.*—A creditor has reasonable cause to believe a debtor to be insolvent when such a state of facts is brought to the creditor's notice, respecting the affairs and pecuniary condition of the debtor, as would lead a prudent business person to the conclusion that he is unable to meet the payment of his obligations as they mature in the ordinary course of business.<sup>257</sup> Where the creditor knew that the debtor's business was bad, and it was necessary to continually press the debtor for payment, the creditor may be said to have had reasonable cause to believe that the debtor was insolvent and that a preference was intended.<sup>258</sup> Where a creditor has

(Wash. Sup. Ct.), 40 Am. B. R. 213, 167 Pac. 113; *Brown v. First State Bank of Weimar* (Tex. Civ. App.), 41 Am. B. R. 151, 199 S. W. 885.

254. *In re First Nat. Bank of Louisville* (C. C. A., 6th Cir.), 18 Am. B. R. 766, 155 Fed. 100; *Hardy v. Gray* (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922; *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166.

*Payments on notes during insolvency.*—Where the only thing to affect claimants holding notes of the bankrupts with notice of the bankrupts' insolvency was the fact that during the year prior to bankruptcy these notes had gone to protest with considerable payments made on such notes during the four months' period voidable as preferences, particularly where claimant had gone to see the bankrupts about one of these protested notes and had been told that the plant was under better management and that in the future bankrupts would be able to pay their bills more promptly. *In re Deutsche & Co.* (D. C., Pa.), 25 Am. B. R. 348, 182 Fed. 435.

255. *Nichols v. Elkins* (C. C. A., 8th Cir.), 35 Am. B. R. 365, 225 Fed. 680; *Butterfield v. Woodman* (C. C. A., 1st Cir.), 34 Am. B. R. 510, 223 Fed. 950; *Wolff Mfg. Co. v. Rathel Shoe Co.* (Mo. Kans. City App.), 35 Am. B. R. 895, 180 S. W. 396; *Matter of Soferenko* (D. C., Mass.), 32 Am. B. R. 32, 210 Fed. 562; *Grandison v. Robertson* (D. C., N. Y.), 34 Am. B. R. 609, 220 Fed. 955.

256. *In re Banks* (D. C., N. Y.), 31 Am. B. R. 270, 207 Fed. 662.

257. *Patterson v. Boher Grocery Co.* (Sup. Ct., Ore.), 33 Am. B. R. 740, 144 Pac. 673; *Lyttle v. Fifth National Bank* (D. C., N. Y.), 39 Am. B. R. 690; *McGill v. Commercial Credit Co.* (D. C., Md.), 39 Am. B. R. 702, 243 Fed. 637; *Matter of Sutherland Co., Inc.* (D. C., Mass.), 40 Am. B. R. 305, 245 Fed. 663; *National Bank of Bakersfield v. Moore* (C. C. A., 9th Cir.), 41 Am. B. R. 409, 247 Fed. 913; *Farmers' State Bank v.*

*Freeman* (C. C. A., 8th Cir.), 41 Am. B. R. 236, 247 Fed. 579; *Fifth National Bank v. Lyttle* (C. C. A., 2d Cir.), 41 Am. B. R. 370, 250 Fed. 361; *Smith v. Powers* (D. C., N. Y.), 43 Am. B. R. 308, 255 Fed. 582; *Matter of Campion* (D. C., N. Y.), 43 Am. B. R. 625, 256 Fed. 902.

Knowledge by a creditor that payments to him are out of funds which, if liquidation were had, would be needed equally by other creditors brings him within the language of section 60-b, making a transfer voidable. *Schener v. Katsoff* (D. C., N. Y.), 37 Am. B. R. 476, 233 Fed. 473.

That a debtor would commit the crime of forgery to enable him to secure loans of money would indicate to the ordinarily intelligent mind that his financial condition was desperate, and knowledge that he had committed such forgeries would furnish reasonable cause to believe that he was insolvent. *Watchmaker v. Baines* (C. C. A., 1st Cir.), 43 Am. B. R. 632, 259 Fed. 783.

258. *Thomas v. Adelman* (D. C., N. Y.), 14 Am. B. R. 510, 136 Fed. 973. Compare *Schuetts & Co. v. Swank* (Pa. Sup. Ct.), 45 Am. B. R. 373, 109 Atl. 531. The mere fact of taking security is not of itself sufficient to show knowledge. *Matter of Alden* (Ref., Ohio), 16 Am. B. R. 362. Where a teller of a bankrupt bank cashes his own check against the funds of the bank, he will be held to have had knowledge of the insolvency of the bank, and the transaction constitutes a preference. *In re Plant* (D. C., Ga.), 17 Am. B. R. 272, 148 Fed. 37.

A debtor's fear about his credit should put a pressing creditor upon inquiry as to the situation of it and the necessity for it. He cannot neglect to investigate, be intent on security and purposely ignorant and blind, or intend to be, of his circumstances until after he gets the security, and escape being held to have had reason to believe what the effect of the giving of it will be. *In re Coffey* (Ref., N. Y.), 19 Am. B. R. 148, 165. See *Dean v. Davis* (C. C. A., 4th Cir.), 31 Am. B. R. 806, 212 Fed. 88.

repeatedly pressed the debtor for the payment of his debt, and checks previously given therefor had been dishonored, the creditor has sufficient notice of the debtor's insolvency to render a transfer preferential.<sup>259</sup> However, it has been ruled that the fact that a firm is unable to meet all its obligations as they fall due is not alone sufficient to cause a reasonable belief that it is insolvent.<sup>260</sup> A bank may loan money on a bill of sale of the debtor's property to permit him to compromise with his creditors and to go on with his business, where upon investigation it appears that the debtor has sufficient property to pay his debts.<sup>261</sup> The fact that most of the bankrupt's indebtedness to a creditor was past due at the time of a payment on account within the four months' period is not sufficient to charge the creditor with notice of the bankrupt's insolvency, and that a preference was intended.<sup>262</sup>

(VII) *Pleading cause to believe insolvency.*—Where in an action to recover a preference the complaint alleges that the defendant had reasonable cause to believe that his debtor was insolvent, an averment in defense that the defendant had no knowledge of the debtor's insolvency is insufficient.<sup>263</sup>

(7) *PURPOSE AND EFFECT TO BE CONSIDERED.*—Courts cannot permit to be done by indirection what the law forbids to be directly done, and, without regard to the form, they consider the purpose and effect of the transaction however devious the ways by which it is accomplished.<sup>264</sup> Under the former law, any transfer out of due course of trade was *prima facie* evidence of fraud;<sup>265</sup> even in the absence of this provision, the same rule probably applies to preferences under the law of 1898.<sup>266</sup> The amendment of 1903 provided in effect that, in order to make a payment a preference, it must have been made by the debtor with intent to prefer, and the creditor who received it must have had reasonable cause to believe that a preference was intended,<sup>267</sup> and the amendment of 1910 has still further emphasized the importance of

(aff'd 38 Am. B. R. 664), where the creditor receiving the presence was urged to loan the money to meet a very urgent demand.

<sup>259</sup> *Grandison v. Nat. Bank of Commerce* (D. C., N. Y.), 34 Am. B. R. 497, 220 Fed. 961, in which the evidence showed that the bank had pressed for payment of its indebtedness, and that discounted notes and a draft had been protested, for nonpayment and were not renewed until several weeks thereafter, and it was held that transfers of book accounts to secure the payment of the indebtedness were preferential. See also *Pittsburg Plate Glass Co. v. Edwards* (C. C. A., 8th Cir.), 17 Am. B. R. 447, 148 Fed. 377; *Connors v. Bucksport Nat. Bank* (D. C. Me.) 32 Am. B. R. 882, 214 Fed. 847.

<sup>260</sup> *Canthorn v. Burley State Bank* (Sup. Ct., Idaho), 33 Am. B. R. 794, 144 Pac. 1608.

<sup>261</sup> *In re Bartlett* (D. C., Pa.), 22 Am. B. R. 891, 172 Fed. 679; *Shelton v. First Nat. Bank of Mannsville* (Sup. Ct., Okl.), 27 Am. B. R. 587, 61 Okla. 217.

<sup>262</sup> *In re Goodhills* (D. C., Iowa) 12 Am. B. R. 374, 130 Fed. 782. In this case the court laid down the rule that under the present law the condition of the debtor's affairs must be known to be such that prudent business men would conclude that the aggregate of the debtor's property at a fair valuation was not sufficient to pay his debts before there is a reasonable cause to believe that the debtor is insolvent, and that a preference would, therefore, be the result of a payment while in such condition. See *Bardes v. First Nat. Bank*, 12 Am. B. R. 771, 122 Iowa 443; *Butler Paper Co. v. Goemmel* (C. C. A., 7th Cir.), 16 Am. B. R. 26, 143 Fed. 295; *First Nat.*

*Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 833.

<sup>263</sup> *Plummer v. Myers* (D. C., Pa.), 14 Am. B. R. 805, 137 Fed. 660; *American Lumber etc., Co. v. Taylor* (C. C. A., 3d Cir.), 14 Am. B. R. 231, 137 Fed. 321.

<sup>264</sup> *Roberts v. Johnson* (C. C. A., 4th Cir.), 18 Am. B. R. 132, 136, 151 Fed. 567, 570; *Wickwire v. Webster City Bank* (Sup. Ct., Iowa), 27 Am. B. R. 157, 133 N. W. 100; *Johnson v. Hanley Hoyer Co.* (D. C., R. I.), 26 Am. B. R. 748, 188 Fed. 702; *Morris v. Tannenbaum* (Ref., N. Y.), 26 Am. B. R. 368; *In re McDonald & Sons* (D. C., S. Car.), 24 Am. B. R. 446, 178 Fed. 487, aff'd, 25 Am. B. R. 948, 184 Fed. 986; *Matter of Sutherland Co., Inc.* (D. C., Mass.), 40 Am. B. R. 305, 245 Fed. 663; *De Forest v. Crane & Ordway Co.* (Mont. Sup. Ct.), 43 Am. B. R. 849, 179 Pac. 291.

*Stopping payment of check to a bankrupt,* where the drawer of the check had a claim against the bankrupt which might have been set-off against the claim of the bankrupt against the drawer if the check were not paid amounts to a preference. *Matter of Star Spring Bed. Co.* (D. C., N. J.), 40 Am. B. R. 1, 243 Fed. 957.

<sup>265</sup> Act of 1897, § 35, R. S. § 5130.

<sup>266</sup> *Walbrun v. Babbitt*, 16 Wall. 577. Compare *In re Eggert* (D. C., Wis.), 3 Am. B. R. 541, 98 Fed. 843; *In re Andrews* (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922.

<sup>267</sup> *Rutland Co. Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 163.

<sup>268</sup> *Keith v. Gettysburg Nat. Bank*, 10 Am.

the effect of the payment, by making it a preference, if the creditor receiving it had reasonable cause to believe that a preference would be thereby effected.

(8) EVIDENCE OF REASONABLE CAUSE TO BELIEVE.—Where there is no evidence tending to show that a creditor had reasonable cause to believe that payments made by the bankrupt would result in a preference a recovery cannot be had;<sup>268</sup> the law presumes that such payments are legal and the burden of proof is on the trustee, seeking to recover them, to overcome this presumption.<sup>269</sup> This burden may be shifted to the person to whom the transfer was made, where it appears that the parties are relatives and the circumstances were such as to put the transferee upon his guard.<sup>270</sup> Payments by a concern

B. R. 762, 23 Pa. Super. Ct. 14; *In re Neill-Pickney-Maxwell Co.* (D. C., Pa.), 22 Am. B. R. 401, 170 Fed. 481; *Matter of States Printing Co.* (C. C. A., 7th Cir.), 88 Am. B. R. 526, 238 Fed. 775; *Marshall v. Nevins* (C. C. A., 9th Cir.), 40 Am. B. R. 85, 242 Fed. 476; *Baxter v. Ord* (C. C. A., 6th Cir.), 39 Am. B. R. 273, 239 Fed. 503.

<sup>268</sup> See *Deland v. Miller & Cheney Bank*, 11 Am. B. R. 744, 119 Iowa 368; *Getts v. Janesville Grocery Co.* (D. C., Wis.), 21 Am. B. R. 5, 163 Fed. 417; *Fellbach Co. v. Russell* (C. C. A., 6th Cir.), 37 Am. B. R. 285, 233 Fed. 412; *Rosenman v. Coppard* (C. C. A., 5th Cir.), 35 Am. B. R. 786, 228 Fed. 114; *Baxter v. Ord* (C. C. A., 6th Cir.), 39 Am. B. R. 273, 239 Fed. 503; *Marshall v. Nevins* (C. C. A., 9th Cir.), 40 Am. B. R. 85, 242 Fed. 476; *Brown v. First State Bank of Weimar* (Tex. Civ. App.), 41 Am. B. R. 151, 199 S. W. 895; *Craig v. Sharp* (Mo. Ct. of App.), 45 Am. B. R. 143, 219 S. W. 95.

<sup>269</sup> Reasonable cause to believe must be proven.—The plaintiff must prove, in order to establish his cause of action, that when the creditor received the payment he had reasonable ground to believe that it was intended as a preference. *Benedict v. Deshel*, 11 Am. B. R. 29, 177 N. Y. 1, 68 N. E. 999; *In re Leach* (C. C. A., 6th Cir.), 22 Am. B. R. 600, 171 Fed. 622; *Harder v. Clark* (City Ct., N. Y.), 23 Am. B. R. 756, 66 Misc. 584, 123 N. Y. Supp. 1102; *Reber v. Schulman & Bro.* (D. C., Pa.), 24 Am. B. R. 782, 179 Fed. 574, affd. 25 Am. B. R. 475, 183 Fed. 564; *Kimmerle v. Farr* (C. C. A., 6th Cir.), 26 Am. B. R. 818, 823, 189 Fed. 295, citing text *Jackson v. Sedgwick* (D. C., N. Y.), 26 Am. B. R. 836, 189 Fed. 508; *Beall v. Bank of Bowden* (D. C., Ga.), 34 Am. B. R. 186, 219 Fed. 316; *In re Hull* (D. C., Ohio), 34 Am. B. R. 447, 224 Fed. 796; *Dunlap v. Seattle Nat. Bank* (Wash. Sup. Ct.), 38 Am. B. R. 937, 161 Pac. 864; *Brown v. First State Bank of Weimar* (Tex. Civ. App.), 41 Am. B. R. 151, 199 S. W. 895 and in the case of *Pyle v. Texas Transportation and Terminal Co.*, 238 U. S. 90, 34 Am. B. R. 843, 59 L. Ed. 1215, 35 Sup. Ct. 667, it was stated that "whether such 'reasonable cause to believe' existed is a question of fact and the burden of proof is upon the trustee." In such case it appeared that cotton exporters drew drafts on a foreign bank and attached thereto forged railroad bills of lading and the drafts were paid by the bank. The exporters thereafter shipped cotton, taking port bills of lading, which were delivered to the bank to be substituted for the forged bills of lading. Before the cotton had left this country, the exporters were adjudicated bankrupts, and the trustee in bankruptcy brought an action against the foreign bank, the steamship company on which the cotton was shipped, and its agent in whose possession the cotton then was, to recover the same on the ground that the shipment constituted a voidable preference.

The evidence was examined and held insufficient to establish that the defendant bank had reasonable cause to believe" that by transferring the genuine bills of lading to them, a preference was intended or given within the meaning of this section. *Soule v. First Nat'l Bank* (Sup. Ct., Idaho), 32 Am. B. R. 536, 140 Pac. 1096.

<sup>270</sup> Burden of proof of elements of a voidable preference.—In order to recover an alleged preference a trustee in bankruptcy must show by a preponderance of evidence (1) that the alleged preferential transfer was made within four months of the filing of the petitions in bankruptcy; (2) that bankrupt was insolvent at the time of the transfer within the provisions of the bankruptcy act; (3) that the creditor knew, or had reasonable cause to believe, that the bankrupt was insolvent and that such transfer was intended as a preference and (4) that the effect of the transfer was to give the preferred creditor a greater percentage of his claim than other creditors of the same class could obtain from the bankrupt's estate if the transfer is permitted to stand. *Utah Assn. of Credit Men v. Boyle Furniture Co.* (Sup. Ct., Utah), 26 Am. B. R. 867, 17 Pac. 800.

The burden of proof is on the trustee alleging the invalidity or voidability of the transfer. He must prove the insolvency of the debtor, at the time the security was given, and establish the existence of other creditors of the same class at that time, and that the enforcement of the security or transfer will operate to give them a lesser percentage of their debt than the secured creditor will receive by reason of the security given by such debtor, and he must also prove the existence of the "reasonable cause to believe." All this must be done by a fair preponderance of all the evidence in the case, and where inferences from proved facts are to be drawn, the rule obtains that if two inferences of substantially equal weight may reasonably be drawn from the proved facts, then that inference shall prevail which sustains the transfer or security. *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234.

<sup>270</sup> *In re Sanger* (D. C., W. Va.), 22 Am. B. R. 145, 169 Fed. 722, in which case it appeared that a sister-in-law of one of two partners loaned him money on several

which has suffered a complete loss of its stock of goods, and has suspended business and is in course of liquidation, are presumptively made for the purpose of preference.<sup>271</sup> The unrequested repayment of a loan, with a letter stating that the money can no longer be used, is not sufficient alone to establish reasonable cause to believe that a preference will be effected.<sup>272</sup> The protest of a debtor's checks, however, long continued, is sufficient to put a bank on inquiry as to the debtor's financial condition.<sup>273</sup> Evidence that a judgment was paid out of the proceeds of the sale of real estate in an effort to obtain funds to accomplish a compromise with creditors of the bankrupt, which was abandoned because of the insanity of the bankrupt, the transaction appearing to have been in good faith, does not show that a preference was intended or that the payment was accepted in the belief that a preference would result.<sup>274</sup> What constitutes reasonable cause to believe may depend upon the circumstances of the case; direct evidence is not essential.<sup>275</sup>

(9) SALE OF ENTIRE STOCK.—The sale of an entire stock of goods of a retail merchant is a suspicious circumstance *per se*, naturally calculated to put the purchaser on inquiry.<sup>276</sup> Such a purchase is presumptively questionable,

occasions, upon the understanding that security would be given therefor, and less than a month prior to his adjudication she received a promissory note of the firm, secured by a deed of trust upon certain personal property, and it was held that the burden is upon her, in seeking to establish a lien under said deed, to show that the transaction was in good faith and without knowledge on her part of the grantor's insolvency.

<sup>271.</sup> *In re Leader* (D. C., Ark.), 26 Am. B. R. 688, 674, 190 Fed. 624.

<sup>272.</sup> *Wright v. Sampter* (D. C., N. Y.), 18 Am. B. R. 355, 358, 152 Fed. 193.

<sup>273.</sup> *Connors v. Brockport Nat'l Bank* (D. C., Maine), 32 Am. B. R. 832, 214 Fed. 847.

<sup>274.</sup> *Templeton v. Woilens* (C. C. A., 2d Cir.), 29 Am. B. R. 208, 200 Fed. 257.

<sup>275.</sup> *Whitwell v. Wright* (N. Y. App. Div.), 23 Am. B. R. 747, 136 App. Div. 246, 120 N. Y. Supp. 1065; *Coleman v. Decatur Egg Case Co.* (C. C. A., 8th Cir.), 26 Am. B. R. 243, 186 Fed. 136; *Jacobs v. Saperstein* (Mass. Sup. Ct.), 38 Am. B. R. 405, 114 N. E. 860; *Batchelder v. Home Nat. Bank* (Mass. Sup. Ct.), 32 Am. B. R. 555, 105 N. E. 1052; *De Forest v. Crane & Ordway Co.* (Mont. Sup. Ct.), 43 Am. B. R. 349, 179 Pac. 291; *Slayton v. Drown* (Vt. Sup. Ct.), 44 Am. B. R. 23, 107 Atl. 307.

Evidence of common report that the bankrupt just immediately prior to the transfer had contemplated bankruptcy on account of his insolvent condition is admissible to show notice to the creditor of such condition. *McAleer v. People's Bank* (Ala. Sup. Ct.), 42 Am. B. R. 581, 80 So. 94.

<sup>276.</sup> *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 146 Fed. 109; *Dokken v. Page* (C. C. A., 8th Cir.), 17 Am. B. R. 228, 147 Fed. 438; *Allen v. McMannes* (D. C., Wis.), 19 Am. B. R. 276, 156 Fed. 615; *McElvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 160 Fed. 32; *Gering v. Leyda* (C. C. A., 8th Cir.), 26 Am. B. R. 137, 186 Fed. 110.

**Sale of entire stock of goods.**—Where a creditor after repeated efforts to secure payment of his claim of \$13,000, finally went to the bankrupt's place of business, and being told by the bankrupt that he was unable to pay a cent, persuaded the bankrupt to "sell" him practically the entire stock in trade, and the creditor made no

effort, by examination of books or questions to the bankrupt, to ascertain the financial condition of the latter, there was evidence upon which a jury might find that the creditor at the time of receiving the transfer had reasonable cause to believe a preference was intended to be given him. *Coleman v. Decatur Egg Case Co.* (C. C. A., 8th Cir.), 26 Am. B. R. 243, 186 Fed. 136.

**Effect of sale of bankrupt's stock of goods; payment to release surety of co-maker of bankrupt's note.**—Where bankrupt within the four months' period, while insolvent, and with intent to give a preference, which intent was known to defendant, sold to defendant his entire stock of goods and with the proceeds took up a note, for the amount of which defendant was bound to indemnify bankrupt's co-maker, the transfer was such that defendant was "benefited thereby" within the meaning of § 60 of the bankruptcy act, so as to render it a voidable preference, which the trustee in bankruptcy could recover in an action brought therefor, where the complaint alleged that defendant had received a preference, not in the disposition of the proceeds of the sale, but in the disposition of the stock itself. *Hungtington v. Baakerville* (C. C. A., 8th Cir.), 27 Am. B. R. 219, 192 Fed. 813.

**Sale of stock of goods in bulk.**—A sale of a stock of goods in bulk in compliance with the State statute is not invalid under section 60-b, because one creditor was omitted by the vendor from his statement to the vendee, where the vendee acted in good faith in compliance with the State statute, because conveyances which are null and void as against creditors under State laws and are not in good faith and for a present fair consideration, and none other, are fraudulent and void under the provisions of the bankruptcy act. *Friend v. Rosenfeld-Rovig Co.* (Wash. Sup. Ct.), 35 Am. B. R. 678, 151 Pac. 776.

and casts the burden of proof on the purchaser to show that he had no notice of facts or circumstances sufficient to arrest his attention, puts him on inquiry, and requires him to use such means of knowledge as were at hand in order to learn whether the seller is not in financial difficulty, and whether a general statement, such as that the book accounts are insufficient to pay the mercantile creditors, was true.<sup>277</sup>

d. Belief or knowledge of agent or attorney.—Here the statute states the rule of law, *i. e.*, that any knowledge possessed by the agent of the creditor may be imputed to the latter;<sup>278</sup> but not if, when acquired, the agent was acting in his own interest.<sup>279</sup> And where the agent of the creditor is also the agent of the bankrupt, it may not be presumed that he will communicate his knowledge of the debtor's financial condition to the creditor.<sup>280</sup> This general rule extends to such agents as attorneys-at-law,<sup>281</sup> but not where the attorney acquired it while acting as attorney for the debtor;<sup>282</sup> to sub-agents,<sup>283</sup> but not, it seems, to attorneys of such sub-agents;<sup>284</sup> and to credit men.<sup>285</sup> This latter rule, though supported by high authority, may be doubted; it would leave a tempting loophole to the "diligent" creditor. The rule may, under certain conditions, be held to apply to the officer of a corporation, where he receives

<sup>277</sup> *Allen v. McMannes* (D. C., Wis.), 19 Am. B. R. 276, 280, 156 Fed. 615, and cases cited; *Dean v. Davis* (C. C. A., 4th Cir.), 31 Am. B. R. 808, 212 Fed. 88, *affd.*, 38 Am. B. R. 664.

<sup>278</sup> *Rogers v. Palmer*, 103 U. S. 263, 26 L. Ed. 164; *Sage v. Wynkoop*, Fed. Cas. 12,215. See also *Babbitt v. Kelley*, 9 Am. B. R. 335, 95 Mo. App. 529, 70 S. W. 384; *Off v. Hakes* (C. C. A., 7th Cir.), 15 Am. B. R. 698, 142 Fed. 364; *In re Nassau* (D. C., Pa.), 15 Am. B. R. 793, 140 Fed. 912; *In re Hughes* (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872.

Knowledge of trustee of township imputed to township; scope of trustee's duties.—Knowledge of the insolvency of the treasurer of a township and of his indebtedness to the township by reason of defalcation coming to one of the trustees, a brother of the insolvent treasurer, is deemed to have come to such trustee officially and is imputable to the township. But where such trustee has knowledge of and participates in a scheme, where by means of the transfer of his homestead in fraud of other creditors, the insolvent treasurer pays his indebtedness to the township and thereby gives a preference, such fraudulent act, being without the scope of the trustee's official duties, will not be deemed to be the act of the township, in the absence of formal direction of the board of trustees as an organization. *Painter v. Township of Napoleon* (D. C., Ohio), 26 Am. B. R. 324, 190 Fed. 637.

<sup>279</sup> *Crooks v. People's Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604; *Rogers v. American Halibut Co.* (Mass. Sup. Ct.), 31 Am. B. R. 576, 103 N. E. 689; *Matter of Miller* (D. C., Ohio), 34 Am. B. R. 275, 221 Fed. 471.

<sup>280</sup> Agent who is also agent of bankrupt.—While generally the knowledge of an agent of a creditor that his debtor is insolvent at

the time payments are made will be imputed to the principal, this rule does not apply where the agent of the creditor is at the same time closely connected with the bankrupt as a managing agent, for the reason that the agent's interests are at the time adverse to those of the principal and it cannot be presumed that he will communicate his knowledge of the debtor's financial condition to the creditor. *Scott County Milling Co. v. Powers* (Miss. Sup. Ct.), 38 Am. B. R. 725, 73 So. 702; *Farmers' State Bank v. Freeman* (C. C. A., 8th Cir.), 41 Am. B. R. 286, 249 Fed. 579.

<sup>281</sup> *In re Ebert* (Ref., Wis.), 1 Am. B. R. 340; *In re Dunavant* (D. C., N. Car.), 3 Am. B. R. 41, 96 Fed. 542; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Vogel v. Lathrop*, Fed. Cas. 16,985; *Brown v. Jefferson County Bank*, 9 Fed. 258; *Hewitt v. Boston Straw Board Co.* (Mass. Sup. Ct.), 31 Am. B. R. 652, 101 N. E. 424; *Connors v. Brockport Nat'l Bank* (D. C., Me.), 32 Am. B. R. 531, 200 Fed. 977.

Knowledge of creditor's agent of proposed assignment.—Where bankrupt gave a mortgage to a creditor to secure a pre-existing debt, which was withheld from record by the mortgagee's attorney, for ten days, the fact that before the mortgage was recorded bankrupt spoke to the mortgagee's attorney about making an assignment, which he did, in fact, subsequently make, is sufficient to charge the mortgagee with reasonable cause to believe that the mortgage would operate as a preference. *Ogden v. Reddish* (D. C., Ky), 29 Am. B. R. 531, 200 Fed. 977.

<sup>282</sup> *In re Ebert* (Ref., Wis.), 1 Am. B. R. 340; *Mayer v. Hermann*, Fed. Cas. 9,344; *The Distilled Spirits*, 11 Wall. 356.

<sup>283</sup> *Storrs v. City of Utica*, 17 N. Y. 104.

<sup>284</sup> *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392.

<sup>285</sup> *Constam v. Haley* (C. C. A., 6th Cir.), 30 Am. B. R. 650, 206 Fed. 260.

a preference from another corporation of which he was at the time a stockholder.<sup>286</sup> And it has been held that a bank which received a note from another bank for collection is an independent contractor and not an agent, and that therefore the knowledge of the agent of the bank which collected the note, in receiving payment of the note, that the payor was insolvent may not be imputed to the bank which transmitted the note for collection.<sup>287</sup> But the knowledge of the president of a bank as to the bankrupt's financial condition will be imputed to the bank.<sup>288</sup>

**e. Recovery of preference.**—(1) **IN GENERAL.**—While all the elements of a voidable preference previously outlined exist, the property affected or its value may be recovered. But the proof must show that the bankrupt made the transfer with intent to prefer, and that the creditor who received them had reasonable cause to believe that a preference was intended.<sup>289</sup> A transfer made with intent to give a preference may be set aside, even if recorded within the four months' period, for in a fraudulent transaction the grantee is presumed to be a party to the fraud, and does not occupy the position of an innocent holder for value.<sup>290</sup> A trustee is entitled to recover property, transferred within the statutory period, under an agreement made anterior to such period, where it was in payment of an antecedent debt. But he has no right to recover exempt property or the proceeds thereof.<sup>291</sup> Where the directors of a corporation transferred to themselves, prior to the four months' period, assets of the corporation in payment of antecedent debts, such transfer is invalid under general principles, independent of the bankruptcy act, and may be recovered by the trustee.<sup>292</sup> The trustee of a bankrupt member of a partnership may not recover firm assets which have been transferred preferentially; the right to recover in such a case is that of the creditors of the firm.<sup>293</sup> The creditor may, in certain cases, retain possession of the property transferred pending the determination of the question as to whether the transfer was preferential.<sup>294</sup> And if an actual present consideration was advanced by the creditor at the time of the transfer, he may be permitted to retain so much of the proceeds of the sale of the property as will compensate him for such advancement.<sup>295</sup> The action of a referee in bankruptcy allowing or disallowing a claim is a judgment, final in the absence of a review,<sup>296</sup> but, where there was no express adjudication that a preference was not created and the record clearly repels all implication of such determination, the trustee is not prevented from suing to recover a preference from the creditor whose claim was

<sup>286</sup>. *Benner v. Blumauer-Frank Drug Co.* (D. C., Wash.), 28 Am. B. R. 798, 197 Fed. 863.

**Knowledge of officer of corporation.**—The knowledge of the secretary and treasurer of a corporation at the time of an alleged preferential payment by him to it, is not chargeable to the corporation, but knowledge of his insolvency conveyed to the president of the corporation may be imputed to it. *Arthur v. Harrington* (D. C., N. Y.), 32 Am. B. R. 216, 211 Fed. 215.

<sup>287</sup>. *Balcomb v. Old National Bank* (C. C. A., 7th Cir.), 29 Am. B. R. 329, 201 Fed. 679.

<sup>288</sup>. *Connors v. Brockport Nat'l Bank* (D. C., Me.), 32 Am. B. R. 882, 214 Fed. 847.

<sup>289</sup>. *Rutland County Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 168; *In re Leach* (C. C. A., 6th Cir.), 22 Am. B. R. 590, 171 Fed. 622; *In re Carille* (D. C., N. Car.), 29 Am. B. R. 373, 190 Fed. 612; *Putnam v. U. S. Trust Co.* (Mass. Sup. Ct.), 36 Am. B. R. 653, 111 N. E. 909; *Abele v. Beacon Trust Co.* (Mass. Sup. Jud. Ct.), 40 Am. B. R. 743, 117 N. E. 833.

**Parol testimony.**—In a suit by a trustee in bankruptcy to set aside an alleged preferential transfer of property by the bankrupt and his wife, the deed having been destroyed, secondary evidence as to its contents was admissible. *Marsh v. Leseman* (C. C. A., 2d Cir.), 40 Am. B. R. 48, 242 Fed. 484.

<sup>290</sup>. *Matter of McKane* (D. C., N. Y.), 19 Am. B. R. 108, 158 Fed. 647.

<sup>291</sup>. *Vitsthum v. Large* (D. C., Ia.), 20 Am. B. R. 666, 162 Fed. 685.

<sup>292</sup>. *In re Salvator Brewing Co.* (D. C., N. Y.), 25 Am. B. R. 536, 183 Fed. 910. See also *Johnson v. Harrison* (Mich. Sup. Ct.), 40 Am. B. R. 806, 165 N. W. 773.

<sup>293</sup>. *Rubinstein v. Lottow* (Mass. Sup. Ct.), 35 Am. B. R. 243, 220 Mass. 156, 107 N. E. 713.

<sup>294</sup>. *In re Blake* (D. C., N. Y.), 22 Am. B. R. 612, 171 Fed. 298.

<sup>295</sup>. *Jackson v. Sedgwick* (D. C., N. Y.), 26 Am. B. R. 836, 189 Fed. 508. See also *Payne v.*



allowed.<sup>296</sup> A trustee may recover property where the transfer amounts to a voidable preference under a State law.<sup>296a</sup> A suit for the recovery of preferences is a controversy between the trustee and the preferred creditor, and is not a part of the "proceedings in bankruptcy."<sup>297</sup>

(2) **RECOVERY BY TRUSTEE ONLY.**—Subsection *b* provides that a preference is voidable by the trustee, and he may recover the property or its value. There is no authority in any one else to maintain the required action. Any other rule, even were the statute not clear on this point, would lead to confusion. The right of a trustee to recover a preference is not assignable.<sup>298</sup> All property, including that fraudulently or preferentially transferred, vests in the trustee by virtue of the adjudication and of his appointment; he represents the creditors in all matters pertaining to such property and they have no remedy which will reach such property except through him.<sup>299</sup> But, if the trustee refuses to sue, or if no trustee has been appointed, it has been held that a creditor may be permitted to do so for the benefit of all.<sup>300</sup> It is unfortunate that, in cases where the outlook seems hopeless, and one creditor or a combination of creditors at their own expense proceed and recover, they must share with the others the fruits of their zeal.<sup>301</sup> To be sure, the amendatory act of 1903 saves to them their reasonable expenses,<sup>302</sup> but in assets cases this is of little importance. Pro-rating among all may be equitable; but, where a few bear the burden and heat of the day, the hangers-back should not share in the reward. This is, however, a basic weakness of all bankruptcy systems, and a feasible lawful remedy is not yet in sight.

(3) **AGAINST WHOM ACTION BROUGHT.**—The words of subsection *b* are clear: the recovery must be had of the person "receiving it or to be benefited thereby."<sup>303</sup> Where the proceeds of an execution sale have been paid to a

Sehon (W. Va. Sup. Ct. of App.), 40 Am. B. R. 462, 94 S. E. 34.

<sup>296a.</sup> *Rees Adjudicata.*—The judgment of a referee, disallowing, on the objections interposed by the trustee in bankruptcy, a claim against the bankrupt estate, on the ground that the creditor had received a preference, constitutes *res adjudicata* on the question of preference. Ullman, Stern v. Krausse (C. C. A., 5th Cir.), 40 Am. B. R. 426, 246 Fed. 124.

<sup>296.</sup> *Sterns Salt & Lumber Co. v. Hammond* (C. C. A., 6th Cir.), 33 Am. B. R. 484, 217 Fed. 559.

<sup>296a.</sup> *McGill v. Commercial Credit Co.* (D. C., Md.), 39 Am. B. R. 702, 243 Fed. 637.

<sup>297.</sup> *McCullough v. Davenport Savings Bank* (D. C., Iowa), 35 Am. B. R. 765, 226 Fed. 309.

<sup>298.</sup> *Belding-Hall Mfg. Co. v. Mercer, etc., Lumber Co.* (C. C. A., 6th Cir.), 23 Am. B. R. 585, 175 Fed. 335; *Strong v. Durdle* (Wash. Sup. Ct.), 38 Am. B. R. 635, 162 Pac. 6; *Lovell v. Latham & Co.* (D. C., Ala.), 32 Am. B. R. 191, 211 Fed. 374, citing text. Compare *In re Downing* (D. C., N. Y.), 27 Am. B. R. 309, 192 Fed. 653, *affd.* 29 Am. B. R. 228, 201 Fed. 93.

**Right to file cross-bill.**—In a suit by a trustee in bankruptcy to set aside alleged preferential transfers of property by the bankrupt creditors of the transferee should not be allowed to file a cross-bill seeking to impress a trust on the property transferred or purchased by the transferees with moneys of the bankrupt, and to be subrogated to the right, title and interest of the trustee. *Lovell v. Latham Co.* (D. C., Ala.), 32 Am. B. R. 191, 211 Fed. 374.

<sup>299.</sup> *Lovell v. Latham & Co.* (D. C., Ala.), 32 Am. B. R. 191, 211 Fed. 374, citing text.

<sup>300.</sup> Compare under § 11, *ante*; *Casey v. Baker* (D. C., N. Y.), 32 Am. B. R. 311, 212 Fed. 247. See also on general proposition that only a trustee should sue, *Glenny v. Langdon*, 98 U.

S. 20, 25 L. Ed. 43; *In re Rothschild* (Ref., Ga.), 5 Am. B. R. 587.

**Right of creditors to bring suit before or after petition filed; intervention of trustee.**—Section 64-b(2) of the bankruptcy act impliedly recognizes the right of a creditor to institute proceedings to recover, for the benefit of the estate of the bankrupt, property fraudulently or preferentially transferred by him either before or after the filing of the petition, wherein it provides that, when such property shall have been recovered by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery shall be paid out of the bankrupt estate; and where such a suit is pending at the time of the election of a trustee, he is entitled to become a party plaintiff. *Frost v. Latham & Co.* (C. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866.

<sup>301.</sup> For an unsuccessful attempt to cure this defect in the bankruptcy system, see *In re McNamara*, 2 N. B. N. Rep. 341.

<sup>302.</sup> Bankr. Act, § 64-b(2) as amended.

<sup>303.</sup> See under this section, subtitle "Creditors only may be preferred," *ante*, p. 897.

**Liability of third person, privy to illegal preference.**—It seems that a third person cannot be held liable to repay the amount of an illegal preference because he was a privy to the payment, as this section provides that in such a case a recovery may be had from the creditor who receives the payment. *Rubenstein v. Lottow* (Mass. Sup. Ct.), 35 Am. B. R. 243, 220 Mass. 156, 107 N. E. 718.

judgment creditor, before the filing of an involuntary petition, the remedy is by action by the trustee against the creditor for having received a preference.<sup>304</sup> An action may be maintained against the board of trustees of a township to recover a preference.<sup>305</sup>

(4) IN WHAT COURT; THE AMENDMENTS OF 1903.—The subject has been discussed in detail elsewhere.<sup>306</sup> The condition of things prior to the amendatory act was almost intolerable, the State courts being unconsciously hostile and their calendars so crowded as to preclude speedy trials. The sentence at the end of subsection *b* was inserted by the amendatory act of 1903. The words inserted in § 23-b by the same act clearly refer to this new sentence and remove all doubt that hereafter, as under the law of 1867, all suits to avoid preferences may be brought either in the district court or in the State court which would have had jurisdiction had not bankruptcy intervened.<sup>306a</sup> If an action be pending in a State court, in which the trustee is a party, the determination of which will settle the question as to the existence of a preferential transfer, the comity existing between the State court and the court of bankruptcy will ordinarily require the action to be continued in the State court.<sup>307</sup> It is thought that where the Federal district court is convenient of access, suits of this character will hereafter be brought in that court, and their determination hastened by a reference to the referee, as special master. Where adjudication was had in one district the trustee may seek to recover property preferentially transferred, by a suit in a district court in another district, where the property was found and the transferee resided.<sup>308</sup> Such suits are analogous to judgment creditors' suits to set aside fraudulent conveyances, and are, therefore, properly within the equity jurisdiction of the court.<sup>309</sup> It has been held that an action to recover money preferentially transferred should be brought on the law side of the court.<sup>310</sup> But a suit by a trustee in bankruptcy to recover the value of certain personal property, alleged to have been fraudulently transferred by the bankrupt to enable the transferee to obtain

<sup>304</sup>. *In re Bailey* (D. C., Or.), 16 Am. B. R. 289, 144 Fed. 214. See also *Benjamin v. Chandler* (D. C., Pa.), 15 Am. B. R. 439, 142 Fed. 217.

<sup>305</sup>. *Painter v. Township of Napoleon* (D. C., Ohio), 19 Am. B. R. 412, 156 Fed. 239; s. c., 26 Am. B. R. 824, 190 Fed. 637.

<sup>306</sup>. See discussion under Section Twenty-three of this work.

<sup>306a</sup>. Since the amendment of 1910 to sections 23b and 60b the United States District Court has jurisdiction of a suit by a trustee in bankruptcy to recover a preference, although it might not have had jurisdiction of the same controversy before bankruptcy. *Golden Hill Distilling Co. (C. C. A., 6th Cir.)*, 39 Am. B. R. 731, 243 Fed. 842.

<sup>307</sup>. *Davis v. Planters' Trust Co. (D. C., Ky.)*, 28 Am. B. R. 496, 190 Fed. 970.

**Proceeding in district court after intervening in state court.**—Where a trustee in bankruptcy, after commencing a suit in the United States District Court to set aside a mortgage as preferential and fraudulent, intervenes in a suit in the State court to foreclose the same mortgage, and finds that he cannot fully protect the interests of the bankrupt estate in said court, and it appears that the jurisdiction of said court to grant equitable relief is doubtful, he may proceed in the District Court. The doctrine of election of inconsistent remedies is not involved. *Hawkins v. Dannenberg Co. (D. C., Ga.)*, 37 Am. B. R. 262, 234 Fed. 732.

**State action pending.**—It is no defense to an action by trustee in bankruptcy to set aside a conveyance of real property as a preference, that an action is pending in a State court be-

tween the bankrupt and the transferee involving the same property. *Collett v. Adams* (U. S. Sup. Ct.), 43 Am. B. R. 496, 39 Sup. Ct. 372.

<sup>308</sup>. *Hillis v. McKinniss Co. (D. C., Ohio)*, 20 Am. B. R. 329, 188 Fed. 1012.

**Auxiliary jurisdiction.**—The action may be maintained in the district where the property is located even though it is not the district of the defendant's residence or the district where the bankruptcy proceedings are pending. *Collett v. Adams* (U. S. Sup. Ct.), 43 Am. B. R. 496, 39 Sup. Ct. 372.

<sup>309</sup>. *Pound v. New York Exchange Bank* (D. C., N. Y.), 10 Am. B. R. 343, 124 Fed. 992; *Wall v. Cox*, 181 U. S. 244, 5 Am. B. R. 727, 45 L. Ed. 845, 21 Sup. Ct. 642; *Parker v. Black* (D. C., N. Y.), 16 Am. B. R. 202, 143 Fed. 560, *affd.* 19 Am. B. R. 15, 151 Fed. 18; *Off v. Hakes* (C. C. A., 7th Cir.), 15 Am. B. R. 696, 142 Fed. 864; *Houghton v. Stiner*, 92 N. Y. App. Div. 171, 87 N. Y. Supp. 10; *Stern v. Mayer*, 16 Am. B. R. 763, 99 N. Y. App. Div. 427, 91 N. Y. Supp. 292; *Volkommer v. Frank*, 14 Am. B. R. 695, 107 N. Y. App. Div. 594, 95 N. Y. Supp. 324; *Lesser v. Bradford Realty Co.*, 17 Am. B. R. 524, 116 N. Y. App. Div. 212, 101 N. Y. Supp. 571; *Matter of Plant* (D. C., Ga.), 17 Am. B. R. 272, 148 Fed. 37; *Mason v. Herkimer County Bank* (D. C., N. Y.), 21 Am. B. R. 98, 163 Fed. 920, *affd.* *sub nom.* *National Bank of Newport v. Herkimer County Bank*, 226 U. S. 90, 28 Am. B. R. 218, 56 L. Ed. 995, 32 Sup. Ct. 657. See discussion of cases cited in *Johnson v. Hanley Hoyer Co. (D. C., R. I.)*, 26 Am. B. R. 748, 188 Fed. 752; *Allen v. Grey* (N. Y. Ct. of App.), 25 Am. B. R. 423, 201 N. Y. 504, 94 N. E. 652; *Johnson v. Harrison* (Mich. Sup. Ct.), 40 Am. B. R. 806, 165 N. W. 773.

an unlawful preference, ought not to be maintained in a court of equity, over the objection of the defendant, the plaintiff having an adequate remedy at law.<sup>311</sup> The bankruptcy court has jurisdiction in a suit to recover a preference although the relief sought requires the application of a State law.<sup>312</sup> The power of the bankruptcy court in a suit by the trustee to set aside preferences is not limited to the mere avoidance of the preference and decreeing that the trustee recover the property or its value, but as a court of equity it may enforce the equitable rights of the defendant as against other creditors of the bankrupt.<sup>313</sup> The words "any court of bankruptcy," seem to imply that the district court, while so sitting, is still exercising its bankruptcy jurisdiction. The referee is not a "court of bankruptcy" within the meaning of this clause,<sup>314</sup> although the parties may stipulate that a suit to recover a voidable preference may be heard and determined by the referee, in which case it constitutes in effect an arbitration.<sup>315</sup> And where a referee determines that certain payments

<sup>310.</sup> *First State Bank of Milliken v. Spencer* (C. C. A., 8th Cir.), 33 Am. B. R. 504, 219 Fed. 503; *Turner v. Schaeffer* (C. C. A., 6th Cir.), 40 Am. B. R. 829, 249 Fed. 654; *Irons v. Blas* (W. Va. Sup. Ct. of App.), 45 Am. B. R. 41, 102 S. W. 126.

<sup>311.</sup> *Warmath v. O'Daniel* (C. C. A., 6th Cir.), 20 Am. B. R. 101, 159 Fed. 87; *Turner v. Schaeffer* (C. C. A., 6th Cir.), 40 Am. B. R. 829, 249 Fed. 654.

By defendant's consent, a bill in equity by a trustee in bankruptcy to recover property in fraud of the Bankruptcy Act may be entertained by the District Court. *Gooch v. Stone* (C. C. A., 6th Cir.), 44 Am. B. R. 86, 257 Fed. 631.

Adequate remedy at law.—Although equity has cognizance of constructive fraud as well as actual fraud, the question whether a bill in equity lies to set aside a preferential payment of money to the creditor of a bankrupt being doubtful, a demurrer to the bill will be overruled, reserving to defendant the right to raise the question of jurisdiction at the final hearing. *Johnson v. Hanley Hoyer Co.* (D. C., R. I.), 26 Am. B. R. 748, 188 Fed. 752.

To establish a liability under section 60-b of the Bankruptcy Act no actual fraud need be shown. That section merely condemns a transfer by a bankrupt within four months for the purpose of creating a preference, and hence the legal remedy is entirely adequate and no relief is offered in equity that the law does not afford. *Simpson v. Western Hardware & Metal Co.* (D. C., Wash.), 35 Am. B. R. 851, 227 Fed. 304.

<sup>312.</sup> *Miller v. New Orleans Acid & Fertilizer Co.*, 211 U. S. 496, 21 Am. B. R. 416, 53 L. ed. 300, 29 Sup. Ct. 173, affg. 117 La. 821, 42 S. E. 329.

Recovery of preference in violation of state law.—The bankruptcy court has jurisdiction of an action by a trustee in bankruptcy, without the consent of the defendants, to recover preferential payments alleged to have been made in violation of section 66 of the New York Stock Corporation Law, which includes a provision giving the right to proceed against creditors who have received transfers of property or preferential payments when the corporation was insolvent, to recover the payments made to the defendants herein. Under such statute such transfers are voidable only when they are made with the intent to give a preference. When it is shown that they were so made, the person receiving the same by means of any prohibited act or deed "shall be bound to account therefor to its creditors or stockholders or their trustees." *Grandison v. Robertson* (D. C., N. Y.), 34 Am. B. R. 609, 220 Fed. 985, mod. 36 Am. B. R. 452, 231 Fed. 785.

<sup>313.</sup> *Allen v. McMannes* (D. C., Wis.), 19 Am. B. R. 376, 156 Fed. 615.

<sup>314.</sup> In *re Overholzer* (Ref., N. Dak.), 23 Am. B. R. 10, holding that where upon the petition of a trustee, the referee in charge issued an order directed to the grantee of real estate to show cause why the conveyance should not be set aside as preferential, the proceeding must be dismissed where, upon the return day, the grantee appears specially by attorney and objects to the jurisdiction of the court; In *re Keystone Press, Inc.* (D. C., Minn.), 29 Am. B. R. 715, 203 Fed. 710, holding that the referee, in a proceeding by a secured creditor who seeks to have turned over to it the proceeds of a sale of the bankrupt's property free from liens, has jurisdiction to determine whether or not such creditor has received a preference, where such creditor claims the right to prove any part of his debt as an unsecured claim, but that the referee cannot determine the existence of the preference for the purpose of recovering the property transferred.

<sup>315.</sup> Stipulation to refer to referee to hear and determine; review.—Where in an action by a trustee in bankruptcy to recover an alleged preference, the parties stipulate and agree that the case shall be heard, tried and determined before a referee, naming him; that upon filing the report of the referee judgment may be entered by the clerk in conformity therewith without further notice; that either party may enter an order to the foregoing effect without further notice, and the court in approving the stipulation added thereto the following "judgment shall not be entered until after ten days' notice of the filing of the report of the referee, and of the judgment proposed to be entered," the court has no power to examine the evidence, rulings of the referee or the findings of fact, and if conclusions of law sufficient to support the judgment directed are supported and justified by the findings of fact, then the judgment must be entered. Such a trial before a referee is little more than an arbitration. *Grant v. National Bank of Auburn* (D. C., N. Y.), 37 Am. B. R. 329, 232 Fed. 201.

by a bankrupt were preferential, in proceedings properly before him, and the person to whom such payments were made acquiesces in such determination, he is concluded thereby, and may not resist the subsequent recovery of such payments in a suit in the bankruptcy court.<sup>316</sup>

(5) **PERMISSION TO SUE.**—While not strictly necessary, good practice seems to require the trustee to ask permission to bring a suit to avoid a preference.<sup>317</sup>

(6) **PRACTICE.**—The practice in such suits is regulated by the rules applicable to the court in which they are brought. The right to a jury trial is considered elsewhere.<sup>318</sup> Careful pleading is essential. The trustee cannot maintain an action unless it is alleged and sustained by proof that he has not sufficient assets in his hands to satisfy the claims of the creditors of the debtor.<sup>318a</sup> In order to recover the bill must allege and the proof must sustain the

<sup>316</sup> *Bret v. Moore* (C. C. A., 9th Cir.), 34 Am. B. R. 295, 220 Fed. 97; *Lincoln v. Peoples' Nat. Bank* (D. C., Mich.), 44 Am. B. R. 351, 200 Fed. 422.

<sup>317</sup> In re *Mersman* (Ref., N. Y.), 7 Am. B. R. 46. But see *Chism v. Bank* (Sup. Ct., Miss.), 5 Am. B. R. 56, 27 So. 610. See also under Section Forty-seven, *ante*.

<sup>318</sup> See Section Nineteen of this work, *ante*. *Watson v. Adams* (C. C. A., 6th Cir.), 39 Am. B. R. 473, 242 Fed. 441.

**Questions for jury.**—In an action by the trustee of a bankrupt to recover an alleged preferential payment, it was not error for the court to submit to the jury the question of bankrupt's insolvency at the time of such payment and of defendant's knowledge that a preference was thereby intended. *Bergdoll v. Harrigan* (C. C. A., 3d Cir.), 33 Am. B. R. 304, 217 Fed. 943.

<sup>318a</sup> *Hibschmann v. Bevis* (Wash. Sup. Ct.), 43 Am. B. R. 154, 174 Pac. 5.

<sup>319</sup> *Painter v. Napoleon Township* (D. C., Ohio), 19 Am. B. R. 412, 156 Fed. 289, holding that a bill, in an action to recover the payment of a township, which fails to allege that the enforcement of the transfer constituting the alleged preference will be to enable the said board of trustees to obtain a larger percentage of its debts than any other creditor of the same class is demurrable; *Mayes v. Palmer* (C. C. A., 8th Cir.), 31 Am. B. R. 225, 208 Fed. 97; *Utah Association of Creditmen v. Boyle Furniture Co.* (Utah Sup. Ct.), 31 Am. B. R. 453, 136 Pac. 672, holding that an allegation substantially in the language of the statute is sufficient. See Am. B. R. Dig. § 672.

**Sufficiency of complaint in an action by a trustee to set aside a preference,** see *Lesser v. Bradford Realty Co.*, 17 Am. B. R. 524, 118 N. Y. App. Div. 212, 101 N. Y. Supp. 571, affg. 15 Am. B. R. 123; *Wilson v. Citizens' Trust Co.* (D. C., Ga.), 37 Am. B. R. 83, 233 Fed. 697; *Minnesota, etc. Power Co. v. Losey* (C. C. A., 8th Cir.), 44 Am. B. R. 395, 260 Fed. 639.

A petition by a trustee is insufficient which fails to allege and prove insolvency and reasonable cause to believe that a preference was intended. In re *Leach* (C. C. A., 6th Cir.), 22 Am. B. R. 609, 171 Fed. 622; *Taylor v. Nichols*, 23 Am. B. R. 310, 134 N. Y. App. Div. 787, 119 N. Y. Supp. 1042; *Rodolph v. First Nat. Bank of Tulsa* (Sup. Ct., Okla.), 28 Am. B. R. 897, 121 Pac. 629; *Carey v. Donohue* (C. C. A., 6th Cir.), 31 Am. B. R. 210, 209 Fed. 323; *revd.* on other grounds, 240 U. S. 430, 36 Am. B. R. 704, 60 L. Ed. 723, 36 Sup. Ct. 386; *Crim v. Rice* (C. C. A., 2d Cir.), 37 Am. B. R. 329, 232 Fed. 570; *Hoshaw v. Cosgriff* (C. C. A., 8th Cir.), 40 Am. B. R. 694, 247 Fed. 22.

A trustee may sue to recover property received as a voidable preference without allegation or proof of a demand and refusal. *McCulloch v. Davenport Savings Bank* (D. C., Ia.), 35 Am. B. R. 765, 226 Fed. 309.

**Suit by trustee to recover deposits; petition.**

—A petition in a suit by a trustee in bankruptcy under section 60-b of the Bankruptcy Act to recover deposits made by the bankrupts with the defendants, which alleges that the deposits were not general, that the bankrupt had no right to check against the same, and that the defendant had the deposits made upon special account "for the purpose of transferring and appropriating the same to its alleged indebtedness," is sufficient upon general demurrer. *Wilson v. Citizens' Trust Co.* (D. C., Ga.), 37 Am. B. R. 86, 233 Fed. 697.

**Action to compel surrender of property; waiver.**—Where in an action to compel the defendants to surrender property they appear specially, but not to raise the question of jurisdiction of their persons, and claim that because they are adverse claimants and reside in other States where the property is located, the court has no jurisdiction to make any summary order, and no motion has been made to quash the service of process nor any exception taken to it, the objection will be deemed to have been waived, although the service was invalid. *Alco Film Corporation v. Alco Film Service* (C. C. A., 2d Cir.), 37 Am. B. R. 307, 234 Fed. 55.

<sup>320</sup> *Crooks v. People's Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604; In re *Nelson* (D. C., Wis.), 1 Am. B. R. 63, 98 Fed. 76; *Chism v. Bank* (Sup. Ct., Miss.), 5 Am. B. R. 56, 27 So. 610; *Hicks v. Langhorst* (C. C. P., Ohio), 6 Am. B. R. 178; *Richter v. Nimmo*, 6 Am. B. R. 680, 64 N. Y. App. Div. 619, 73 N. Y. Supp. 1125; *Martin v. Bigelow*, 7 Am. B. R. 218, 36 N. Y. Misc. 298, 73 N. Y. Supp. 443; *Brown v. Guichard*, 7 Am. B. R. 515, 77 N. Y. App. Div. 642, 79 N. Y. Supp. 1127; *Murphy v. Ford Motor Co.* (D. C., Ohio), 39 Am. B. R. 665, 241 Fed. 134; *Taylor v. Fram* (D. C., N. Y.), 40 Am. B. R. 377, 243 Fed. 733; *Johnson v. Harrison* (Mich. Sup. Ct.), 40 Am. B. R. 806, 165 N. W. 773; *Cohen v. Goldman* (C. C. A., 1st Cir.), 42 Am. B. R. 85, 250 Fed. 599; *Van Slyke v. Huntington* (C. C. A., 8th Cir.), 45 Am. B. R. 173, 265 Fed. 86.

**Further hearing.**—Where in a suit by a trustee in bankruptcy to recover alleged preferences, it appears that the question, whether the effect of an assignment of accounts receivable by the bankrupt would be to enable any one of the bankrupt's creditors to obtain a greater percentage of his debt than any other creditors of the same class, was not tried out at the hearing, and that no finding on the issue was made by the judge, the issue may be decisive of the validity of the assigna-

four statutory elements constituting a preference.<sup>319</sup> Some of the more valuable discussions on practice under the present law will be found in the footnote.<sup>320</sup> In a suit by a trustee to recover land mortgaged by the bankrupt within the four months' period without consideration, a plea of title, derived from one in whose favor the land court of Massachusetts had decreed the registration of title to the land, will be overruled.<sup>321</sup> A proceeding to set aside an illegal preference must be governed, as to pleading and practice, by the laws and rules of the court wherein it is instituted; if instituted in a Federal court it is governed by the Federal equity practice.<sup>322</sup> The trustee may settle or compromise a suit to recover an alleged voidable preference, when deemed advisable for the interests of the creditors, and the court may, in its discretion, refuse to set aside or vacate the agreement.<sup>323</sup>

(7) **DOWER IN PROPERTY COVERED BY PREFERENTIAL TRANSFER.**—A wife's release of dower can survive only so long as it attends the conveyance of her husband, and when the conveyance of the husband in which the wife joins is set aside as constituting a preference, the effect is to revive the wife's right of dower.<sup>324</sup>

**f. Property or its value.**—(1) **IN GENERAL.**—Similar words were used in the law of 1867. The option of suing for the property or for its value rests with the trustee. These words are doubtless merely expressive of the rule of law. It has been held that interest should be allowed either from the time a demand was made upon the transferee for the return of the property transferred, or, in case no demand was made, from the date of the commencement of a suit to recover such property.<sup>325</sup> Where property is transferred by a bankrupt to a third person at the instance of a creditor and the money received by the bankrupt is paid to the creditor the trustee cannot recover both the property and the money.<sup>326</sup> In most cases, the value, *i. e.*, damages, is demanded. This in effect ratifies the title which passed through the preference.<sup>327</sup> The liability to restore or repay is a *quasi* contractual obligation imposed by the act upon the preferred creditor, and a suit in assumpsit rather than trespass is the proper form, in those jurisdictions where the distinction between these classes of suits is still retained.<sup>328</sup> Suits to recover the property in specie should only be brought where it can be identified and is found in

ment, and the case should stand for a further hearing and trial. *Rubenstein v. Lottow* (Mass. Sup. Ct.), 35 Am. B. R. 243, 220 Mass. 156, 107 N. E. 718.

**Burden of proof.**—In an action by a trustee in bankruptcy to set aside a deed given by a bankrupt to secure the repayment to the grantor of money advanced by him to a third person, the burden of establishing that such third person had repaid the advance is on the trustee. *Angle v. Bankers Surety Co.* (C. C. A., 2d Cir.), 41 Am. B. R. 90, 244 Fed. 401, affg. 32 Am. B. R. 71, 210 Fed. 289.

**Garnishment.**—Where, in an action by a trustee in bankruptcy to recover the value of certain personal property alleged to have been transferred by the bankrupt while insolvent and within four months of adjudication, it appears that the value of the property is certain, known and properly alleged, a writ of garnishment may be issued under the State statute. *State ex rel. American Piano Co. v. Superior Court* (Wash. Sup. Ct.), 43 Am. B. R. 139, 178 Pac. 827.

<sup>321.</sup> *Morris v. Small* (Cir. Ct., Mass.), 20 Am. B. R. 138, 160 Fed. 142.

<sup>322.</sup> *Westall v. Avery* (C. C. A., 4th Cir.), 22 Am. B. R. 673, 171 Fed. 626.

<sup>323.</sup> Application to set aside settlement.—The

District Court may, in its discretion, deny the petition of holders of liens on the bankrupt's property, who had not presented their claims against the estate, to set aside and vacate an agreement by the trustee in bankruptcy to settle a suit to have a mortgage on the same property declared invalid as a preference, and to compel the trustee to prosecute said suit to final judgment. *Stanrod & Co. v. Utah Implement-Vehicle Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 280, 223 Fed. 517.

<sup>324.</sup> *Matter of Lingafelter* (C. C. A., 6th Cir.), 24 Am. B. R. 656; *Marsh v. Walters* (C. C. A., 6th Cir.), 34 Am. B. R. 85, 220 Fed. 805.

<sup>325.</sup> *Utah Association of Creditmen v. Boyle Furniture Co.* (Utah Sup. Ct.), 31 Am. B. R. 488, 136 Pac. 572; *Kaufman v. Tredway*, 195 U. S. 271, 12 Am. B. R. 632, 49 L. Ed. 190, 25 Sup. Ct. 33; *Ourmen v. Talcott* (D. C., N. Y.), 23 Am. B. R. 572, 175 Fed. 261, holding that interest is recoverable from the date on which the goods that were transferred as a preference were sold by the transferee.

<sup>326.</sup> *Golden & Co. v. Loving* (Ct. of App., D. C.), 33 Am. B. R. 469, 42 Wash. L. Rep. 818.

<sup>327.</sup> Compare *Winslow v. Clark*, 47 N. Y. 261.

<sup>328.</sup> *Reber v. Ellis Bros.* (D. C., Pa.), 25 Am. B. R. 567, 185 Fed. 313.

the hands of the person preferred. If the property transferred cannot be restored in kind, its value may be recovered.<sup>329</sup> If the trustee proceeds in equity to recover the actual property transferred, he is only entitled to a delivery of the property and may not have judgment for depreciation or other consequential damages.<sup>330</sup> If a transfer be made within the four months' period in part for a present consideration and in part payment of an antecedent indebtedness, a recovery may be had for the balance of the value of the property transferred after deducting the value of the present consideration.<sup>331</sup> Where the preference consists of suffering or permitting a judgment which has become a lien, the trustee has, it is thought, the option of suing under § 60-b or under § 67-e.<sup>332</sup> Though the words "recover the property or its value"<sup>333</sup> do not exactly describe the purpose of such a suit where the transaction amounts to a preference, nor do the words "recover and reclaim the same by legal proceedings,"<sup>334</sup> describe the purpose where the transaction is a fraudulent transfer, the prayer of the bill or complaint may be easily adapted to the circumstances and may be to annul the lien or to recover possession of the property if seized on execution, or otherwise as the facts require. In any event, the pleading should show a demand and refusal to restore.<sup>335</sup> Where the purchaser has sold the property and the evidence shows that he received as much or more than the trustee could have realized from the same property, he will not, in a suit by the trustee to set aside the preferential transfer, be held in an amount in excess of the proceeds of the sale by him.<sup>336</sup>

(2) DAMAGES.—If the suit is for value, the judgment, if granted, should be for the worth of the property, not the amount realized under the execution sale by the preferential transferee.<sup>337</sup> He is also entitled to the gross proceeds.<sup>338</sup> Nor can the court allow by way of reduction of damages such amounts as the preferred creditor has paid to other creditors out of the avails

<sup>329</sup>. *McElvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 169 Fed. 32.

<sup>330</sup>. *Ernst v. Mechanics and Metals Nat. Bank* (C. C. A., 2d Cir.), 29 Am. B. R. 299, 201 Fed. 664, affg. 31 Am. B. R. 291, 200 Fed. 287. See same case on Appeal to U. S. Supreme Court, *Hotchkiss v. National City Bank*, 231 U. S. 50, 31 Am. B. R. 291, 302, 58 L. Ed. 115, 34 Sup. Ct. 20.

Depreciation.—In a suit in equity by a trustee in bankruptcy to recover specific securities deposited with a bank, within four months of bankruptcy, the plaintiff cannot recover for depreciation of the securities intermediate the decision of the original suit in the District Court and their final delivery, especially where the parties had stipulated that the securities might be sold by the bank at the best price obtainable, at such times as might seem best to its officers. *Hotchkiss v. National City Bank* (C. C. A., 2d Cir.), 34 Am. B. R. 544, 223 Fed. 533.

<sup>331</sup>. *In re Manning* (D. C., S. Car.), 10 Am. B. R. 500, 123 Fed. 181.

<sup>332</sup>. See *In re Adams* (Ref., N. Y.), 1 Am. B. R. 94; *In re Gray*, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, and, perhaps, § 70-e. See also *In re Mersman* (Ref., N. Y.), 7 Am. B. R. 46.

<sup>333</sup>. Bankr. Act, § 60-b.

<sup>334</sup>. Bankr. Act, § 67-a.

<sup>335</sup>. *In re Phelps* (Ref., N. Y.), 3 Am. B. R. 396; *Schuman v. Flickenstein*, Fed. Cas. 12,826.

<sup>336</sup>. *Allen v. McMannes* (D. C., Wis.), 19 Am. B. R. 276, 156 Fed. 615.

As to recovery of proceeds of sale of goods preferentially transferred, where such goods were retained under agreement with a receiver in bankruptcy, see *Ommen v. Talcott* (D. C., N. Y.), 23 Am. B. R. 572, 175 Fed. 259, revd. in part 26 Am. B. R. 689, 188 Fed. 401.

<sup>337</sup>. An action of assumpsit by a trustee in bankruptcy to recover the actual amount at which a creditor received and accepted property from the bankrupt as a payment upon its claim, alleged to constitute a preference, is not objectionable because it does not appear that the creditor received money or money's worth for the property. *Stearns Salt & Lumber Co. v. Hammond* (C. C. A., 6th Cir.), 33 Am. B. R. 484, 217 Fed. 559; *Clarion Bank v. Jones*, 21 Wall. 325.

<sup>338</sup>. *Traders' Bank v. Campbell*, 14 Wall. 97.

of the property transferred.<sup>339</sup> If the latter includes exempt articles, their value cannot be included in the judgment.<sup>340</sup>

(3) Costs.—This is regulated by the law and rules of practice applicable to the court where the suit is brought.<sup>341</sup>

#### IV. SET-OFF OF A SUBSEQUENT CREDIT.

a. Prior to amendments of 1903.—Subsection *c* which, standing by itself, seems clear enough, was wrenched and twisted and fought over by the bar and the courts in an effort to escape the innocent preference doctrine of *Carson v. Chicago Title & Trust Co.* The controversy raged about the word "recoverable." The question was whether this had reference to a voidable preference only or also to a mere preference in fact. If the former, then subsequent credits after a payment in due course of trade could not be set off, and the creditor not only found the door of the court shut to him if he refused to surrender, but the estate to be distributed increased by his goods sold, perhaps, on the strength of the confidence inspired by such payment. Nothing could be more inequitable. On the other hand, some courts gave a wide meaning to the subsection and declared it applicable even to the technical preference defined in subsection *a*. The question did not reach the Supreme Court before the amendatory act. But it was held in very exhaustive opinions both by Referee James and by Judge Shiras of the Northern District of Iowa that this subdivision of the section applies only to cases where the preferred creditor is compelled against his will to return what he has received and is therefore limited to proceedings taken under subsection *b* and does not apply to a case where he seeks to enforce a claim which the trustee recites under section 57-g on the ground of preference.<sup>342</sup> The authorities each way are indicated in the foot-note.<sup>343</sup>

b. Meaning of subsection *c*.—Nor is it likely now that it will be necessary to determine the question. The cases which attempt to enlarge its meaning all turn on the manifest inequity of doing otherwise. Such inequity no longer exists. Only voidable preferences need now be surrendered. Common sense and syntax connect the word "recoverable" in subsection *c* with

339. *North v. House*, Fed. Cas. 10,310.

340. *Grow v. Ballard*, Fed. Cas. 5,848; *Brock v. Terrill*, Fed. Cas. 1,914.

341. Compare *Collins v. Gray*, Fed. Cas. 3,013.

Contribution by one compelled to surrender preference.—A preferred creditor of a bankrupt, who has been compelled to surrender his preference in a suit by the trustee in bankruptcy, is benefited thereby as an unsecured creditor, and is bound to contribute ratably as a general creditor toward payment of counsel fees rendered in the commencement and prosecution of the preference suit in the name of the trustee and with his consent. *Matter of Stearns Salt & Lumber Co.* (C. C. A., 6th Cir.), 35 Am. B. R. 264, 225 Fed. 1. 342. In *re Christensen* (D. C., Ia.), 4 Am. B. R. 202, 101 Fed. 802.

343. Compare *Kimball v. Rosenham Co.* (C. C. A., 8th Cir.), 7 Am. B. R. 718, 114 Fed. 85; *Morey Mfg. Co. v. Schiffer* (C. C. A., 8th Cir.), 7 Am. B. R. 670, 114 Fed. 447; *Gans v. Ellison* (C. C. A., 3d Cir.), 8 Am. B. R. 153, 114 Fed. 734; *Kahn v. Export, etc., Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 157, 115 Fed. 290; *McKey v. Lee* (C.

C. A., 7th Cir.), 5 Am. B. R. 267, 105 Fed. 923; In *re Ryan* (D. C., Ill.), 5 Am. B. R. 394, 105 Fed. 780; In *re Sechler* (D. C., Kan.), 5 Am. B. R. 579, 106 Fed. 484; In *re Southern, etc., Co.* (D. C., Ga.), 6 Am. B. R. 633, 111 Fed. 518; In *re Thompson's Sons* (Ref., Pa.), 6 Am. B. R. 663, affd. s. c., 7 Am. B. R. 214, 112 Fed. 651; In *re Saldosky* (D. C., Minn.), 7 Am. B. R. 123, 111 Fed. 511; with *contra*, In *re Arndt* (D. C., Wis.), 4 Am. B. R. 773, 104 Fed. 234; In *re Keller* (D. C., Iowa), 6 Am. B. R. 334, 109 Fed. 118; In *re Oliver* (D. C., Mo.), 6 Am. B. R. 624, 109 Fed. 784; In *re Steers Lumber Co.* (D. C., N. Y.), 6 Am. B. R. 315, 110 Fed. 738; affd. s. c., 7 Am. B. R. 332, 112 Fed. 406; In *re Bailey* (D. C., Vt.), 7 Am. B. R. 26, 112 Fed. 406; In *re Jones* (D. C., S. Car.), 10 Am. B. R. 513, 123 Fed. 128; *Rotan Grocery Co. v. West* (C. C. A., 5th Cir.), 41 Am. B. R. 153, 246 Fed. 685. A summary of cases pro and con will be found in In *re Topliff* (D. C., Mass.), 8 Am. B. R. 141, 114 Fed. 323.

Stay of action.—Where a judgment is recovered in an action to set aside a preferential transfer, execution will not be stayed till the defendant has opportunity to prove its claim in bankruptcy, and to have the amount thereof set off against the judgment. *Minnesota, etc., Power Co. v. Losey* (C. C. A., 8th Cir.), 44 Am. B. R. 395, 260 Fed. 689.

"recover" in subsection *b*. Standing alone, subsection *a* is nothing but an explanation or definition of a preference. The latter is not recoverable, unless the element of reasonable cause to believe appears. Only against a preference so recoverable than may subsequent credits granted the debtor be set off. The cases holding this doctrine are thought still in point. The practitioner should, however, note that to entitle to the set-off, the credit must be "in good faith," "without security,"<sup>344</sup> and result in "property which becomes a part of the debtor's estate;" also, that any payments on the new credit must be deducted before the set-off is allowed. If the creditor acted in good faith, extended credit without security, and the money or property actually passed into the debtor's possession, he is entitled to the set-off, and he need not show that the money or property remained in the debtor's possession until his bankruptcy.<sup>345</sup> The right of the creditor to set off a new credit given in good faith is restricted to the amount of the new credit remaining unpaid at the time of the adjudication.<sup>346</sup> The rule stated in this subsection is an extension of that phrased in § 68-a.<sup>347</sup> Here there is not that mutuality of debt required there. Were there, subsection *c* would be unnecessary.

#### V. PREFERENCES TO BANKRUPT'S ATTORNEY.

**a. In general.**—In connection with subsection *d* relative to preferences to bankrupt's attorney, § 64-b (3), on attorney's priorities, should also be read. The services referred to in section 64-b (3) are those already rendered, while the services referred to in this subsection are those "to be rendered," which are paid for in advance "in contemplation of the filing of a petition by or against" the bankrupt. The compensation for the latter services depends both as to payment and amount on the acts of the parties, and what the statute does is to recognize the validity of the payment, but subjects the reasonableness of the amount to the supervision of the court.<sup>348</sup> Section 60-d

<sup>344</sup>. Compare *In re Tanner* (Ref., N. Y.), 6 Am. B. R. 196.

<sup>345</sup>. *Kaufman v. Tredway*, 195 U. S. 271, 12 Am. B. R. 682, 49 L. Ed. 190, 25 Sup. Ct. 33; *In re Morrow & Co.* (D. C., Ohio), 13 Am. B. R. 392, 134 Fed. 686; *Price v. Derbyshire Coffee Co.*, 21 Am. B. R. 280, 128 N. Y. App. Div. 472, 112 N. Y. Supp. 830; *Grandison v. Nat. Bank of Commerce of Rochester* (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800.

Property must become part of estate.—In the case of *Bank of Wayne v. Gold* (N. Y. App. Div.), 26 Am. B. R. 722, 146 N. Y. App. Div. 296, 130 N. Y. Supp. 942, the court says: "Counsel for appellant further urges that in any event it was entitled to recover certain advances made by it in connection with the mortgaged property after it had taken possession thereof under the mortgage, and before the bankruptcy proceedings were begun. This claim is made under subdivision 'c' of section 60 of the Bankruptcy Act. Reference to this provision of the act discloses that the further credit given the debtor by the creditor, which may be set off as therein provided, must not only be given in good faith and without security, but must also result in property which becomes a part of the debtor's estate. Collier on

Bankruptcy (8th ed.), p. 677. Whether any recovery for such alleged expenditure could in any event be had in the present action it is unnecessary now to determine; for the proof does not disclose that any part thereof resulted in any advantage to, or increase of, the mortgaged property. Having apparently voluntarily relinquished possession of the mortgaged property without then making any claim on account of such expenditure and the proceeds of the sale being now in the possession of the trustee, it would seem that the proper method to collect such amount, if any, as it may be entitled to receive because of this claim would be by presentation thereof in the orderly course of the administration of the bankrupt's estate in the bankruptcy court."

<sup>346</sup>. *Grandison v. Nat. Bank of Commerce of Rochester* (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800.

<sup>347</sup>. See an effort to connect the two in *In re Ryan* (D. C., Ill.), 5 Am. B. R. 396, 105 Fed. 760.

<sup>348</sup>. *Furth v. Stahl*, 10 Am. B. R. 442, 205 Pa. St. 439; *Pratt v. Bothe* (C. C. A., 6th Cir.), 12 Am. B. R. 529, 130 Fed. 670.

Exception in favor of attorneys.—In the case of *In re Kross* (D. C., N. Y.), 3 Am. B. R. 187, 190, 96 Fed. 816, Brown, J., used



is a part of the original bankruptcy act of 1898 and intended by Congress to be a part of the uniform system of bankruptcy to be consistently administered by the courts given jurisdiction.<sup>349</sup> A payment of money or a transfer of property by a bankrupt made in contemplation of bankruptcy to an attorney or counselor in consideration of future professional services, does not constitute a preference under § 60-b.<sup>350</sup> The transfer to the attorney for his services must relate solely to contemplated bankruptcy and may not cover compensation for other services.<sup>351</sup> The only legal services which may be paid or secured under this provision are those directly connected with the bankruptcy proceeding; it was not the intent that an honest insolvent should lose the benefit of the act because he had no cash in hand with which to pay a lawyer to prepare the petition and schedules; but as to past services the claim

the following language: "While by the general terms of the act, the debtor is required to turn over all his unexempt property to the trustee, an exception is here created in favor of an attorney, to a reasonable amount, for services to be rendered to the debtor in bankruptcy; although this is valid so far only as subsequently approved by the court. The charges to be 'approved' are, I cannot doubt, for the same services which the 'fee' is designed to be allowed for under section 64, subd. b, par. 3. Both paragraphs are to be construed together, so that it becomes immaterial in the result whether the attorney obtains his compensation in the first instance from the bankrupt under section 60 refunding what, if anything, is disallowed by the court, or whether he waits for an allowance by the court under section 64. The latter is evidently the more convenient and desirable practice, and considering that prior payment for an attorney's services to the bankrupt is expressly allowed by section 60, I cannot agree to any such construction of the act as would deprive the attorney of a proper compensation for a necessary service, merely because he did not take it out of the estate at his own estimate in advance."

The transfer of an automobile to an attorney by a bankrupt prior to bankruptcy, the proceeds of a sale thereof to be applied on account of disbursements and fees for services rendered and to be rendered, is not invalid, where it appears that a reasonable fee for services rendered to the date of the transfer was equal to the value of the property transferred, since by section 60-b, a debtor, in contemplation of bankruptcy, may fully pay an attorney reasonable compensation for services to be rendered, and it is immaterial whether the payment is made at or after the professional engagement is entered into. In re Cummins (D. C., N. Y.), 28 Am. B. R. 365, 196 Fed. 224.

349. In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621.

350. In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621; Haffenberg v. Chicago Title & Trust Co. (C. C. A., 7th Cir.), 27 Am. B. R. 708, 192 Fed. 874.

**Future services.**—In re Furth v. Stahl, 205 Pa. St. 439, 10 Am. B. R. 442, Mr. Justice Mitchell, after quoting section 60-d, says: "A pledge or payment for a consideration given in the present or to be given in the future, whether in money or goods or services, is not a preference. The object of prohibiting preferences is to prevent favoritism, whether for secret benefit to himself or other reason among a debtor's creditors who ought in fairness to stand on the same footing. A transaction by which the debtor parts with something now, in return for something he acquires or is to acquire in the future, is not within the mischief the act was aimed against. Section 60, therefore, expressly recognizes this class of transactions, but as it is capable of abuse, provides for a re-examination and reduction if necessary to a reasonable amount, by the court on petition of the trustee or a creditor."

This same section was before the court of appeals for the sixth circuit in the case of Pratt v. Bothe (C. C. A., 6th Cir.), 12 Am. B. R. 529, 130 Fed. 670. In that case Judge Severans, speaking for the court, said: "It would rather seem that Congress, engaged, as many signs indicate, in guarding the assets of those in contemplation of bankruptcy, to the end that they might be brought without unnecessary expenditure to the hands of the trustee for distribution to creditors, while it would not deny to the debtor the right to employ and pay for legal assistance in his affairs during that critical period, yet proposed a restraint upon that privilege by requiring that such payment should be reasonable in amount—in short, proposed to apply to the incipient stage of bankruptcy the provident economy which it sought to apply to the administration of the bankrupt estate. It may have been thought that there was the same reason for such restraint at that stage of affairs as subsequently. And it is to be observed that the transaction would not become the subject of revision unless bankruptcy ensued. It put attorneys, solicitors and proctors in no worse position than it did some classes of those having business with the debtor."

351. Tripp v. Mitschrich (C. C. A., 8th Cir.), 31 Am. B. R. 602, 211 Fed. 424.

of the lawyer is no better than that of any other creditor.<sup>352</sup> If the services performed were reasonably necessary for the protection of the interests of the bankrupt, in contemplation of bankruptcy, compensation may be made therefor out of the bankrupt estate; the only question open in such a case being the reasonableness of the charge.<sup>353</sup> The law gives him the option, either of collecting his compensation in advance or of asking its allowance, as entitled to priority, under § 64-b (3); with, however, this exception, that, if he elects to pursue the former and presumably more tempting method, the court has the power to inquire into the payment and the trustee to recover any excess for the benefit of the estate.<sup>354</sup> This re-examination has been held merely a part of the proceeding and therefore not affected by the now abrogated doctrine that suits to recover preferences must be brought in the State courts;<sup>355</sup> and where this method is pursued the amount thus attempted to be used is subject to revision in the court of original jurisdiction, and not elsewhere.<sup>356</sup> Where payments are made to an attorney in the settlement of a running account, he is in the same position as any other creditor whose claim has been paid within the four months' period.<sup>357</sup> The general subject of the employment and compensation of attorneys is considered elsewhere.<sup>358</sup>

b. Practice.—Section 60-d is *sui generis* and does not contemplate the bringing of plenary suits for the recovery of preferential transfers in any jurisdiction. It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such debtor to have the aid and advice of counsel and in contemplation of bankruptcy proceedings which shall strip him of his property to make provisions for a reasonable compensation to his counsel, and in view of the circumstances the act makes provision that the bankruptcy court administering the estate may if the trustee or any creditor questions the transaction, re-examine it with a view to a

352. *Magee v. Fox* (C. C. A., 2d Cir.), 36 Am. B. R. 161, 229 Fed. 395.

353. *Matter of Humphreys* (D. C., N. Car.), 34 Am. B. R. 655, 221 Fed. 997. In the case of *In re Wood & Henderson*, 210 U. S. 246, 20 Am. B. R. 1, 52 L. Ed. 1046, 28 Sup. Ct. 621, the court said: "The act recognizes the right of \* \* \* a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And in view of the circumstances, the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness."

What constitutes transfer in contemplation of bankruptcy.—The fact that it might have occurred to a bankrupt when he made an assignment for the benefit of creditors that proceedings in bankruptcy might thereafter be instituted either by or against him, and that the attorney to whom the collection of moneys was intrusted might deduct his fees therefrom, coupled with the fact that he afterwards attempted to do so, cannot be considered as a payment in contemplation of the filing of a petition in bankruptcy, within

the meaning of subdivision d. *Matter of Galler* (D. C., N. J.), 32 Am. B. R. 620, 216 Fed. 558.

354. But compare *In re Stolp* (D. C., Wis.), 29 Am. B. R. 32, 199 Fed. 488, holding that the services must be actually rendered, if at all, before the institution of bankruptcy proceedings, and the payment or transfer specified in subsection d cannot apply to services rendered as specified in section 64-b, providing for an allowance to the bankrupt's attorney as part of the cost of administration, since the latter section refers to services rendered after the bankruptcy proceedings are instituted, to aid the bankrupt in performing his duties under the Act.

355. *In re Lewin* (D. C., Vt.), 4 Am. B. R. 632, 103 Fed. 860. The purpose and intent of this section has been carefully considered in the case of *In re Habegger* (C. C. A., 8th Cir.), 15 Am. B. R. 198, 71 C. C. A. 607, 139 Fed. 123.

356. *Lazarus v. Prentice* (Sup. Ct., U. S.), 234 U. S. 263, 32 Am. B. R. 559, 53 L. Ed. 1305, 34 Sup. Ct. 851.

357. *In re Shiebler & Co.* (D. C., N. Y.), 20 Am. B. R. 777, 163 Fed. 545.

358. See discussion under Section Sixty-two of this work.

determination of its reasonableness.<sup>359</sup> This section added a feature to the bankruptcy act not found in former acts regulating practice and procedure in bankruptcy, therefore, adjudications upon other provisions of the bankruptcy act or concerning the judiciary acts giving jurisdiction to the courts of the United States have no binding effect in the construction of this section.<sup>360</sup> There is no provision for the enforcement of this section in another court of bankruptcy, where the bankrupt may be personally served with process in a plenary suit; such court is not given authority to re-examine the transaction.<sup>361</sup> A State court has no jurisdiction to re-examine the transfer of property to counsel.<sup>362</sup> The practice on proceedings of this character—the attorney being usually an officer of the court—is both simple and summary. Being rarely resorted to, there are no stated rules or forms applicable. The amount paid must appear in Schedule B (4) of a voluntary petition. Proceedings to test the propriety of payments to an attorney for all services, namely, those rendered before the payment, as well as those services to be rendered in the bankruptcy proceeding itself, should be taken in the form of a motion to fix the allowance and for an order directing the return of the balance unless an issue is raised.<sup>363</sup> The motion may be heard on affidavits or orally. A suit to recover will rarely be necessary; though an order to restore, if not obeyed, is perhaps not now the foundation for a proceeding in contempt.<sup>364</sup> Since this section makes no provision for the service of process, it seems that such reasonable notice should be given to the parties affected, either by mail or otherwise as the court shall direct, so that an opportunity may be given them to appear in court and contest the reasonableness of the charges in question.<sup>365</sup> Any notice to the attorney directed by the court is sufficient.<sup>366</sup>

c. *Illustrative cases.*—Other cases which have originated under this subsection are collated in the foot-note.<sup>367</sup>

<sup>359</sup>. In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621.

<sup>360</sup>. In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621.

<sup>361</sup>. In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621.

<sup>362</sup>. In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621.

<sup>363</sup>. In re Shiebler & Co. (D. C., N. Y.), 20 Am. B. R. 777, 163 Fed. 545; Tripp v. Mitschrich (C. C. A., 8th Cir.), 31 Am. B. R. 662, 211 Fed. 424. In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621, Mr. Justice Day said, referring to section 60-d: "This section does not undertake to provide for a plenary suit, but for an examination and order in the course of the administration of the estate with a view to permitting only a reasonable amount thereof to be deducted from it because of payments of money or transfers of property to attorneys or counselors in contemplation of bankruptcy proceedings."

<sup>364</sup>. Cominger v. Louisville Trust Co., 184 U. S. 18, 7 Am. B. R. 421, 49 L. Ed. 413,

22 Sup. Ct. 293. Compare In re Sims, Fed. Cas. 12,688.

*Payment to attorney in contemplation of bankruptcy; recovery of excess.*—A petition by a trustee, for a re-examination by the court of payments by a debtor to an attorney in contemplation of bankruptcy, is a condition precedent to any determination by the referee that any portion of the amount paid to an attorney, as specified in the section, may be recovered by the trustee for the benefit of the estate as an excess over and above what is reasonable. Matter of Union Dredging Co. (D. C., Del.), 35 Am. B. R. 555, 225 Fed. 188.

<sup>365</sup>. In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621; Haffenberg v. Chicago Title & Trust Co. (C. C. A., 7th Cir.), 27 Am. B. R. 708, 162 Fed. 874.

<sup>366</sup>. In re Lewin (D. C., Vt.), 4 Am. B. R. 632, 103 Fed. 850.

<sup>367</sup>. In re Lewin (D. C., Vt.), 4 Am. B. R. 632, 103 Fed. 850; In re Kross (D. C., N. Y.), 3 Am. B. R. 187, 96 Fed. 816; In re Goodwin, 2 N. B. N. Rep. 445; In re Tollett, 2 N. B. N. Rep. 1096; In re Corbett (D. C., Wis.), 5 Am. B. R. 224, 104 Fed. 872. Compare also, under the law of 1867, In re Sidle, Fed. Cas. 12,844; In re Sims, Fed. Cas. 12,688.

## SECTION SIXTY-ONE.

### DEPOSITORIES FOR MONEY.

§ 61. **Depositories for Money.**—*a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

**Analogous provisions:** In U. S.: None in the law; but see General Order XXVIII under the law of 1867.

In Eng.: See miscellaneous provisions in General Rules.

In Can.: Act of 1919, § 26.

**Cross-references:** To the law: Distribution of consideration of composition on confirmation, § 12-a.

Duty of trustee to deposit money in designated depository, and disbursement thereof, § 47-a(3) (4).

Filing bonds and suits thereon, § 50-h.

To the General Orders: Payment of money deposited by check or warrant, XXIX.

### SYNOPSIS OF SECTION.

#### I. Depositories for Money, 929.

a. *Designation of banks*, 929.

b. *Depository to give bond; suit thereon*, 930.

c. *Disbursement of moneys by depositories*, 930.

#### I. DEPOSITORIES FOR MONEY.<sup>1</sup>

a. **Designation of banks.**—This section is new. Under the law of 1867, the practice was the same, but rested on the authority of a general order merely.<sup>2</sup> The provisions of this section and of section 47-a (3) are mandatory in form and should not be departed from unless the consent of all interested parties has been obtained.<sup>3</sup> The designation of banks is usually made by a standing order of the district court.

1. See also Am. B. R. Dig. § 580.

2. Act of 1867, General Order XXVII.

3. *Huttig Manfg. Co. v. Edwards* (C. C. A., 8th Cir.), 20 Am. B. R. 349, 354, 160 Fed. 619.

**Liability of trustee.**—Where a trustee, having deposited money of the bankrupt estate to his own account instead of in a

designated depository, pays therefrom to the bankrupt the amount set apart to him as exempt, as soon as set apart, by and with the approval of the referee, he should not be required to repay and deposit such sum in a designated depository. *Matter of Barnett* (D. C., Ga.), 32 Am. B. R. 585, 214 Fed. 263.

b. **Depository to give bond; suit thereon.**—The depository must give a bond, which should be large enough to cover the amount on deposit at any time. The fact that a bond has been given by a bank or trust company does not authorize a bankruptcy court to make summary orders directing the payment of deposits to receivers and trustees in bankruptcy while the affairs of the bank or trust company are being liquidated under a State law.<sup>4</sup> It is provided in § 50-h that bonds of "designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions." The reasonable if not necessary implication from the phrase "in the name of the United States" is that the suit shall be brought not by the United States, but by the trustee or other person injured in the name of the United States.<sup>5</sup> The beneficiaries under a bond given pursuant to this section include all depositing trustees and receivers of bankrupt estates, who should be made parties to a suit on such bond.<sup>6</sup> There is no right of subrogation under such a bond until the creditors have obtained from the principal or the surety payment not merely of the penalty, but of the debtor's entire obligation.<sup>7</sup>

c. **Disbursement of moneys by depositories.**—This is regulated by General Order XXIX. It is suggested that deposits by trustees be always in the name of, say "John Doe, as Trustee of Richard Roe, in Bankruptcy No. 765."<sup>8</sup> Each check should indicate the purpose for which it was drawn. Checks on the funds, if on the clerk's deposit, must be signed by the latter and countersigned by the judge;<sup>9</sup> if on a trustee's deposit, must be signed by the latter and countersigned by the referee. A bank which pays a check not so countersigned may do so at its peril.<sup>10</sup> This general order has been construed somewhat strictly.<sup>11</sup> Perhaps this is wise in exceptional cases. Still, a reasonable observance of proper safeguards against unauthorized withdrawals seems enough.

4. *Matter of Bologh* (D. C., N. Y.), 25 Am. B. R. 726, 185 Fed. 825.

**Preference upon dissolution of depository.**—Funds in the possession of a receiver or trustee in bankruptcy, which belong to the bankrupt estate, will be deemed to be "money paid into court" within the meaning of the New York Banking Law; and where such funds have been deposited by a receiver or trustee in a trust company which has been designated as a depository for the moneys of bankrupt estates under section 61 of the Bankruptcy Act, and which has also been designated by the State comptroller as a depository of all funds or moneys paid into court, he is entitled upon a dissolution of the trust company to a preference over its general creditors by virtue of section 190 of the New York Banking Law under which debts due from a trust company as a designated depository shall be given a preference. *Morris v. Carnegie*

*Trust Co.* (N. Y., Sup. Ct.), 29 Am. B. R. 884, 154 N. Y. App. Div. 596, 139 N. Y. Supp. 969.

5. *Illinois Surety Co. v. United States* (C. C. A., 7th Cir.), 36 Am. B. R. 82, 226 Fed. 665.

6. *Illinois Surety Co. v. United States* (C. C. A., 7th Cir.), 36 Am. B. R. 82, 226 Fed. 665.

7. *Illinois Surety Co. v. United States* (C. C. A., 7th Cir.), 36 Am. B. R. 82, 226 Fed. 665.

8. *In re Carr* (D. C., N. Car.), 9 Am. B. R. 58, 17 Fed. 572.

9. Sometimes they take the form of a court order, attested by the clerk. See also *Trustees' Combined Dividend check and Receipt*, in "Supplementary Forms," *post*.

10. *In re Cobb* (D. C., N. Car.), 7 Am. B. R. 58, 17 Fed. 572.

11. *Id.*

## SECTION SIXTY-TWO.

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### EXPENSES OF ADMINISTERING ESTATES.

§ 62. **Expenses of Administering Estates.**—*a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

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**Analogous provisions:** In U. S.: Act of 1867, § 38, R. S., §§ 5099, 5127A, 5127B; Act of 1800, § 29.

In Eng.: Act of 1883, § 73.

In Can.: None.

**Cross-references:** To the law: Duties or referees in respect to administration of estates, § 39.

Trustees to account for expenses of administration, § 47.

Priority of cost of administering estates, § 64-b (2) (3).

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### SYNOPSIS OF SECTION

#### EXPENSES OF ADMINISTERING ESTATES.

#### **I. Expenses of Administering Estates, 932.**

- a. Scope of section, 932.*
- b. Priority of payment, 932.*
- c. Auctioneer's services, 932.*
- d. Appraiser's services and fees, 933.*
- e. Sums paid for preservation of property, 933.*
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I. EXPENSES OF ADMINISTERING ESTATES.<sup>1</sup>

a. Scope of section.—Clearly the disbursements authorized by this section are (1) the "actual and necessary expenses," (2) incurred by officers<sup>2</sup> in the administration of estates. These include such disbursements as for service of process, for advertising and giving notices,<sup>3a</sup> for stationery used in replying to inquiries,<sup>3b</sup> for perpetuating testimony, for the trustee's bond, for the rent,<sup>3</sup> insurance, and other necessary expenses attending the closing out of a going business, for the fees of the appraisers, and for the compensation of attorneys employed by the trustee. They do not include clerical assistance to a referee, except in particular cases where necessary in order that the referee may adequately and efficiently perform his duties.<sup>3a</sup> Under the former law, the words were "all necessary disbursements made by him (the assignee) in the discharge of his duty."<sup>4</sup> The expenses properly chargeable against a bankrupt estate for administration are those which pertain to the property belonging to the estate; such expenses may not be charged against property which is subject to valid liens nor against those who have vested rights in the bankrupt's property.<sup>5</sup> The close connection between this section and § 64-b is apparent. Indeed, "expenses of administering estates" here seems to be the equivalent of "the cost of administration" in § 64-b (3).

b. Priority of payment.—There is nothing either here or in § 64 to indicate the order of payment in case the assets are not sufficient to pay these expenses and the priority debts. Nor has the question yet been squarely up.<sup>6</sup> A fair construction perhaps would be that "expenses of administering" are the same as the "cost of administration" in § 64-b (3), with the result that they will be paid only in case there is sufficient cash on hand to care for (1) taxes (2) the cost of preserving the estate, and (3) the filing fees paid by creditors.<sup>7</sup> Whether such expenses should be paid ahead of a valid specific lien at the time of the bankruptcy is a question.<sup>8</sup> A trustee will be surcharged the amount of penalties incurred for a failure to pay taxes, if there were funds of the estate available for the purpose when the taxes were due.<sup>9</sup>

c. Auctioneer's services.—The courts are reluctant to allow a trustee any sum in payment of the fees of an auctioneer.<sup>10</sup>

1. See also Am. B. R. Dig. § 584 and cross references thereunder.

2. Bankr. Act, § 1 (18); *Wilson v. Penn., etc.*, Co. (C. C. A., 3d Cir.), 8 Am. B. R. 109, 114 Fed. 742.

Payment from separate fund.—Where the trustee received a sum of money from bankrupt as the result of a successful prosecution for concealment of assets, which fund it was agreed should be used to defray the expenses of the bankruptcy administration, he can not charge his expenses against the general estate. *Matter of Di Cola* (C. C. A., 3d Cir.), 33 Am. B. R. 389, 217 Fed. 743.

Upon the bankruptcy of a stockbroker, the expense of engaging accountants to unravel the details in the books of a pledgee of the bankrupt, are chargeable to the claimants, except such as were able to trace their securities without the aid of the accountants. *Matter of Wilson & Co.* (D. C., N. Y.), 42 Am. B. R. 350, 252 Fed. 631.

2a. *Matter of Pierce Butler & Pierce Mfg. Co.* (C. C. A., 2d Cir.), 40 Am. B. R. 445, 246 Fed. 814; *United States v. U. S. Fidelity, etc. Co.* (D. C., Tex.), 45 Am. B. R. 295, 263 Fed. 442.

2b. *Matter of Capital Security Co.* (D. C., Tenn.), 41 Am. B. R. 184, 251 Fed. 927.

3. Consult *In re Wiesner* (D. C., N. Y.), 8 Am. B. R. 415, 115 Fed. 421.

3a. *Matter of Capital Security Co.* (D. C., Tenn.), 41 Am. B. R. 184, 251 Fed. 927.

4. Act of 1867, § 23, R. S. § 5099.

5. *Matter of Ranch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982 citing text; *Matter of O'Garra Coal Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 131, 235 Fed. 883.

A mortgagee is not entitled to an attorneys fee stipulated for in a mortgage note where the

property is sold by a trustee in bankruptcy. Such a fee can only be allowed where services are actually rendered. *Gugel v. New Orleans Bank* (C. C. A., 5th Cir.), 39 Am. B. R. 100, 239 Fed. 676.

6. Note *In re Burke* (Ref., Ohio), 6 Am. B. R. 502.

7. See Bankr. Act, § 63-a-b (1) (2).

8. *In re Frick* (Ref., Ohio), 1 Am. B. R. 719. *Contra: In re Tebo* (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419; *In re Bourlier Cornice & Roofing Co.* (D. C., Ky.), 13 Am. B. R. 535, 123 Fed. 958. *In Matter of Ranch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982. It was held that since the words "of estates" and "bankrupt's estates," as used in sections 62 and 64-b respectively relating to the payment of costs of administration, referred to the unincumbered as sets generally as distinguished from property upon which there is a specific lien, only such costs as are necessarily incident to the preservation of the particular estate, its conversion into money and payment thereof to the lienor, are entitled to payment in preference to a landlord's lien for rent.

9. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 820, 3 U. S. Dist. Ct. Haw. 641.

10. Payment of fees of auctioneer.—In the case of *In re Pegues*, 3 N. B. R. 80, Fed. Cas. 10,907, it was said: "The law contemplates that the assignee shall himself sell the property of the estate. There may be cases in which it will be proper to employ an auctioneer, but the necessity for so doing should be first shown to the court and leave obtained." This language was quoted with approval by Judge Longyear in the case of *In re Sweet* (D. C., Mich.), 9 N. B. R. 43, Fed. Cas. 12,038.

**d. Appraisers' services and fees.** When property is to be administered through the bankruptcy court it is often important that a reliable inventory be made at as early date as possible. The appraisal should be made carefully and accurately and compensation therefor, based on the nature of the estate and the circumstances of the case, should be paid and charged against the estate.<sup>11</sup>

**e. Sums paid for preservation of property.**—The trustee may be allowed for all sums necessarily paid for the preservation of the estate. If such sums have been paid by other parties he may, with the approval of the court, repay them especially if they had an interest in the preservation of the property, and if there were circumstances which necessitated prompt action on their part. Thus, if creditors prior to the appointment of a trustee should pay for liens which were being enforced in order to save the property for the estate they would be subrogated to the rights of the lienors.<sup>12</sup> And it has been held that where creditors have secured a lien of which they are deprived by the operation of the bankruptcy law, and the full benefit of their litigation accrues to others, the bankruptcy court may make a reasonable allowance as an indemnity for the cost and expenses through which such benefit has been obtained.<sup>13</sup> The compensation of a receiver in bankruptcy lies in the sound discretion of the court. This rule also applies to marshals in taking care of property.<sup>14</sup> Where expenses are incurred by a trustee in the preservation of property subject to mortgage, solely in the interest of creditors generally, they should be paid out of the estate, and may not be charged against the mortgagees.<sup>15</sup> The expenses of preserving and conducting the business of an estate pending action on a composition may become part of the expenses of administration in case the composition is finally denied and an adjudication made.<sup>15a</sup>

**f. Allowances to assignee for the benefit of creditors.**—An assignee for the benefit of creditors is not entitled to compensation merely by virtue of his office; his sole claim to any reward is measured by the extent of his labors in preserving the estate.<sup>16</sup> Where he has in good faith protected and preserved property to the benefit of the estate of the bankrupt he is entitled to payment of his legitimate expenses and to compensation for his services and for the services of his attorney out of the proceeds of the property he has received,<sup>17</sup> and the trustee in bankruptcy may properly allow his expenses in converting the property into money, but to the extent only to which his conversion of it into money has saved the estate in bankruptcy similar expenditure.<sup>18</sup> Thus, money paid by the assignee for the benefit of creditors, to discharge valid liens upon the property, may be allowed him.<sup>19</sup> An assignee for the benefit of creditors may also be allowed sums which, pursuant to the terms of the

11. Appraisers; fees.—Appraisers should make a careful and accurate inventory; it should be more than a mere formality, especially where receivers are operating a business. An allowance of two hundred and fifty dollars apiece to three appraisers should be approved, where it appears that the case was extraordinary, the business consisting of thirty stores scattered over New England, and that the receiver and trustee have handled over \$66,000.00. *Matter of Mills Tea & Butter Co.* (D. C., Mass.), 37 Am. B. R. 154, 235 Fed. 812.

A claim by an appraiser for services rendered a prior assignee for the benefit of creditors should be allowed as a preferred claim. *Matter of Cooper* (D. C., Mass.), 40 Am. B. R. 17, 343 Fed. 797.

12. In re Gregg, 3 N. B. R. 539, Fed. Cas. 576.

13. In re Lesser (D. C., N. Y.), 3 Am. B. R. 815, 100 Fed. 433. See also In re Little River Lumber Co. (D. C., Ark.), 3 Am. B. R. 682, 107 Fed. 558.

14. In re Scott (D. C., N. Car.), 3 Am. B. R. 625, 99 Fed. 404. As to compensation for services of custodian of property, see In re Prichardt (D. C., Wis.), 29 Am. B. R. 524, 198 Fed. 579.

15. In re Vulcan Foundry & Machine Co. (C. C. A., 3d Cir.), 24 Am. B. R. 825, 180 Fed. 671.

15a. *Matter of Kinnane Co.* (C. C. A., 6th Cir.), 39 Am. B. R. 593, 242 Fed. 769.

16. *Matter of Sobol* (D. C., N. Y.), 35 Am. B. R. 804, 230 Fed. 652. See also Am. B. R. Dig. § 586.

17. *Bramble v. Brett* (C. C. A., 8th Cir.), 30



assignment, he has paid over to the creditors.<sup>20</sup> Where an assignee for the benefit of creditors remains in possession of the property with the consent of the referee, and performs valuable services for the estate, his expenses and compensation for such services, up to the time of the adjudication, should be paid as disbursements.<sup>21</sup>

**g. Practice on allowance.**—Expenses of administration must be reported in detail under oath, and should be accompanied with proper vouchers, and be examined and approved by the court.<sup>21a</sup> Where the allowance is for the compensation of the trustee's attorney, he should always file an affidavit specifying the services performed. But such an allowance may be made without a notice to creditors.<sup>22</sup> Agreements and stipulations as to payment of costs and expenses, entered into by the attorneys for the respective parties have been sanctioned, and if fair and equitable will be enforced and carried into effect according to their terms.<sup>23</sup> The allowance of expenses is within the power and control of the District Court both as to occasion and amount and is not subject to collateral attack.<sup>23a</sup> As a rule, all disbursements by the trustee are itemized in his verified reports, and formally allowed on the coming up of such reports for confirmation.

## II. EMPLOYMENT AND COMPENSATION OF ATTORNEYS.<sup>24</sup>

**a. In general.**—Section 62 strictly only has to do with disbursements by the attorney for the trustee. For convenience, however, the subject of attorneys and their compensation is generally discussed here.<sup>25</sup> Economy in the administration of estates is the policy of the present law,<sup>26</sup> and is to be strictly enforced.<sup>27</sup> This principle should be kept in mind in fixing the compensation of attorneys.<sup>28</sup> Courts will require satisfactory evidence to show necessity of legal aid on the part of the trustee.<sup>29</sup> Attorneys should be allowed reasonable compensation for services rendered, but only when they are beneficial

Am. B. R. 526, 230 Fed. 385; *Matter of Morris & Rice* (D. C., Mass.), 44 Am. B. R. 140, 253 Fed. 712.

18. *MacDonald v. Moore*, 15 N. B. R. 26, 1 Abb. N. C. 53; *Burkholder v. Stump*, 4 N. B. R. 579, Fed. Cas. 2,165; *In re Cohn*, 6 N. B. R. 879, Fed. Cas. 2,966.

19. *Livingston v. Bruce*, 1 Blatch, 318.

20. *Craig v. Thompson*, 12 N. B. R. 81, Fed. Cas. 3,320, 2 Dill. 513; *Jones v. Kinney*, 4 N. B. R. 649, Fed. Cas. 7,473, 5 Ben. 259.

21. *In re Pattee* (D. C., Ct.), 16 Am. B. R. 450, 143 Fed. 994.

**Services of assignee.**—*In re Pauley* (Ref., N. Y.), 2 Am. B. R. 333, Referee Hotchkiss, writing the opinion, holds that a general assignee in possession, prior to bankruptcy, will be allowed out of the estate his disbursements in preserving the same, and that he will also be allowed reasonable fees as custodian of the estate, but he cannot be given fees as assignee, and that the attorneys of such assignee should not be allowed, except in unusual circumstances, anything out of the estate.

In the case of *Peter Paul Book Co.* (D. C., N. Y.), 5 Am. B. R. 105, 104 Fed. 796, the court held that no allowance can be made by a court of bankruptcy to an assignee under a general assignment for services rendered as custodian of the property prior to the filing of the petition in bankruptcy against the assignor, even though such services appear to have been for the benefit of the general creditors. The Court, however, said the bankruptcy court is authorized to make an allowance for services rendered in preserving the estate subsequent to filing the petition.

21a. *Matter of Capital Security Co.* (D. C., Tenn.), 41 Am. B. R. 184, 251 Fed. 927.

22. *In re Stotts* (D. C., Iowa), 1 Am. B. R. 641, 93 Fed. 438. Compare *In re Brinker*, Fed. Cas. 1,882.

23. *King Hardware Co. v. Christopher* (C. C. A., 5th Cir.), 34 Am. B. R. 422, 222 Fed. 224.

23a. *United States v. Wood* (C. C. A., 8th Cir.), 43 Am. B. R. 711, 257 Fed. 352.

24. See also Am. B. R. Dig. §§ 101-113.

25. See also Bankr. Act, § 64-b (3).

26. *Matter of Frank Mels* (Ref., Ky.), 18 Am. B. R. 104.

27. *In re Ketterer Manufacturing Co.* (D. C., Pa.), 19 Am. B. R. 646, 155 Fed. 987.

28. *In re Lang* (D. C., Tex.), 11 Am. B. R. 794, 127 Fed. 755.

29. **Necessity of employment of counsel by trustee.**—*In re Davenport* (D. C., Tex.), 3 N. B. R. 77, Fed. Cas. 3,587, holding that while in prosecuting or defending suits the assignee had the right to employ counsel, and also had the right to obtain legal advice whenever really necessary to enable him to act for the interests of the estate or of creditors, still an allowance to an assignee for the services of counsel in connection with the compromise of an ordinary claim could not be allowed, it being a proceeding of such character that an assignee of ordinary intelligence would be able to act for himself and without the aid of an attorney. But in *re Colwell* (D. C., Mass.), 15 N. B. R. 92, it was held that an allowance was proper to the trustee for procuring the services of counsel to investigate as to the affairs of the estate, although no litigation resulted.

to the estate.<sup>30</sup> An application to the court for the removal of an attorney for a trustee or receiver will be considered, but will not be granted unless clearly shown to be necessary for the interests of creditors and the estate.<sup>31</sup>

b. *Employment of attorney for the trustee.*<sup>32</sup>—This is carefully regulated by statute in England; and the law there, being expressive of the experience of centuries, may be consulted with profit. The reported cases under the law of 1867, while not numerous, are valuable.<sup>33</sup> Under the present law, it has been held that the trustee's attorney may be chosen by the creditors in the same way the trustee is chosen;<sup>34</sup> although the better opinion is that he should employ his attorney himself without interference from the creditors.<sup>35</sup> Also, that the attorney should not have been the attorney for the bankrupt,<sup>36</sup> or for an interest adverse to the general creditors.<sup>37</sup> It is the duty of the trustee to employ counsel to protect the interests of the estate in pending litigations.<sup>38</sup>

c. *Compensation of attorneys.*—(1) *IN GENERAL.*—An attorney's right to compensation is incident to his employment. Whether it shall be paid out of the assets of a bankrupt estate is the question considered here. It has been held that, under § 64-b (3), the attorneys for the petitioning creditors and for the bankrupt in involuntary cases have an absolute right to compensation;<sup>39</sup> the amount only is discretionary. It is suggested, however, that the clause "as the court may allow" has relation to all the words of the subdivision and not merely to the clause "and to the bankrupt in voluntary cases."<sup>40</sup> Such a view would harmonize the statute and the practice under it. But this discretion must be sound and not unrestrained; it is subject to review.<sup>41</sup> Generally speaking, the determination as to the amount to be paid

30. *Randolph v. Scruggs*, 190 U. S. 533; 10 Am. B. R. 1, 47 L. Ed. 1165, 23 Sup. Ct. 710; *In re Zier & Co.* (D. C., Ind.), 11 Am. B. R. 527, 142 Fed. 102; *In re Covington* (D. C., N. Car.), 13 Am. B. R. 150, 132 Fed. 894; *In re Duran Mercantile Co.* (D. C., N. Mex.), 29 Am. B. R. 450, 199 Fed. 961.

31. *In re Champion Wagon Co.* (D. C., N. Y.), 28 Am. B. R. 51, 193 Fed. 1004.

32. See also Am. B. R. Dig. § 106.

33. For instance, *In re Drake*, Fed. Cas. 4,068; *In re Davenport*, Fed. Cas. 3,587; *In re Noyes*, Fed. Cas. 10,371. For an order of appointment under the present law, see "Supplementary Forms," *post*.

34. *In re Smith* (Ref., N. Y.), 1 Am. B. R. 37; *In re Little River Lumber Co.* (D. C., Ark.), 3 Am. B. R. 682, 101 Fed. 558.

35. *In re Abram* (D. C., Cal.), 4 Am. B. R. 575, 103 Fed. 272; *In re Arnett* (D. C., Tenn.), 7 Am. B. R. 522, 112 Fed. 770; *In re Baber* (D. C., Tenn.), 9 Am. B. R. 406, 119 Fed. 525; *Matter of Columbia Iron Works* (D. C., Mich.), 14 Am. B. R. 526, 142 Fed. 234.

36. *In re Teuthorn* (Ref., Mass.), 5 Am. B. R. 767.

*Attorney for bankrupt.*—A trustee or receiver should not ordinarily employ the attorney who represents the bankrupt or one representing interests in a litigation which are adverse to the general estate, or in conflict with other interests represented by the trustee; and where there are matters in

controversy between different classes of creditors, the court will usually decline to authorize the employment by the trustee of an attorney representing one of such classes. *In re Smith* (C. C. A., 6th Cir.), 29 Am. B. R. 628, 203 Fed. 369.

37. *In re Rusch* (D. C., Wis.), 5 Am. B. R. 565, 106 Fed. 607; *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

38. *In re McKenna* (D. C., N. Y.), 15 Am. B. R. 4, 137 Fed. 611.

39. *In re Curtis* (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784, approved and followed in *Smith v. Cooper* (C. C. A., 5th Cir.), 9 Am. B. R. 755, 120 Fed. 230. Compare *In re Smith* (D. C., N. Car.), 5 Am. B. R. 559, 106 Fed. 30.

40. *In re Morris* (D. C., N. Car.), 11 Am. B. R. 145, 125 Fed. 841; *In re Kross* (D. C., N. Y.), 3 Am. B. R. 187, 96 Fed. 816.

41. *In re Curtis* (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784; *In re Burrus* (D. C., Va.), 3 Am. B. R. 296, 97 Fed. 926; *Smith v. Cooper* (C. C. A., 5th Cir.), 9 Am. B. R. 755, 120 Fed. 230. But it will not usually be disturbed. *In re Tebo* (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419.

*Review of exorbitant fee.*—Still, in the exercise of its judicial discretion, the court will not allow an attorney's fee which is exorbitant, though recommended by the referee. *In re Carr* (D. C., N. Car.), 8 Am. B. R. 636, 116 Fed. 566; *Matter of Grant* (C.

attorneys will not be disturbed on appeal except for manifest error.<sup>42</sup> Whether compensation shall be allowed depends on the facts of each case.<sup>43</sup> In determining the amount of compensation, the value of the estate must be taken into consideration.<sup>44</sup> It is not so much what was done by the attorney, as what was really required.<sup>45</sup> The court should not be called upon to settle differences between counsel as to what proportion of the total amount allowed each should receive.<sup>46</sup> The bankrupt should act in good faith and not delay the proceedings in order to have a fee allowed to his attorney.<sup>47</sup> Neither the attorney for petitioning creditors in involuntary bankruptcy proceedings, nor the attorney for the bankrupt, can be allowed compensation out of a fund derived from the sale of property under mortgage foreclosure proceedings, where it appears that such bankruptcy proceedings were of no benefit to the mortgagee.<sup>48</sup> But if a mortgagee has his lien enforced in such proceedings and thus profits by the result he may be charged with counsel fees.<sup>49</sup> If the right to attorney's fees for the collection of a mortgage debt depends upon a statute requiring notice of foreclosure, such right is inchoate dependent upon suit being brought after notice and non-payment by the mortgagor; if bankruptcy intervene prior to the foreclosure, the mortgagee will not be entitled to attorney's fees.<sup>50</sup> In some jurisdictions the claim of a mortgagee for attorney's fees incurred by him in protecting his lien during bankruptcy proceedings of the mortgagor will be allowed where the mortgage contained a stipulation that the mortgagee should be paid attorney's fees in case he was obliged to employ counsel.<sup>51</sup> If the referee is not satisfied as to the services rendered by an attorney, he may suspend the hearing for a reasonable time,<sup>52</sup> and it is his duty to reduce the

C. A., 2d Cir.), 38 Am. B. R. 210, 238 Fed. 132, holding that the amount to be allowed as compensation for attorneys is within the discretion of the court, and the determination will not be disturbed unless there is a plain abuse of discretion.

42. *Matter of Atcherley* (D. C., Hawaii), 25 Am. B. R. 827; *Matter of Iron Clad Mfg. Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 69, 215 Fed. 877.

43. See *In re Evans* (D. C., N. Car.), 6 Am. B. R. 730 (and modification on rehearing in foot-note), 116 Fed. 909.

**Waiver.**—Where attorneys for the bankrupt, for the trustee and petitioning creditors, and for the trustee himself, all waive in writing the deposit in a composition proceeding in a sum sufficient to pay their fees, in order to expedite and facilitate the proceeding, they may not thereafter insist upon payment out of the estate. It seems that if the bankrupt be benefited by the waiver he himself should pay the attorneys. *Matter of Frischnecht* (C. C. A., 2d Cir.), 34 Am. B. R. 530, 233 Fed. 417.

44. *In re Ellett Electric Co.* (D. C., N. Y.), 28 Am. B. R. 453, 196 Fed. 400.

45. *In re Connell & Sons* (D. C., Pa.), 9 Am. B. R. 474, 120 Fed. 846.

46. *Hall v. Reynolds* (C. C. A., 8th Cir.), 36 Am. B. R. 721, 231 Fed. 946.

47. *In re Woodward* (D. C., N. Car.), 2 Am. B. R. 692, 95 Fed. 955. Thus, a fee will not be allowed for defending the bank-

rupt for contempt. *In re Mayer* (D. C., Wis.), 4 Am. B. R. 238, 101 Fed. 695.

48. *In re Goldville Mfg. Co.* (D. C., N. Car.), 10 Am. B. R. 552, 118 Fed. 892. As to allowance to attorney for services performed for mortgagee on foreclosure, see *In re Clausen & Co.* (D. C., N. Car.), 21 Am. B. R. 34, 164 Fed. 300.

49. *In re Torchia* (D. C., Pa.), 26 Am. B. R. 188, 185 Fed. 576.

50. *In re Weiland* (D. C., Ga.), 23 Am. B. R. 620, 197 Fed. 116.

51. *Matter of Ferreri* (D. C., La.), 26 Am. B. R. 659, 168 Fed. 675.

In Pennsylvania, the bankruptcy court may, under the settled rule of practice, reduce an attorney's commission, stipulated for in the bond and mortgage. *In re Wendel* (D. C., Pa.), 18 Am. B. R. 665, 152 Fed. 672.

**Stipulation of fees in mortgage.**—Where a mortgage made by the bankrupt stipulated for payment of attorney's fees upon foreclosure and the mortgagee came into the bankruptcy court, proved his claim, and a private sale of the property was made by the trustee, this sale is not an equivalent of a foreclosure, and the attorney's fee provided for in the mortgage should not be allowed. *In re Roche* (C. C. A., 5th Cir.), 4 Am. B. R. 370, 101 Fed. 956.

52. *In re Dreeben* (D. C., Tex.), 4 Am. B. R. 140, 101 Fed. 110.

amount allowed by a trustee as counsel fees if they are excessive.<sup>53</sup> Compensation cannot be allowed save for "professional services actually rendered." Additional precedents will be found under the appropriate paragraphs, *post*.

(2) FOR CLAIMANTS.—Attorneys for mere claimants are not entitled to allowances out of the estate;<sup>54</sup> not even attorneys for the petitioning creditors for services after the appointment of the trustee,<sup>55</sup> nor attorneys for creditors who object to the allowance of claims of other creditors.<sup>56</sup> But where the trustee has refused or neglected to recover assets or resist a questionable claim, and individual creditors do this for the benefit of all, their attorneys will be allowed compensation for so doing;<sup>57</sup> attorneys who come to the assistance of the trustee in proceedings instituted by him to compel the bankrupt to disclose property retained by him, may be compensated.<sup>58</sup>

(3) FOR PETITIONING CREDITORS IN INVOLUNTARY CASES.<sup>59</sup>—The allowance to attorneys for the petitioning creditors must be confined to services actually rendered in filing the petition and prosecuting it to the adjudication of the bankrupt; when this is done the estate passes under the control and jurisdiction of the court and its officers, and there is then neither necessity nor opportunity for the attorneys to render actual services to the estate.<sup>60</sup> The amount depends on a variety of circumstances, unnecessary to enumerate here. The allowance of a fee to attorneys for petitioning creditors is a matter of right;<sup>60</sup> the amount of the allowance is not wholly a matter of discretion; it must be reasonable, determined upon evidence of the service performed and of the value of such service; it rests in legal judgment and judicial discretion, but not in unrestrained discretion.<sup>61</sup> The elements to be taken into consideration in making an allowance to attorneys for petitioning creditors are (1) the time properly required to be spent on the controversy; (2) the intricacy of the question involved; (3) the amount involved; (4) the strenuousness of the opposition encountered; (5) the results achieved therein; as well as (6) the policy of the bankruptcy act toward economy in administration.<sup>62</sup> The counsel fees allowed in proceedings

<sup>53</sup> *Matter of Ferreri* (D. C., La.), 26 Am. B. R. 656, 188 Fed. 675.

<sup>54</sup> *In re Smith* (D. C., N. Car.), 5 Am. B. R. 559, 108 Fed. 39; *In re Coventry Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 623, 171 Fed. 673; *In re Allert* (D. C., N. Y.), 28 Am. B. R. 101, 173 Fed. 691.

<sup>55</sup> *In re Silverman* (D. C., N. Y.), 3 Am. B. R. 227, 97 Fed. 32.

<sup>56</sup> *Matter of Fletcher* (Ref., N. Y.), 10 Am. B. R. 398; *In re Rondarmour* (C. C. A., 6th Cir.), 24 Am. B. R. 49, 177 Fed. 379. See *In re Worth* (D. C., Iowa), 12 Am. B. R. 566, 130 Fed. 927. A claim for such an allowance should be formally presented. *In re Stoddard Bros. Lumber Co.* (D. C., Idaho), 22 Am. B. R. 435, 169 Fed. 190.

<sup>57</sup> *In re Groves*, 2 N. B. N. Rep. 466; *In re Little River Lumber Co.* (D. C., Ark.), 3 Am. B. R. 682, 101 Fed. 558.

<sup>58</sup> *In re Felson* (D. C., N. Y.), 15 Am. B. R. 185, 139 Fed. 275.

<sup>59</sup> See also Am. B. R. Dig. § 104.

<sup>60</sup> *Matter of Munford* (D. C. N. Car.), 43 Am. B. R. 218, 255 Fed. 108.

<sup>61</sup> *Matter of Williams* (D. C., Ohio), 38 Am. B. R. 769.

Only one fee will be allowed irrespective of the number of attorneys employed. *Matter of Munford* (D. C., N. Car.), 43 Am. B. R. 218, 255 Fed. 108.

**Right to employ attorney.**—A creditor who thinks that an involuntary bankruptcy petition should be filed, has the right to employ an attorney to investigate the legal questions involved, to give such advice as is necessary, to

investigate records and to prepare the petition and file it, beyond this, an attorney's services are not necessary, and an allowance should not be made. *Matter of Sage* (D. C., Ia.), 35 Am. B. R. 625, 225 Fed. 397.

<sup>61</sup> *In re Curtis* (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784; *Smith v. Cooper* (C. C. A., 5th Cir.), 9 Am. B. R. 755, 120 Fed. 230; *In re Southern Steel Co.* (D. C., Ala.), 22 Am. B. R. 476, 169 Fed. 702; *Matter of Williams* (D. C., Ohio), 38 Am. B. R. 762; *Hall v. Reynolds*, (C. C. A., 8th Cir.), 36 Am. B. R. 721, 231 Fed. 946; *Matter of Munford* (D. C., N. Car.), 43 Am. B. R. 218, 255 Fed. 108.

**Additional allowance.**—Evidence insufficient to authorize. *Matter of Terrell* (D. C. S. Car.), 40 Am. B. R. 138, 250 Fed. 317.

<sup>62</sup> *Matter of Smith & Oakland Motor Co.* (Ref., N. J.), 32 Am. B. R. 363.

**Amount of allowance.**—The value of an attorney's services in preparing a petition and filing the same, and procuring the adjudication, should not be more than \$100 in ordinary cases. *Matter of Sage* (D. C., Ia.), 35 Am. B. R. 625, 225 Fed. 397. Where petition was brief and there was no contest, and the attorney did not prepare the schedules or perform duties after adjudication an allowance of \$100 was considered liberal. *Matter of Atkins* (D. C., Ky.), 34 Am. B. R. 794, 225 Fed. 639. Where the bankrupt offered a compromise of forty cents on the dollar, a fee of \$50 has been held sufficient compensation for the attorney for the petitioning creditors, and \$20 for the attorney for the bank-

for seizing and holding the property of an alleged bankrupt are for special services, and are a distinct matter.<sup>63</sup> Where two proceedings are started by attorneys representing different creditors, and are thereafter consolidated by order of the court, only a single attorney's fee will be allowed, and this should be equitably divided.<sup>64</sup> Where two petitions are presented, the first being defective and being shown to be in bad faith, and was subsequently amended to include acts of bankruptcy not alleged in the first petition, the attorneys for the second petitioning creditors are entitled to an allowance for services in securing the adjudication.<sup>65</sup> Compensation should be paid to attorneys for petitioning creditors out of the fund remaining for distribution to unsecured creditors and not out of the proceeds of the sale of incumbered property, prior to the payment of valid liens.<sup>66</sup> An allowance will not be permitted for services rendered before proceedings were begun,<sup>67</sup> nor for services rendered necessary by the attorney's own negligence,<sup>68</sup> nor for solicitation of other creditors to join in the petition.<sup>69</sup> Attorneys for petitioning creditors who are afterwards appointed trustees are not entitled to allowances for services as attorneys in addition to their commissions as trustees, after appointment as such.<sup>70</sup>

(4) FOR RECEIVERS.—(I) *Appointed in bankruptcy*.<sup>71</sup>—The rules applicable to the compensation of attorneys for the trustee apply also to those

rupt. In re Talton (D. C., N. C.), 14 Am. B. R. 617, 137 Fed. 173.

Where \$2,000 was distributed, allowance of \$200 to creditors' attorney was approved. In re Covington (D. C., N. Car.), 13 Am. B. R. 150, 132 Fed. 884. In an important case, an allowance of \$12,500 was cut down by the circuit court of appeals to \$2,000. In re Curtis (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784. A fee of \$5,000 to attorneys for petitioning creditors was allowed where the estate created by the acts of such attorneys approximated \$15,000 in value, and it appeared that the services rendered required a high grade of ability and energy, that the time employed was insufficient to command equal compensation in private practice, that the results had been accomplished against the most strenuous opposition, and the creditors had received the full amount of their claims. In re Berkowitz (Ref., N. J.), 22 Am. B. R. 236. For other cases dealing with the amount of allowance to the attorney for petitioning creditors, see In re Woodard (D. C., N. Car.), 2 Am. B. R. 692, 95 Fed. 955; In re Silverman (D. C., N. Y.), 3 Am. B. R. 227, 97 Fed. 325; In re Harrison Mercantile Co. (D. C., Mo.), 2 Am. B. R. 419, 95 Fed. 123; In re Ghiglione (D. C., N. Y.), 1 Am. B. R. 580, 93 Fed. 186; Matter of Munford (D. C., N. Car.), 43 Am. B. R. 218, 255 Fed. 108.

63. Hoffschlaeger Co. v. Young Nap (D. C., Hawaii), 12 Am. B. R. 526, 2 U. S. D. C., Hawaii 108.

64. In re McCracken & McLeod (D. C., La.), 12 Am. B. R. 95, 129 Fed. 621; In re Coney Island Lumber Co. (D. C., N. Y.), 29 Am. B. R. 91, 199 Fed. 197, holding that but one allowance, based on actual value, can be made for all services rendered to the parties whose rights are embodied in and depend upon the application of the petitioning creditors.

65. In re Southern Steel Co. (D. C., Ala.), 23 Am. B. R. 476, 169 Fed. 702. See also Matter of Fischer (C. C. A., 2d Cir.), 23 Am. B. R. 427, 175 Fed. 531.

66. Matter of Rauch, (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982.

**Compensation of attorneys for petitioning creditors out of general fund.**—Where it appeared that the property of a bankrupt consisted largely of real estate heavily incumbered by liens which would have to be paid before the petitioning and other unsecured creditors could realize anything, it was error for the referee to decree compensation to be paid the attorneys for the petitioning creditor out of the proceeds of a sale of the property when made, it being impossible to ascertain what surplus, if any, would remain for the unsecured creditors after payment of liens. In re Gillaspie (D. C., W. Va.), 27 Am. B. R. 59, 190 Fed. 88. See also In re Freeman (D. C., Ga.), 27 Am. B. R. 16, 190 Fed. 48, holding that where, upon the filing of an involuntary petition in bankruptcy, by a small creditor, the alleged bankrupt's answer the next day admitting bankruptcy, and thereupon the referee, without notice to other creditors, passes an order of adjudication, the proceeding will be deemed only nominally an involuntary one, and fees of attorneys for the petitioning creditors will not be paid out of the proceeds of the sale of bankrupt's stock of goods to the detriment of one holding a valid mortgage thereon, who participated in the proceedings, if at all, only for the purpose of objecting.

**Allowance out of funds payable to secured creditor.**—Although a secured creditor may object to the payment of the fees of attorneys for the petitioning creditors out of funds payable to it, it is estopped from doing so by its acquiescence for several months. Liller Bldg. Co. v. Reynolds (C. C. A., 4th Cir.), 40 Am. B. R. 371, 247 Fed. 90.

67. Matter of Hart & Co. (D. C., Hawaii), 16 Am. B. R. 725.

68. In re Francis Levy Outfitting Co., Ltd. (D. C., Hawaii), 29 Am. B. R. 8.

69. Matter of Sage (D. C., Ia.), 35 Am. B. R. 625, 225 Fed. 397.

70. Holland v. McIlwaine (C. C. A., 4th Cir.), 34 Am. B. R. 416, 223 Fed. 777.

71. See also Am. B. R. Dig. § 107.

appointed for receivers.<sup>72</sup> Ordinarily the duties of a receiver in bankruptcy neither require nor justify the employment of an attorney, and no claim for such services is chargeable *per se* against the estate predicated alone upon the fact of employment and services rendered.<sup>73</sup> An attorney for a receiver will be allowed compensation for services only to the extent that the services were rendered in behalf of the estate or to its benefit,<sup>74</sup> and the fixing of the compensation to be made rests in the sound discretion of the district judge.<sup>75</sup> No allowance will be made to the receiver for services rendered by his attorney in the interest of petitioning creditors who were his clients.<sup>76</sup> The receiver should engage counsel who stand independent of the parties to the litigation, and the estate is not chargeable for services which may be given to the receiver by the attorney for either party during the continuance of such relation.<sup>77</sup> The number of attorneys employed by a receiver should not enter into the allowance of fees, which should be made as though one attorney had been employed.<sup>78</sup>

(II) *Appointed by State court.*<sup>79</sup>—Where a receiver has been appointed in a State court in an action antagonistic to the interests of the general creditors of the bankrupt, an attorney employed by the receiver will not be allowed compensation for his services.<sup>80</sup> A State court may not incumber the assets of the bankrupt's estate for services performed by attorneys for a receiver after the proceedings in which he was appointed have been suspended by bankruptcy.<sup>81</sup> Services rendered by an attorney of a receiver appointed in a State court which are beneficial to the estate of a bankrupt corporation, may, in pursuance of unmistakable equitable consideration, be paid for out of the estate.<sup>82</sup>

72. See "For Trustees," in this section, *post*.

73. *In re T. E. Hill Co.* (C. C. A., 7th Cir.), 20 Am. B. R. 73, 159 Fed. 73.

74. *In re Ketterer Manufacturing Co.* (D. C., Pa.), 19 Am. B. R. 646, 155 Fed. 987; *In re Huddleston* (D. C., Ga.), 21 Am. B. R. 669, 167 Fed. 428. Text, cited and approved in *In re Leonard* (D. C., Nev.), 24 Am. B. R. 97, 108, 177 Fed. 503.

75. *Matter of Cash-Papworth, Grow-air* (C. C. A., 2d Cir.), 31 Am. B. R. 709, 210 Fed. 24.

76. *In re Oppenheimer* (D. C., Pa.), 17 Am. B. R. 59, 146 Fed. 140; *In re Falkenberg* (D. C., N. Mex.), 30 Am. B. R. 718, 206 Fed. 835.

77. *In re Kelley Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 746.

**Agreement by receiver to employ attorney if appointed.**—No allowance should be made to attorneys who have been employed by a trust company acting as receiver and trustee under an agreement made in advance that if such attorneys procured its appointment they should be retained as advisors. *In re Smith* (C. C. A., 6th Cir.), 29 Am. B. R. 628, 203 Fed. 369.

78. *In re Falkenberg* (D. C., N. Mex.), 30 Am. B. R. 718, 206 Fed. 835.

79. See also Am. B. R. Dig. § 108.

80. *In re Zier* (C. C. A., 7th Cir.), 15 Am. B. R. 646, 142 Fed. 102, holding that the disallowance of fees in such a case rests

primarily on the fact that the services were not beneficial to the estate.

81. *Lambert v. National Hog Co.* (Pa. Com. Pl.), 43 Am. B. R. 240, 67 Pittsb. Leg. J. 219.

**Fees allowed attorneys of receiver in State court.**—*In re Rogers* (D. C., Ga.), 8 Am. B. R. 723, 116 Fed. 435, the court said: "The Federal court will decline to recognize the authority of the State court to incumber assets of a bankrupt for the fees and expenses of its officers entered after the proceedings therein were suspended by the bankruptcy proceedings. . . . If the assets are delivered to the trustees by the receiver of the State court, this court will consider any application for compensation which may be made by officers of the State court, and, if allowable, will grant suitable compensation."

82. **Compensation of attorneys for receiver of corporation appointed by State court.**—Where a fee has been allowed attorneys by a State court for services rendered the receiver of a corporation in that court and ordered to be paid by such receiver out of any funds available for that purpose, and prior to the making of such order the corporation has become bankrupt and its assets have passed under the jurisdiction of the bankruptcy court, such fee is not a priority claim constituting a lien on the assets of the bankrupt corporation. Such claim is allowable only upon equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial in fact.

(5) **FOR BANKRUPTS IN INVOLUNTARY CASES.**<sup>82</sup>—Here the statute limits compensation to services rendered to the bankrupt while performing the duties put on him by the act.<sup>84</sup> There has been some discussion as to the meaning of the words.<sup>85</sup> Where there are separate attorneys for different partnership bankrupts but one allowance should be made.<sup>86</sup> The test seems to be: did the performance of the prescribed duties materially benefit or hasten the administration of the estate,<sup>87</sup> and, if so, were the services of the bankrupt's attorney both necessary and instrumental to either of those ends? The bankrupt's attorney may not be allowed for services rendered in defending a suit by the trustee to compel the bankrupt to turn over assets,<sup>88</sup> nor for contesting a petition for adjudication of bankruptcy,<sup>89a</sup> nor for attending a first meeting of creditors, where it does not appear that his presence was of assistance to the bankrupt in performing duties required under the act,<sup>89</sup> nor for resisting the claim of a receiver appointed by a State court prior to adjudication,<sup>90</sup> nor for endeavoring to effect a composition with the bankrupt's creditors.<sup>90a</sup>

(6) **FOR BANKRUPTS IN VOLUNTARY CASES.**<sup>91</sup>—Here the cases take a wide range. The allowance itself and the amount are both discretionary. It has been held on the one hand that the attorney for the bankrupt is merely a general creditor entitled to dividends;<sup>92</sup> and, on the other, that he is entitled to an allowance for all services to the bankrupt during the proceeding, whether beneficial to the estate or not, even those connected with the discharge; and, in addition, to priority of payment.<sup>93</sup> The safer rule is that the bankrupt's attorney is only entitled to compensation out of the estate for services which, though performed for the bankrupt, are really "in aid of the estate and its administration."<sup>94</sup> This excludes services in connection with the discharge,<sup>95</sup> and, it is thought, save in exceptional instances, everything done after the appointment of the trustee. But it has been held that an attorney for a

In re Standard Fuller's Earth Co. (D. C., Ala.), 26 Am. B. R. 562, 196 Fed. 578. See *State of Missouri v. Angle* (C. C. A., 8th Cir.), 38 Am. B. R. 394, 236 Fed. 644, affg. 35 Am. B. R. 436, 224 Fed. 525.

82. See also Am. B. R. Dig. § 108.

84. See Bankr. Act, § 7, *ante*; In re *Payne* (D. C., N. Y.), 18 Am. B. R. 192, 151 Fed. 1,018; In re *Woodard* (D. C., N. Car.), 2 Am. B. R. 692, 95 Fed. 955.

**Compensation of attorney for bankrupt.**—An allowance of \$25 to the attorney for the debtor in contemplation of bankruptcy, is sufficient, where he never appeared before the referee and did nothing but prepare bankrupt's schedules which were brief and did not require much labor. In re *Fullick* (D. C., Pa.), 28 Am. B. R. 634, 201 Fed. 463.

**Claim by attorneys for bankrupt examined and held.** that \$500, received by them from the debtor in contemplation of bankruptcy, is ample consideration for all services performed and disbursements. Matter of *Union Dredging Co.* (D. C., Del.), 35 Am. B. R. 555, 225 Fed. 188.

85. See foot-notes of next paragraph, where the case in both voluntary and involuntary bankruptcy are collated.

86. In re *Eschwege* (Ref., N. Y.), 8 Am. B. R. 282.

87. In re *Goldville Mfg. Co.* (D. C., S. Car.), 10 Am. B. R. 552, 118 Fed. 892; In re *Rosenthal* (D. C., Mo.), 9 Am. B. R. 626, 120 Fed. 848.

88. In re *Felson* (D. C., N. Y.), 15 Am. B. R. 185, 139 Fed. 275; In re *Stratemeyer* (D. C., Hawaii), 14 Am. B. R. 120, 2 U. S. D. C., Hawaii 269.

**89a. Services in resisting adjudication.**—Where the minority stockholders of a corporation employed an attorney to resist adjudication in bankruptcy, and later sold their stock, and the attorney withdrew from the case and adjudication was had by consent, he should not be allowed payment from the estate for professional services rendered the alleged bankrupt in resisting adjudication. Matter of *Murphy Boot & Shoe Co.* (D. C., Mass.), 39 Am. B. R. 811, 242 Fed. 991.

89. In re *Francis Levy Outfitting Co., Ltd.* (D. C., Hawaii), 29 Am. B. R. 8.

90. *Whitla & Nelson v. Boyd* (C. C. A., 9th Cir.), 32 Am. B. R. 469, 213 Fed. 587.

90a. Matter of *Kinnane Co.* (C. C. A., 6th Cir.), 39 Am. B. R. 593, 242 Fed. 769.

91. See also Am. B. R. Dig. § 103.

92. In re *Beck* (D. C., Iowa), 1 Am. B. R. 536, 92 Fed. 880.

93. In re *Cross* (D. C., N. Y.), 3 Am. B. R. 187, 96 Fed. 816; Matter of *Hitchcock* (D. C., Hawaii), 17 Am. B. R. 664.

A reasonable fee for the bankrupt's attorney, as part of the costs of administration, is entitled to priority of payment out of the proceeds of the sale of mortgaged property. Matter of *Meis* (D. C., Ky.), 18 Am. B. R. 104.

94. In re *Mayer* (D. C., Wis.), 4 Am. B. R. 238, 101 Fed. 635, 697; In re *Terrill* (D. C., Vt.), 4 Am. B. R. 625, 103 Fed. 731; In re *Anderson* (D. C., S. Car.), 4 Am. B. R. 640, 103 Fed. 854.

95. In re *Brudlin* (D. C., Minn.), 7 Am. B. R. 296, 112 Fed. 306; In re *Averill*, 1 N. B. N. 544; In re *Duran Mercantile Co.* (D. C., N. Mex.), 29 Am. B. R. 450, 190 Fed. 961. See also *Ex parte Hale*, Fed. Cas. 5,910.

voluntary bankrupt is entitled to an allowance for services reasonably necessary to enable the bankrupt to perform his duties under the act and to secure the benefit of its provisions, including his discharge when entitled thereto.<sup>95</sup> Legal services to a bankrupt in having his exemption allowed is a matter between the bankrupt and his attorneys and fees therefor are not allowable.<sup>97</sup> Also, where an offer of composition has been confirmed, the bankrupt must pay his attorney in the matter.<sup>98</sup> It is well settled, too, that where the bankrupt's attorney has received compensation from the bankrupt or any one else shortly before the bankruptcy and the amount is as much as he would have been allowed in the proceeding, no further sum should be paid.<sup>99</sup> The allowance in voluntary cases is usually to cover services in drawing the petition and schedules and until the first meeting of creditors, and should be moderate, rather than the opposite.<sup>100</sup>

(7) **FOR TRUSTEES.**<sup>101</sup>—The fees of the attorney for the trustee are strictly an expense of administration and are payable as provided in this section.<sup>102</sup> The trustee is not entitled to a counsel fee upon an order rejecting a claim not prosecuted in good faith,<sup>103</sup> nor upon the mere dismissal of the bankruptcy proceedings in cases where a receivership is neither had nor asked.<sup>103a</sup> It was held early in the administration of the present law that a trustee who was also an attorney could be allowed the same fees that would have been paid to other competent counsel,<sup>104</sup> but later cases do not sustain that holding, the trustee's fee being limited by § 48 and General Order XXXV (3).<sup>105</sup> When an attorney accepts the office of trustee he surrenders for the time his standing in the court of bankruptcy as attorney for creditors, and must look to them, not to the bankrupt estate or the court, for his compensation.<sup>106</sup> And where an attorney for creditors seeking to remove a trustee is subsequently employed as attorney for the new trustee, his compensation must be limited to services rendered after his employment as attorney for the trustee.<sup>107</sup> As a general rule an allowance should not be made to a trustee in bankruptcy for compensation for an attorney employed by him for doing such things for the protection and benefit of the estate as do not

95. In re Christianson (D. C., No. Dak.), 23 Am. B. R. 719, 175 Fed. 867.

97. In re Castlebury (D. C., Ga.), 16 Am. B. R. 480, 143 Fed. 1,018; Matter of Bohrmann (D. C., Ga.), 34 Am. B. R. 801, 224 Fed. 287.

98. In re Martin (D. C., N. Y.), 18 Am. B. R. 250, 151 Fed. 780.

99. In re O'Connell (D. C., N. Y.), 8 Am. B. R. 422, 98 Fed. 83; In re Smith (D. C., N. Car.), 5 Am. B. R. 559, 108 Fed. 39; Matter of Union Dredging Co. (D. C., Del.), 35 Am. B. R. 565, 226 Fed. 183. Compare In re Goodwin, 2 N. B. W. Rep. 445.

100. Compare In re Carolina Cooperage Co. (D. C., N. Car.), 3 Am. B. R. 154, 96 Fed. 950; Matter of Meis (D. C., Ky.), 18 Am. B. R. 104, holding that where there had been no litigation and where the services to the bankrupt had not been onerous, an allowance of \$75 was excessive and should be reduced to \$25.

Two per cent of the amount realized from the estate has been held a proper allowance. Matter of Meiss (D. C., Ky.), 18 Am. B. R. 104.

101. See also Am. B. R. Dig. § 106.

102. In re Burke (Ref., Ohio), 6 Am. B. R. 602; In re Stotts (D. C., Iowa), 1 Am. B. R. 641, 93 Fed. 438.

A trustee in bankruptcy is not entitled to credit for counsel fees for services unconnected with the sale of property subject to lien. Gugel v. New Orleans Bank (C. C. A., 5th Cir.), 30 Am. B. R. 160, 230 Fed. 676.

**Stockbrokerage case.**—Upon the bankruptcy of a stockbroker an allowance cannot be made to the attorney for the trustee out of securities or their proceeds which the claimants have successfully reclaimed. Matter of Wilson & Co. (D. C., N. Y.), 42 Am. B. R. 350, 232 Fed. 631.

**Attorney working against estate.**—An attorney for a trustee in bankruptcy who, while thus acting as attorney for the estate was really working against the interest of the estate and its creditors, is not entitled to receive compensation for his services. Matter of De Ban (C. C. A., 6th Cir.), 44 Am. B. R. 400, 260 Fed. 732.

**Action to recover preference.**—The reasonable fee of counsel employed by the trustee to recover a voidable or fraudulent preference made by the bankrupt constitutes a part of the trustee's expenses, and as such a part of the costs and expenses of administration entitled to preferential payment. Page v. Rogers (C. C. A., 6th Cir.), 17 Am. B. R. 854, 149 Fed. 194; *rev'd* on other grounds, 211 U. S. 576, 21 Am. B. R. 496, 53 L. Ed. 332, 29 Sup. Ct. 159.

103. Matter of Rome (D. C., N. J.), 19 Am. B. R. 820, 162 Fed. 971.

103a. Matter of Ohio Motor Car Co. (C. C. A., 6th Cir.), 39 Am. B. R. 218, 241 Fed. 330.

104. In re Mitchell (Ref., Pa.), 1 Am. B. R. 687.

105. Compare In re Muldaur, Fed. Cas. 9,905. Judge Ray in the case of In re McKenna (D. C., N. Y.), 15 Am. B. R. 4, 157 Fed. 611, holds



require professional skill, but are well within the ability of a person possessing ordinary intelligence and business capacity.<sup>108</sup> The determinative question is not whether it is agreeable and convenient to the trustee to have attorneys to act for him, but whether it is reasonably necessary for the welfare of the estate that counsel should be so employed. This rule, in the absence of special elements of difficulty, has general application with respect to such matters as the payment of taxes, the collection of rents, the payment for water and electricity, and the continuance of insurance in force. But where there are special difficulties in successfully attending to such matters, which could be overcome through the personality of a certain attorney, but probably would have proved insurmountable without his intervention, compensation may be allowed.<sup>109</sup> The amount of the allowance depends on a variety of circumstances, viz.: The time employed, the difficulty of the legal questions involved, the result achieved, the amount at stake, and the size of the estate.<sup>110</sup> The allowance should be moderate, rather than large.<sup>111</sup> The fee of an attorney of a trustee for services rendered in the recovery of assets may not depend upon agreement between the attorney and trustee and be deducted from the amount of the recovery; the right to and payment for such services depends absolutely upon the discretion of the court.<sup>112</sup> An allowance should not be made for services rendered before the appointment of the trustee.<sup>113</sup> Allowances should not be made until the services are rendered, or usually, until the final meeting of

that a trustee is not entitled to compensation for services rendered as an attorney; *In re Felson* (D. C., N. Y.), 15 Am. B. R. 185, 139 Fed. 275; *In re Halbert* (C. C. A., 2d Cir.), 13 Am. B. R. 399, 134 Fed. 236.

108. *In re Evans* (D. C., N. C.), 8 Am. B. R. 730, 116 Fed. 909.

107. *In re Fidler & Son* (D. C., Pa.), 23 Am. B. R. 16, 172 Fed. 632.

109. *Matter of Union Dredging Co.* (D. C., Del.), 35 Am. B. R. 555, 225 Fed. 188; *In re Knight* (Ref., Ohio), 5 Am. B. R. 560.

109. *Matter of Union Dredging Co.* (D. C., Del.), 35 Am. B. R. 555, 225 Fed. 188.

110. *In re Knight* (Ref., Ohio), 5 Am. B. R. 560; *In re Burrus* (D. C., Va.), 3 Am. B. R. 296, 97 Fed. 926. Compare also, for an attempt to establish compensation on a sliding scale basis, *In re Smith* (Ref., N. Y.), 2 Am. B. R. 648. See also *In re Drake*, Fed. Cas. 4,058; *In re Noyes*, Fed. Cas. 10,371; *In re Treadwell*, 23 Fed. 442; *In re Rude* (D. C., Ky.), 4 Am. B. R. 319, 101 Fed. 805; *In re McKenna* (D. C., N. Y.), 15 Am. B. R. 4, 137 Fed. 611; *Matter of Tietje* (D. C., N. Y.), 44 Am. B. R. 638, 263 Fed. 917; *Matter of Ninam* (Ref., Mich.), 14 Am. B. R. 515, allowing fee of \$25.00 where the attorney by his diligence recovered assets valued at \$16,000; *In re Hoffman* (D. C., Wis.), 23 Am. B. R. 19, 173 Fed. 234.

The attorneys' allowance may be \$75 where the report of the trustee shows assets received to the amount of \$7,500. *In re Lang* (D. C., Tex.), 11 Am. B. R. 794, 127 Fed. 755. An allowance of \$15,000 has been held not to be excessive. *Page v. Rogers* (C. C. A., 6th Cir.), 17 Am. B. R. 854, 149 Fed. 194, rev'd. on other grounds, 211 U. S. 575, 21 Am. B. R. 496, 53 L. Ed. 832, 29 Sup. Ct. 159.

Where a trustee and his attorney by persistence compelled a silent partner of a bankrupt to pay back \$6,300 which he had withdrawn without right, and it appearing that to secure that amount an action was brought and compromised, an allowance of 25 per cent of the amount recovered, after deducting the other expenses attendant on such recovery, is proper. *Matter of Tavarro & Co.* (D. C., Porto Rico), 39 Am. B. R. 342, 9 P. R. Fed. 414.

**Fees dependent upon size of estate and services rendered.**—Counsel for the trustee of a bankrupt estate involving \$16,147, whose duties were laborious, extending over several years and in four or five different courts, should not be granted an allowance in excess of \$2,500, where the assets, which had been recovered by attorneys for so-called antecedent creditors were in safe hands, and the legal question involved was whether the antecedent creditors should share with the other creditors. *Matter of Atkins* (D. C., Ky.), 34 Am. B. R. 794, 225 Fed. 639.

**Considerations in arriving of amount of compensation.**—*In Matter of Metallic Specialty Mfg. Co.* (D. C., Pa.), 32 Am. B. R. 446, 215 Fed. 987, the Court said: "It is the duty of everyone connected with the administration of the bankruptcy laws to make sure that the fund which would otherwise be distributed among creditors is not diminished by the payment of any fees or charges except those intended by the acts of Congress to be paid. Counsel for the trustee both as representing the trustee and therefore the court, and as members of the bar are in an especial sense to have all their acts, and emphatically their claims to compensation, pass under the supervision of the Courts. As the compensation allowed by the court is in fact usually paid by creditors or the bankrupt, the power to fix the amount of compensation ought to be exercised with that degree of care and discriminating judgment which any one should exercise who is spending the money of another."

**Additional allowance.**—Circumstances held not to warrant the award of additional compensation. *Matter of Terrell* (D. C., S. Car.), 40 Am. B. R. 138, 250 Fed. 817.

111. *In re Talton* (D. C., N. Car.), 14 Am. B. R. 617, 137 Fed. 178. Compare *In re Knight* (Ref., Ohio), 5 Am. B. R. 560, with *In re Curtis* (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784. See also *In re Davenport*, Fed. Cas. 3,587; *In re Cook*, 17 Fed. 328.

112. *Matter of Stemper* (D. C., Ariz.), 34 Am. B. R. 806, 222 Fed. 690.

113. *In re N. Y. Mail Steamship Co.*, Fed. Cas. 10,210.

creditors. Where the service has been unusual or protracted or the amount asked for is large in proportion to the estate, a notice to creditors of the intention to apply is good practice, though doubtless not essential.<sup>114</sup> An allowance to attorneys for the trustee in bankruptcy intended to cover services still to be rendered, but expressly limited to ordinary services, does not cover extraordinary and, at the time, unexpected and unanticipated services rendered by counsel, and an additional allowance may be granted.<sup>115</sup> A trustee's attorney should not be deprived of his compensation because he had previously acted for the bankrupt,<sup>116</sup> but where attorneys have acted for a receiver and been paid for their services, they should not be allowed compensation for services as attorneys to the petitioning creditors.<sup>117</sup> The trustee is entitled upon an accounting to amounts reasonably expended by him for the services of an attorney, made necessary for the preservation of the estate which had been assigned to him as assignee for creditors prior to his appointment as trustee.<sup>118</sup> The fact that the attorney for the trustee is also the attorney for several of the creditors of the bankrupt, will not operate to deny him fair compensation for services which inure to the benefit of the estate.<sup>118a</sup> The allowance by the referee is not a final adjudication but a mere administrative order subject at any time before the closing of the estate to re-examination.<sup>118b</sup>

(8) FOR ASSIGNEE PRIOR TO BANKRUPTCY.<sup>119</sup>—Attorneys for an assignee, in possession prior to bankruptcy, should not be allowed fees out of the estate, save in unusual circumstances.<sup>120</sup>

d. Effect of amendments of 1903.—Generally speaking, the policy of the law as amended as to attorneys' allowance is, perhaps, more liberal than was that of the original act.<sup>121</sup> Within proper limits, such a tendency is in aid of administration. The courts may be relied on to check any effort to carry it too far. The amendment of § 64-b (2) should also be read in this connection. It is in line with the practice as previously established in some of the districts.<sup>122</sup>

114. Consult *In re Arnett* (D. C., Tenn.), 7 Am. B. R. 522, 112 Fed. 770; *Ex parte Whitcomb*, Fed. Cas. 17,520.

115. *Matter of Metallic Specialty Mfg. Co.* (D. C., Pa.), 32 Am. B. R. 446, 215 Fed. 937.

116. *In re Dimm & Co.* (D. C., Pa.), 17 Am. B. R. 119, 144 Fed. 402.

The attorney for the trustee is entitled to recover from him the amount, included in a composition, for services rendered to the trustee in the collection of debts, although the plaintiff also acted as attorney for the bankrupt. *Keyes v. McKirrow* (Mass. Sup. Ct.), 9 Am. B. R. 522, 180 Mass. 261, 62 N. E. 259.

117. *In re Southern Steel Co.* (D. C., Ala.), 23 Am. B. R. 476, 169 Fed. 702.

Employment by trustee of attorneys representing creditors.—Attorneys who acted for the receiver and trustee and conducted a contest over a claim filed by bankrupt's wife, who were also the attorneys for certain creditors having claims in a large amount, may be paid compensation for services actually rendered for the benefit of the estate, it appearing the interests of their clients with respect to the contested claim were not adverse to any class of creditors, that the estate was not prejudiced by their advice to contest the claim, and that it had been the practice in the district to permit the attorneys for the petitioning creditors to represent the trustee where their interests were not adverse to the general creditors, and to allow attorneys for creditors to advise him. *In re*

*Smith* (C. C. A., 6th Cir.), 20 Am. B. R. 628, 208 Fed. 369.

118. *In re Byerly* (D. C., Pa.), 12 Am. B. R. 186, 128 Fed. 637. See also *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. ed. 1165, 23 Sup. Ct. 710.

118a. *Matter of Tietje* (D. C., N. Y.), 44 Am. B. R. 638, 263 Fed. 917.

118b. *Setting aside allowance*.—A court of bankruptcy is a court of equity and has undoubted jurisdiction to set aside an allowance for services and expenses of an attorney of the trustee in bankruptcy, when it satisfactorily appears that the allowance was procured through fraud. *Matter of De Ran* (C. C. A., 6th Cir.), 44 Am. B. R. 400, 260 Fed. 782.

119. See also Am. B. R. Dig. § 108.

120. *In re Pauly* (Ref., N. Y.), 2 Am. B. R. 333. In *Randolph v. Scruggs*, 10 Am. B. R. 1, 190 U. S. 533, 47 L. ed. 1165, 23 Sup. Ct. 719, a claim for services beneficial to the estate was allowed. See *ante* under "Allowances for assignees for benefit of creditors."

Attorneys for assignees.—As to the compensation of attorneys for general assignees paid them prior to bankruptcy, see *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. ed. 413, 22 Sup. Ct. 293; *In re Klein & Co.* (D. C., N. Y.), 8 Am. B. R. 559, 116 Fed. 523. Compare *In re Mays* (D. C., W. Va.), 7 Am. B. R. 764, 114 Fed. 600.

121. Compare Bankr. Act, §§ 2 (3), 40, 48.

122. *In re Felsou* (D. C., N. Y.), 15 Am. B. R. 185, 139 Fed. 275.

## SECTION SIXTY-THREE.

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### DEBTS WHICH MAY BE PROVED.

§ 63. Debts Which may be Proved.—*a* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

*b* Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

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Analogous provisions: In U. S.: As to provable debts in general, Act of 1867, § 19, R. S., § 5067; Act of 1841, § 5; Act of 1800, § 39; As to unliquidated claims, Act of 1867, § 19, R. S., § 5067; As to contingent claims, Act of 1867, § 19, R. S., § 5068; Act of 1841, § 5; Act of 1800, § 39; As to surety debts, Act of 1867, § 19, R. S., §§ 5069, 5070.

In Eng.: Act of 1883, § 37.

In Can.: Act of 1919, §§ 44, 48, 49, 50, 51.

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Suits by and against bankrupts upon provable debts, § 11-a.

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See also Supplementary Forms, *post*; Hagar and Alexander's Bankruptcy Forms (2d ed.).

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## I. HISTORY AND COMPARATIVE LEGISLATION.

A clear understanding of what is a provable debt is important to either the due administration of, or practice under, all bankruptcy laws. If provable, a debt is the basis of its owner's right to a *pro rata* share in the estate; if provable, with certain exceptions, always stated in the statute,<sup>1</sup> it is barred by the discharge. The earlier statutes were inclined to go far afield in defining such debts. Of late, the tendency has been to make the phrasing generic, and leave its construction to the courts. Thus, the present English law, after excepting all "demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust," in substance declares provable: "all debts and liabilities, present or future, certain or contingent."<sup>2</sup> The same is true of the new Canadian act.<sup>3a</sup> The same tendency is apparent in the United States. Section 19 of the law of 1867 was phrased in greater detail than § 63 of the present statute.<sup>3</sup> Much of it was expressive of existing rules of law; these are unquestionably still in force, even though omitted from the act of 1898. The omission of other provisions, not expressive of general rules, seems to warrant the view that having been dropped out, they are no longer the law. These differences are considered in appropriate paragraphs, *post*.

## II. DETERMINATION OF PROVABILITY.

a. *As affected by statute.*—Subsection *a* indicates those "debts" that are provable; subsection *b* those debts which, because unliquidated at the time of the petition, are not immediately provable, but may be when liquidated. "Debt" and "liability" are here used somewhat loosely. The definition of the former in § 1 (11) seems hardly applicable, as it results in the truism: a debt is a debt. The tendency of the courts has been to give a somewhat narrow meaning to the word.<sup>4</sup> Strictly, a debt is "something owed." Here this is immaterial; the five subdivisions of subsection *a* indicate the only obligations of the debtor which are, strictly speaking, provable.

b. *Defenses to allowance.*—In general every existing claim upon which an action at law or in equity could be maintained at the time of the filing of the petition is provable in bankruptcy, and any defense which might have been urged had action been brought on the claim may be urged against its allowance in bankruptcy.<sup>5</sup> If the claim is not enforceable because of some State statute,

1. See Bankr. Act, § 17.

2. Eng. Act of 1883, § 37.

3a. Can. Bankr. Act of 1919, § 44.

3. The difference between the two statutes in this particular are tersely stated in a previous edition, as follows (3d ed., p. 380):

"The following are the most important differences: first, omission from the present act of any express provision authorizing the proving of contingent debts and liabilities, or the liability of the bankrupt, as surety, indorser, or guarantor; second, omission of any express provision as to the proving of damages resulting from a conversion or trespass by the bankrupt; third, omission of any express provision as to the apportionment of rent and proving for the same; fourth, the embodiment in the present act of an express provision as to proving a judgment recovered after the commencement of proceedings in

bankruptcy upon a debt at that time provable; fifth, the embodiment of an express provision making costs incurred by the bankrupt in certain suits by and against him provable debts; sixth, the embodiment of a provision that unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such a manner as it shall direct, and may thereafter be proved and allowed against the bankrupt's estate; seventh, the lack of any general provision as to the time when a debt must have become fixed and owing in order to be provable."

4. In *re Sutherland*, Fed. Cas. 13,639; In *re Foye*, Fed. Cas. 5,021; *Wilson v. Bank*, 3 Fed. 391.

5. In *re Prescott*, 9 N. B. R. 385, Fed. Cas. 11,389, 5 Biss. 523.

and this clearly appears from the character of the claim itself, it is not to be regarded in a strict sense as a provable debt.<sup>6</sup> Thus it has been held that a *feme covert* may set up her coverture as a defense to a claim made against her estate.<sup>7</sup> And if a corporation enters into an *ultra vires* contract upon which it could not bring an action it cannot prove a claim arising thereon in bankruptcy.<sup>8</sup> So contracts void because of the consideration being illegal or because the contract is against public policy cannot be the foundation of a debt provable or at least allowable in bankruptcy.<sup>9</sup> So as to stock gambling transactions. But the burden of proof rests upon those disputing a contract apparently valid.<sup>10</sup> So if the statute of frauds would be a defense to an action it may be set up as an objection to the allowance of a claim.<sup>11</sup> The considerations here referred to relate more to the allowance of the claim than to the mere presentation of it for the purpose of proof.

c. "Proved" and "allowed."—In this connection, it is important to recall the difference between a debt which may be proved and one which may be allowed. As has been stated, every claim on which an action in law or in equity might have been maintained may be proved;<sup>12</sup> whether a debt so proved will be allowed is decidedly another matter. This distinction is perhaps somewhat artificial, the words "proved and allowed" being in § 63 yoked together and their equivalency to "provable" apparently taken for granted.<sup>13</sup> A disallowed claim and a non-provable debt are not identical things; and where a debt is disallowed because without foundation the claimant does not have a non-provable debt.<sup>14</sup> It has been held that the term "provable debt" is not limited in its meaning to a debt against the allowance of which no defense can be successfully interposed; as where a claim is disallowed for the reason that it was barred by the statute of limitations it is nevertheless a provable debt, so far at least as the bankrupt's discharge therefrom is concerned.<sup>15</sup>

6. In re Talbot (D. C., Mass.), 7 Am. B. R. 29, 110 Fed. 924, in which case it was held that in Massachusetts, a wife's claim for money advanced to her husband from her separate estate as a loan cannot be enforced by either legal or equitable proceedings, and so cannot be proved against her husband's estate in bankruptcy.

Claims unauthorized by statute.—Claims for merchandise sold and delivered to a co-operative company, on credit, in violation of a statutory inhibition, are not provable debts in bankruptcy, so as to entitle the holders thereof to petition for the adjudication in bankruptcy of said association. In re Wyoming Valley Co-operative Association (D. C., Pa.), 28 Am. B. R. 462, 198 Fed. 436.

7. In re Rachel Goodwin, 8 N. B. R. 380, Fed. Cas. 5,540, 5 Biss. 401.

8. In re Jaycox & Greene, Fed. Cas. 7,233, 12 Blatch. 200; Matter of Springfield Realty Co. (D. C., Mich.), 44 Am. B. R. 105, 257 Fed. 786. Compare Matter of Machine Metal Products Co. Inc. (C. C. A., 2d Cir.), 41 Am. B. R. 505, 251 Fed. 280; Garden City, etc. Co. v. Commerce Trust Co. (C. C. A., 7th Cir.), 44 Am. B. R. 340, — Fed. —.

Purchase of its own stock contrary to law by bankrupt corporation.—Where bankrupt, a corporation, purchased from claimant shares of its own stock in a manner contrary to the provisions of the Oklahoma statutes relating to the purchase by a corporation of its capital stock, the transaction was void and fraudulent as to its creditors and a claim for the balance due on the purchase price should be disallowed. Matter of Sapulpa Produce Co. (Ref., Okla.), 26 Am. B. R. 900.

9. In re Chandler, 9 N. B. R. 514, Fed. Cas. 590, 6 Biss. 53; In re Greene, 15 N. B. R. 198, Fed. Cas. 5,751; *Es parte* Jones, 17 Ves. 332; *Lowe v. Waller*, 1 Dougl. 736; In re Young, Fed. Cas. 18,145, 6 Biss. 53; *Es parte* Mumford, 15 Ves. 289; *Lehman v. Strassberg*, 2 Woods, 554; *Es parte* Cottrell, 2 Cowp. 742; *Es parte* Daniels, 14 Ves. 191.

10. See *Hill v. Levy* (D. C., Va.), 3 Am. B. R. 374, and note, 96 Fed. 94. As to gambling contracts, see In re Dorr (C. C. A., 9th Cir.), 26 Am. B. R. 408, 186 Fed. 276; In re Norris (D. C., Minn.), 26 Am. B. R. 945, 190 Fed. 101, and also discussion, *post*, under this section, sub-title, "Gambling transactions."

11. Capell v. Trinity Church, 11 N. B. R. 536, Fed. Cas. 2,392.

12. See In re Jordan, 2 Fed. 319.

13. Note that the words "provable debts" occur in § 17, and the words "provable claims" in § 59-b.

14. *Lesser v. Gray*, 236 U. S. 70, 34 Am. B. R. 8, 59 L. Ed. 471, 35 Sup. Ct. 227.

15. *Hargadine, etc., Dry Goods Co. v. Hudson* (C. C. A., 8th Cir.), 10 Am. B. R. 235, 123 Fed. 232, affg. 6 Am. B. R. 657. Where a firm gives a promissory note to secure an existing indebtedness of one of the members, the statute of limitation is not a bar to the provability of the note, although the original

But this does not affect the question of the "provability" of a debt for the purpose of determining whether or not it should be paid out of the estate. It would seem better, therefore, to retain the distinction between the "provability" and "allowability" of a debt; the latter term including the former and requiring in addition thereto a determination as to whether the debt is a valid claim against the estate.

d. *Ex contractu* and *ex delicto*.—(1) **IN GENERAL.**—Liabilities grounded in contract are, almost without exception, provable. So also are judgments grounded in tort.<sup>16</sup> Whether mere liabilities *ex delicto* may be liquidated and thus become provable has been doubted.

(2) **RULE UNDER FORMER LAW.**—Under the former law, such claims, if "on account of any goods or chattels wrongfully taken, converted or withheld," i. e., if in conversion, were provable, but only after being duly liquidated.<sup>17</sup> With the single exception next noted, other liabilities sounding in tort were not.<sup>18</sup> Debts created by the fraud or embezzlement of the bankrupt were, by the terms of another section, made provable, but were also declared not dischargeable.<sup>19</sup>

(3) **RULE UNDER PRESENT LAW.**—Even the clause above quoted has been omitted from the present law; the same is silent as to the provability of debts in fraud or for embezzlement. Hence, the argument that such mere liabilities are not provable. But, strictly, debts grounded in tort are as much liabilities as are those entirely *ex contractu*, and a distinction between those actually liquidated at the time the petition is filed and those which may be thereafter liquidated is somewhat artificial.<sup>20</sup> Besides, § 17 now excepts from dischargeable debts many "provable debts" that are unliquidated torts; the words "judgments in actions" in § 17-a (2) having now given place to the word "liabilities." It would seem, therefore, that liabilities for torts *per se*, and not merely those provable on the theory of quasi-contracts,<sup>21</sup> may now be liquidated and proven and allowed, at least all those that are both *in praesenti* debts as (distinguished from fines or duties).<sup>22</sup>

(4) **CLAIMS TORTUOUS IN CHARACTER BASED ON CONTRACT.**—The Supreme Court has held that subsection a of this section, defining provable debts, must be read in connection with § 17 limiting the operation of discharges, in which the provable character of claims for fraud in general is recognized, by excepting from a discharge claims for frauds which have been reduced to judgment, or which were committed by the bankrupt while acting as an officer, or in a fiduciary capacity; and that, therefore, if a debt originates, or is "founded upon an open account, or upon a contract, expressed or implied," it is provable against the bankrupt's estate, though the creditor may

indebtedness was so barred. *Dacovich v. Schley* (C. C. A., 5th Cir.), 13 Am. B. R. 752, 134 Fed. 72.

16. *In re Putnam* (D. C., Cal.), 27 Am. B. R. 923, 193 Fed. 464, citing text.

17. Act of 1867, § 19, R. S., § 5061; *In re Bailey*, Fed. Cas. 729; *In re Hennocksburgh*, Fed. Cas. 6367; *Weaver v. Voils*, 68 Ind. 191.

18. *In re Schuchardt*, Fed. Cas. 12,463; *Gilman v. Cate*, 63 N. H. 278.

19. Act of 1867, § 33, R. S., § 5117.

20. On the other hand, it is, of course, true that much practical inconvenience would

result from the doctrine stated in the text. Consult section seventeen. See also the limitation of the English statute to unliquidated damages "by reason of a contract, promise, or breach of trust;" Act of 1883, § 37.

21. See *In re Hirschman* (D. C., Utah), 4 Am. B. R. 715, 104 Fed. 69, and *In re Filer* (Ref., N. Y.), 5 Am. B. R. 582, for the prevailing rule before the amendatory act of 1903. And compare *In re Lazarovic* (Ref., Kan.), 1 Am. B. R. 476, and *In re Cushing* (Ref., N. Y.), 6 Am. B. R. 22.

22. For instance, fines for crimes, alimony, and rent to accrue.



elect to bring his action in trover, as for a fraudulent conversion, instead of *in assumpsit* for a balance due upon an open account.<sup>23</sup> In other words, if a party has a cause of action which, at his election, he may maintain either upon a contract or in tort, then such cause of action becomes a provable debt.<sup>24</sup> If the claimant elects to sue in tort upon his claim, his debt is not thereby deprived of its provable character,<sup>25</sup> but if he proves his claim as founded on an implied contract, he will be deemed to have waived the tort, and will be precluded from a recovery based thereon.<sup>26</sup> It is a well settled rule that where a tort-feasor, by conversion of personal property, has sold the property converted and received cash therefor, the true owner may sue him for money had and received as on an implied contract.<sup>27</sup> It follows that a claim based upon such a transaction is a provable debt. It has, therefore, been held that an obligation resting upon an officer or other person occupying

23. *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147, 25 Sup. Ct. 9, revg. 201 Ill. 581. And see *Clarke v. Rogers*, 228 U. S. 534, 30 Am. B. R. 39, 57 L. Ed. 953, 33 Sup. Ct. 587; *Friend v. Talcott*, 228 U. S. 27, 30 Am. B. R. 31, 57 L. ed. 718, 33 Sup. Ct. 505. See cases digested Am. Bankr. Dig. § 845.

24. *Reinhardt v. Freiderich* (Ind. App. Ct.), 34 Am. B. R. 633, 635, 108 N. E. 258, citing *Collier on Bankruptcy* (9th ed.), 306, 853, 870, and the following cases: *Crawford v. Burke*, 195 U. S. 176-194, 12 Am. B. R. 659, 25 Sup. Ct. 9, 49 L. Ed. 147; *In re Hirschman* (D. C. Utah), 4 Am. B. R. 715, 104 Fed. 69; *Clark v. Rogers* (C. C. A., 1st Cir.), 26 Am. B. R. 413, 183 Fed. 518; *Disler v. McCauley*, 7 Am. B. R. 138, 66 N. Y. App. Div. 42, 73 N. Y. Supp. 270; *In re Filler* (D. C. N. Y.), 5 Am. B. R. 835, 125 Fed. 261; *Tinker v. Colwell*, 193 U. S. 473, 11 Am. B. R. 568, 24 Sup. Ct. 505, 49 L. Ed. 754; *Barrett v. Prince* (C. C. A., 7th Cir.), 16 Am. B. R. 64, 143 Fed. 302; *Sabinal Nat. Bank v. Bryant* (Tex. Civ. App.), 39 Am. B. R. 304, 191 S. W. 1179.

25. *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147, 25 Sup. Ct. 9.

Effect of waiver.—When a tort is of a character which may be waived and an action *quasi ex contractu* maintained, the claim is a debt within the meaning of the bankruptcy act and provable. *First National Bank v. Bamfuth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600.

26. *Standard Varnish Wks. v. Haydock* (C. C. A., 8th Cir.), 16 Am. B. R. 286, 143 Fed. 318; *In re Hirschman* (D. C. Utah), 4 Am. B. R. 715, 104 Fed. 69; *Bunting Stone Hardware Co. v. Alexander* (Tex. Civ. App.), 38 Am. B. R. 631, 190 S. W. 1152, holding that where a creditor stands, either in the proceeding in bankruptcy or in a suit in a State court, upon a contract as originally made, he waives any right arising thereon in tort, and the claim as a consequence becomes one provable in bankruptcy and from which the bankrupt is released when discharged.

Rights against joint tortfeasors.—If the principal wrongdoer has become bankrupt and the plaintiff has proved his claim as upon an implied contract against such bankrupt, and received his dividends thereon, he cannot, at the same time or thereafter, maintain an action in tort against those who may have assisted the principal wrongdoer in converting the property. *Shonkweller v. Harrington* (Neb. Sup. Ct.), 42 Am. B. R. 445, 169 N. W. 258.

Waiver of tort, and recovery on quasi-contract.—In the case of *Clarke v. Rogers* (C. C. A., 1st Cir.), 26 Am. B. R. 413, 183 Fed. 518, the court said: "A claim based

on a tort as known at common law is undoubtedly provable whenever it may be resolved into an implied contract. For example, it is a settled rule that where a tort-feasor by conversion of personal property has sold the property converted, and received cash therefor, the true owner may sue him for money had and received as on an implied contract. This, of course, is a mere fiction of law; but, like all other such fictions, it is effectual when it will accomplish the ends of justice. So that, in that case, the owner of the property may proceed for a tort, or, at his option, on an implied contract, which would entitle him to make proof under section 63. An illustration appears in *Tindle v. Birkett*, 205 U. S. 183, 186, 18 Am. B. R. 121, 27 Sup. Ct. 493, 51 L. Ed. 762. On the other hand, a mere tort, for example, a trespass involving a mere destruction of property, does not lay the foundation for a proceeding under that section. The force of *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 25 Sup. Ct. 9, 49 L. Ed. 147, is not correctly understood by the appellee here. This is made plain by what is said in *Dunbar v. Dunbar*, 190 U. S. 340, 350, 10 Am. B. R. 139, 23 Sup. Ct. 757, 47 L. Ed. 1084, in the opening paragraph; so that the result of it all is that claims for mere torts, like personal injuries and injuries to real property, are not provable, as was determined by the Circuit Court of Appeals for the Third Circuit in *Brown & Adams v. United Button Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 565, 149 Fed. 48, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961, and by the Circuit Court of Appeals for the Second Circuit in *In re New York Tunnel Co.* (C. C. A., 2d Cir.), 20 Am. B. R. 25, 159 Fed. 688, 86 C. C. A. 556."

27. *Clarke v. Rogers* (C. C. A., 1st Cir.), 26 Am. B. R. 413, 183 Fed. 518 (aff'd. 228 U. S. 534, 30 Am. B. R. 39, 57 L. Ed. 953, 33 Sup. Ct. 587), citing, as an illustrative case, *Tindle v. Birkett*, 205 U. S. 183, 18 Am. B. R. 121, 51 L. Ed. 762, 27 Sup. Ct. 493; *Reynolds v. New York Trust Co.* (C. C. A., 1st Cir.), 26 Am. B. R. 698, 699, 188 Fed. 611.

a fiduciary capacity to restore to a fund money which he has embezzled is contractual in its nature, and gives rise to a provable debt in behalf of the beneficiaries against his bankrupt estate.<sup>28</sup> A creditor whose claim is grounded in tort is not entitled to priority, even one whose claim rests on conversion. Once the goods are sold and the avails mingled with the debtor's funds, such a creditor's claim is for damages only.<sup>29</sup>

(5) FRAUD OR CONNIVANCE.—A claim based upon a fraudulent connivance with the bankrupt to impose upon other creditors, as where money was advanced to the bankrupt to give him a fictitious commercial rating, is not allowable.<sup>30</sup> And where transactions between the bankrupt and the creditor were such as to indicate an intention to overreach the other creditors and obtain an undue advantage over them, their claims, although provable, may be disallowed.<sup>31</sup>

e. The debt must have existed when the petition was filed.—Here the statute is not entirely harmonious. Subsection *a* (4), unlike the other subdivisions, has no words of time. The rule is that the provability of a claim depends upon its status at the time the petition is filed.<sup>32</sup> If it be then owing it may be proved; if it become due after the filing of the petition, even if before the

28. *Clarke v. Rogers* (C. C. A., 1st Cir.), 26 Am. B. R. 413, 183 Fed. 516, *affd.* by Supreme Court in 228 U. S. 534, 30 Am. B. R. 39, 57 L. Ed. 953, 33 Sup. Ct. 587, holding that where a trustee converts trust funds to his own use, a liability is created which is provable in the bankruptcy proceedings of such trustee as a liability founded "upon an open account, or upon a contract, express or implied."

29. *Ungewitter v. Von Sachs*, Fed. Cas. 14,343.

30. *In re Friedman* (D. C., Wis.), 21 Am. B. R. 213, 104 Fed. 131.

31. *Clere Clothing Co. v. Union Trust & Savings Bank* (C. C. A., 9th Cir.), 35 Am. B. R. 419, 224 Fed. 363, in which it appeared that a clothing company, with other creditors effected a composition, advancing for that purpose money which it borrowed from a bank. The trustee made a bill of sale of the merchandise of the bankrupt to the clothing company, which put them on sale. The bankrupt was then reorganized, the president of the clothing company gaining control. Thereafter the reorganized company claimed to have sold the merchandise to the clothing company, taking its note. The clothing company presented claims based on this note and on a note for merchandise sold to the bankrupt. It was held that, on all the evidence, the claims should be rejected, as the reorganized corporation was merely an agent of the claimant, and that a corporation may not for a period of over a year so intertwine its affairs and business transactions with a second company as to virtually create the relationship of principal and agent, and then upon the insolvency of the second company insist upon the payment of alleged debts incurred in the very transactions by which the relationship was created.

Holder of promissory note and stock for loan with option to elect which he will take;

failure to elect before bankruptcy.—A person, who loans money to a corporation on its promissory note and also takes shares of its stock at par for the amount of the loan, under an agreement providing that he shall have his election whether to become the absolute owner of the shares and surrender the note, or to surrender the shares and demand payment of the note, and does not elect which position he will assume until the indebtedness of the company has accumulated to such an extent as to render it a bankrupt, is estopped from demanding his rights as a creditor, under the agreement. *Matter of Silvernail Co.* (D. C., Kan.), 33 Am. B. R. 57, 218 Fed. 977.

32. *Matter of Van Horn* (C. C. A., 3d Cir.), 41 Am. B. R. 12, 246 Fed. 822; *In re Burka* (D. C., Mo.), 5 Am. B. R. 12, 107 Fed. 674; *In re Garlington* (D. C., Tex.), 8 Am. B. R. 602, 115 Fed. 999; *Swartz v. Fourth Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1, 54 C. C. A. 387; *In re Adams* (D. C., Mass.), 12 Am. B. R. 368, 130 Fed. 381, holding that a creditor cannot prove for an indebtedness arising between the filing of an involuntary petition and the adjudication of his debtor as a bankrupt; *In re Coburn* (D. C., Mass.), 11 Am. B. R. 212, 126 Fed. 218; *In re Simon* (D. C., N. Y.), 26 Am. B. R. 611, 197 Fed. 105. Compare *In re Bingham* (D. C., Vt.), 2 Am. B. R. 223, 94 Fed. 796; *In re Reliance, etc., Co.* (D. C., Pa.), 4 Am. B. R. 40, 100 Fed. 619; *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315, *affg.* s. c., 5 Am. B. R. 336, 106 Fed. 493; *In re Crawford*, Fed. Cas. 3,363; *In re Ward*, 12 Fed. 325; *In re Morrill*, 19 Fed. 874; *Fowler v. Kendall*, 44 Me. 448.

A breach of contract may result from the filing of a petition, and in such a case the claim for damages ripens simultaneously with the filing of the petition. *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 375, 112 Fed. 315; *In re National Wire Corp.* (D.

adjudication, it is not "absolutely owing."<sup>33</sup> Where a vendee under an executory contract of sale is adjudicated an involuntary bankrupt, the vendor's claim for damages for breach of the contract is not provable.<sup>34</sup> The word "and" in the form of proof prescribed by the Supreme Court requiring that it should state that the debt proved existed "at and before filing of the petition for adjudication of bankruptcy" must be construed either "or" or "and," as the circumstances may require.<sup>35</sup> In addition to claims upon which actions could be brought debts existing at the time of the filing of the petition but not then payable are provable in bankruptcy, and being provable the holder of such debts may be a petitioner to have the debtor involuntarily adjudged a bankrupt.<sup>36</sup> And so where money was received by a bankrupt intended to be used for gambling purposes, a considerable portion of it being in his hands at the time of the filing of the petition, the claimant may base his claim upon money had and received, and prove his claim regardless of the intended use of the money.<sup>37</sup>

f. **Equitable debts.**—It has always been the law in England that equitable demands may be proved in bankruptcy.<sup>38</sup> Cases under the former law to the

C. Conn.), 22 Am. B. R. 186, 166 Fed. 631. Thus, the obligation of a contract guaranteeing the redemption of corporate stock, three years after date of issue, is a provable claim, although the time for redemption has not arrived at the date of bankruptcy. In re Pettingill (D. C., Mass.), 14 Am. B. R. 728, 137 Fed. 840; In re Neff (C. C. A., 6th Cir.), 19 Am. B. R. 23, 157 Fed. 57, affg. 19 Am. B. R. 911.

The status of a claim must depend upon its provability at the time the petition was filed. It cannot be benefited by its status at a later date. In re Neff (C. C. A., 6th Cir.), 19 Am. B. R. 23, 157 Fed. 57; In re Reading Hosiery Co. (D. C., Pa.), 22 Am. B. R. 562, 171 Fed. 195; Matter of Sterne & Levi (Ref., Tex.), 26 Am. B. R. 535, 539, citing text. In re Board of County Com'rs v. Hurley (C. C. A., 8th Cir.), 22 Am. B. R. 209, 212, 169 Fed. 92, the court said: "The status of claims at the time of the filing of the petition in bankruptcy, and not at any subsequent time, fixes the rights of their owners to share in the distribution of the estate of the bankrupt. . . . Thus the filing of a petition upon which a subsequent adjudication of bankruptcy is rendered places all the property of the bankrupt which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him *in custodia legis*. . . . On that date the property of the bankrupt passes from his control to the court or its receiver, and thence to the trustee. . . . Indeed, the condition at the time of the filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt and all parties interested in the property." See Synnott v. Tombstone Consol. Mines Co. (C. C. A., 9th Cir.), 31 Am. B. R. 421, 208 Fed. 251, citing text.

Debts not existing when petition was filed.—The debts founded upon open account

or upon contract, express or implied, that are provable under this section, include only such as existed at the time of the filing of the petition in bankruptcy. Lavelo v. Reeves, 227 U. S. 625, 29 Am. B. R. 493, 57 L. Ed. 676, 33 Sup. Ct. 365.

Where a claim for damages is contingent at the date of an assignment, and not an existing demand presently due, but not presently payable, even though resting upon a contract and capable of liquidation, is not provable. So where under an assignment for benefit of creditors the lessors have the right to enter upon the premises and terminate the lease, or at their election to demand damages, a claim for damages at the date of assignment was contingent and not provable. Cotting v. Hooper, Lewis & Co. (Mass. Sup. Ct.), 34 Am. B. R. 23, 107 N. E. 931.

33. Phenix Nat. Bank v. Waterbury, 20 Am. B. R. 140, 123 App. Div. 453, 108 N. Y. Supp. 391, affg. 23 Am. B. R. 250, 197 N. Y. 161, 90 N. E. 435.

34. In re Inman & Co. (D. C., Ga.), 23 Am. B. R. 556, 175 Fed. 312.

35. In re Swift (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315, affg. 5 Am. B. R. 335.

36. In re Alexander, 4 N. B. R. 178, Fed. Cas. 161.

37. In re Norris (D. C., Minn.), 26 Am. B. R. 945, 190 Fed. 101, in which case it was held that where claimants base their claims, not upon their contracts, but upon money had and received, they will be allowed the amount of their original investments, irrespective of whether the money was intended to be used by the bankrupt for gambling purposes, it appearing from the evidence that a considerable part of the money was in bankrupt's possession just prior to bankruptcy, not having been employed in gambling, but converted by bankrupt to his own use.

38. Ex parte Yonge, 3 Ves. & B. 31; Ex parte Williamson, 2 Ves. 252; Ex parte Dewdney, 15 Ves. 479.

same effect are numerous.<sup>39</sup> Such claims are provable under the present bankruptcy law, and the Federal courts administering the general law of equity, as accepted in England, and as generally accepted in this country, will recognize and establish an equitable claim within the purview of the general rules of equity, though under the decisions of the State court it has no status.<sup>40</sup> In bankruptcy proceedings which are summary and equitable in their nature, the creditor may invoke the principle of law that money secured by false and fraudulent representations of material facts may be recovered back by proving a demand for money had and received by the bankrupts to their use.<sup>41</sup> The claim of an assignee for the benefit of creditors and his attorney, for services rendered both prior and subsequent to the bankruptcy, is provable, where such services were beneficial to the estate.<sup>42</sup> If a mortgagee bids in at foreclosure sale the property covered by the mortgage, and takes title he may prove his claim for the amount equitably due on the mortgage debt, to be ascertained by deducting the value of the property.<sup>43</sup>

**g. Debts against more than one person.**—If the debt is of such a nature that an action upon contract to collect it could be brought against the bankrupt, it is provable, although it might be collected from others. The test is: could the claimant have maintained an action against the bankrupt? Thus, in a case of principal and agent, if the principal has become a bankrupt, the claim may be proved in bankruptcy against him.<sup>44</sup> So the holder of a joint obligation

39. For instance, *Sigsby v. Willis*, Fed. Cas. 12,849; *In re Buckhause*, Fed. Cas. 2,086.

**Proof of equitable claims.**—In *In re Blandin*, 5 N. B. R. 39, Fed. Cas. 1,527, 1 Low. 543, Judge Lowell of the district court of Massachusetts decided that the wife of a bankrupt might prove in bankruptcy as a creditor of the estate of her husband, for money realized by him out of the property which she held as her separate estate, under the statutes of Massachusetts, the evidence clearly showing that the transaction between her and her husband was intended to be a loan and not a gift. In rendering his opinion the judge said: "It seems to me to be the intent of that statute to give all creditors an equal share of the assets without regard to the mode in which their rights might have been enforced if there had been no bankruptcy; and that the debtor should be discharged from all debts and demands which are liquidated or capable of liquidation. In respect to both debtors and creditors the act is highly remedial, and the district court is vested with most ample equitable powers to enable it to work out full remedies to all persons. It has always been the law of England that equitable demands may be proved in bankruptcy; *Ex parte Williamson*, 2 Ves. Sr. 252; *Ex parte Taylor*, 2 Rose, 175. 'A commission in bankruptcy,' said Lord Eldon, 'is nothing more than a substitution of the authority of the lord chancellor, enabling him to work out the payment of those creditors who could by legal action or equitable suit have compelled payment.' *Ex parte Dewdney*, 15 Ves. 498. The nine-

teenth section of our statute (Act of 1867) makes provable all debts and liabilities, in language broad enough certainly to cover such as a trustee owes to his *cestui que trust*, or a partner to his copartner; and so of demands which, but for the bankruptcy, would be properly cognizable in a court of admiralty. If this be not so, I do not see how the law can be uniform, for proof of debts will depend on the remedies given in the several States, in one of which the very same debt might be sued at law which in another must be prosecuted in equity, and in some of which there is no distinction between law and equity."

40. *James v. Gray* (C. C. A., 1st Cir.), 12 Am. B. R. 573, 131 Fed. 401; *In re Peasley* (D. C., N. H.), 14 Am. B. R. 496, 137 Fed. 190.

41. *In re Arnold & Co.* (D. C., Mo.), 13 Am. B. R. 320, 133 Fed. 789, holding that a claim for money obtained by the bankrupt, to use in gambling ventures, through false representations may be proved. To the same effect see *In re Norris* (D. C., Minn.), 26 Am. B. R. 945, 190 Fed. 101.

42. *Randolph v. Scruggs*, 10 Am. B. R. 1, 190 U. S. 593, 47 L. Ed. 1,165 23 Sup. Ct. 710; *Matter of Morris & Elce* (D. C., Mass.), 44 Am. B. R. 146, 258 Fed. 712.

43. *In re Dix* (D. C., Pa.), 23 Am. B. R. 889, 176 Fed. 882. And see *In re Davis* (C. C. A., 3d Cir.), 23 Am. B. R. 446, 174 Fed. 556. Both of these cases arose under the laws of Pennsylvania in which State there is no provision for a deficiency judgment on the bond accompanying the mortgage.

44. *In re Troy Woolen Co.*, 8 N. B. R. 412, Fed. Cas. 14,208.

tion can prove his claim against any and every person whom he could have sued.<sup>45</sup> A holder of a note which has become due and has been protested, if protest were necessary, may prove against the maker or any indorser.<sup>46</sup> If one holds a firm obligation indorsed by one or more of the individual members, all of whom as a firm and as individuals afterward go into bankruptcy, he may prove his entire claim against the partnership estate, and the estate of each individual indorser; but in the aggregate can recover no more than his full claim.<sup>47</sup>

**h. Provability as affected by the person proving.**—(1) **IN GENERAL.**—An assignee of the creditor has a provable debt if his assignor had, even if the assignment post-dates the bankruptcy.<sup>48</sup> But where the creditor is a debtor of the bankrupt in a larger sum than the amount claimed, such claim is not provable.<sup>49</sup> An executor may prove a debt against the bankrupt, notwithstanding a provision in the will for a deduction of any debt due the testator from the bankrupt.<sup>50</sup> A person who is induced by a materially false and fraudulent statement to take stock in a corporation which subsequently becomes bankrupt, may rescind his contract to take the stock and prove his claim for the amount paid.<sup>51</sup> A bondholder holding a bond secured by a trust mortgage may prove the amount of the bond where the property is sold free of liens and the mortgage trustee did not take steps to foreclose the mortgage.<sup>52</sup> Other

**45. Proof where several liable.**—The obligee in a bond, or the holder of a claim upon which several parties are personally liable, may prove his claim against each of the estates of those who become bankrupt, and may at the same time pursue the others at law, and he may recover notwithstanding payments after the bankruptcy by other obligors or by their estates dividends from each estate in bankruptcy upon the full amount of his claim at the time the petition in bankruptcy was filed therein, until from all sources he has received full payment of his claim, but no longer. *Board of County Commissioners v. Hurley* (C. C. A., 8th Cir.), 22 Am. B. R. 209, 169 Fed. 92.

One holding promissory notes on which third parties, as well as bankrupt, are liable, may prove his claim against bankrupt's estate, and, notwithstanding that payments on account of said notes have been made by such third parties after bankruptcy, he is entitled to be allowed dividends on the full amount of his claim as it stood when the petition was filed, until from all sources he has received full payment of his claim. *In re Simon* (D. C., N. Y.), 28 Am. B. R. 611, 197 Fed. 105.

**46. *Downing v. Traders' Bank***, 11 N. B. R. 371, 2 Dill, 136.

**47. *In re Howard, Cole & Co.***, 4 N. B. R. 571, Fed. Cas. 6,750; *Mead v. Bank*, 2 N. B. R. 173, Fed. Cas. 9,366, 6 Blatch. 185; *Emery v. Bank*, 7 N. B. R. 217, Fed. Cas. 4,446, 3 Cliff. 507; *Board of County Commissioners v. Hurley* (C. C. A., 8th Cir.), 22 Am. B. R. 209, 169 Fed. 92. See discussion under Section Five, *ante*, and for limitations on the doctrine there stated, see La-

moille, etc., *Bank v. Stevens' Estate* (D. C., Vt.), 6 Am. B. R. 164, 107 Fed. 245, and *Shattuck v. Bugh* (Ref., N. Y.), 6 Am. B. R. 56.

**Provability of individual notes of partner to firm, pledged as security for firm obligation.**—A partner, under a firm contract made by him personally with a firm creditor, pledged as collateral for a firm obligation on which he was indorser, certain notes made by him individually to the firm for personal loans, and, after bankruptcy of the firm and its members, the creditor sold the collateral pursuant to the terms of the contract. *Held*, that the obligation of the partner on his notes to the firm was wholly independent of his obligation as indorser on the firm notes and that the purchaser of the individual notes was entitled to prove a claim thereon against the individual estate of such partner. *In re White* (C. C. A., 7th Cir.), 25 Am. B. R. 541, 183 Fed. 310.

**48. *In re Goodman Shoe Co.*** (D. C., Pa.), 3 Am. B. R. 200, 96 Fed. 494; *In re American Specialty Co.* (C. C. A., 2d Cir.), 27 Am. B. R. 463, 191 Fed. 807; *In re Murdock*, Fed. Cas. 9,939; *In re Pease*, Fed. Cas. 10,866. For method of proving assigned claims, see discussion under Section Fifty-seven, *ante*.

**49. *In re Gerson*** (D. C., Pa.), 5 Am. B. R. 850, 105 Fed. 891.

**50. *In re Woods*** (D. C., Pa.), 13 Am. B. R. 240, 133 Fed. 82.

**51. *Davis v. Louisville Trust Co.*** (C. C. A., 6th Cir.), 25 Am. B. R. 621, 181 Fed. 10.

**52. *United States Trust Co. v. Gordon*** (C. C. A., 6th Cir.), 33 Am. B. R. 300, 216 Fed. 929.

instructive cases on this general subject, in particular those where the creditor is the customer of a stockbroker, will be found in the foot-note.<sup>53</sup>

(2) **TRANSACTIONS BETWEEN HUSBAND AND WIFE.**—Where the common-law disability of the wife has been abolished by statute, she may have a provable debt against her husband's estate,<sup>54</sup> even if a statute prohibits a suit by her against her husband;<sup>55</sup> but her claim is usually looked on with suspicion.<sup>56</sup> A bankrupt's note to his wife is provable, especially when it does not appear that at the time it was given the husband was in debt.<sup>57</sup> Under a statute conferring upon a married woman the same powers in respect to her property as if she were unmarried, it has been held that a contract to pay for a wife's services is not a provable debt;<sup>58</sup> and under a statute giving to a married woman her individual earnings "except those accruing from labor performed for her husband, or in his employ, or payable by him," the wife's claim for wages earned as bookkeeper in her husband's store is not provable.<sup>59</sup> But it would be otherwise under a statute authorizing contracts to be made by and between husband and wife as though they were unmarried.<sup>60</sup> If still a *feme covert*, a wife who is bankrupt may allege her coverture as a defense and prevent proof.<sup>61</sup> Under a statute rendering invalid a direct gift of corporate stock from husband to wife, her loan of the certificates, indorsed in blank to him, creates no allowable claim against his estate.<sup>62</sup>

(3) **SERVICES OF MINOR CHILD.**—The presumption is that a father is entitled to the wages of his minor child. This is overcome by evidence that the child has been emancipated and thus permitted to receive for his own use the compensation or wages earned by him. Unless such evidence is adduced, the father is the proper party to prove a claim for the child's services.<sup>63</sup> The claim of a minor son against his bankrupt father for services rendered will

53. In re Ervin (D. C., Pa.), 6 Am. B. R. 350, 109 Fed. 135; *affd.* as *Wallerstein v. Ervin* (C. C. A., 3d Cir.), 7 Am. B. R. 256, 112 Fed. 124; also in re Ervin (D. C., Pa.), 7 Am. B. R. 480, 114 Fed. 596; In re Clark (D. C., Wash.), 7 Am. B. R. 96, 111 Fed. 893; In re Swift (D. C., Mass.), 5 Am. B. R. 415, 106 Fed. 65; *affd.* s. c., 7 Am. B. R. 874, 112 Fed. 815; In re Graff (D. C., N. Y.), 8 Am. B. R. 744, 117 Fed. 843; In re Chase (D. C., Mass.), 13 Am. B. R. 294, 133 Fed. 79; Matter of National Piano Co. (D. C., Mass.), 42 Am. B. R. 111, 252 Fed. 950.

Proof by president of corporation for money advanced to make payments under composition agreement allowed. *McKey v. Bruns* (C. C. A., 7th Cir.), 40 Am. B. R. 189, 243 Fed. 370.

Claim of parent corporation against subsidiary corporation.—Where a corporation is so organized and controlled, and its affairs so managed, as to make it a mere instrumentality or adjunct of another corporation and such subsidiary corporation becomes bankrupt, the parent corporation cannot have its claims paid until all of the creditors are satisfied. *Baker Motor Vehicle Co. v. Hunter* (C. C. A., 2d Cir.), 39 Am. B. R. 122, 238 Fed. 894.

Director of bankrupt corporation who invests money in another corporation, organized to take over the assets of the bankrupt, may, under certain circumstances be held to be a creditor of the bankrupt. In re *Holbrook Shoe & Leather Co.* (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973.

54. In re *Novak* (D. C., Ia.), 4 Am. B. R. 811, 101 Fed. 800; *Hawk v. Hawk* (D. C., Ark.), 4 Am. B. R. 463, 102 Fed. 679; In re *Neiman* (D. C., Wis.), 6 Am. B. R. 329, 109 Fed. 113. This is not the rule in Massachusetts. In re *Talbot* (D. C., Mass.), 7 Am. B. R. 29, 110 Fed. 924. But see In re *Nickerson* (D. C., Mass.), 8 Am. B. R. 707, 116 Fed. 1003; Matter of *Crumling* (D. C., Pa.), 32 Am. B. R. 656, 214 Fed. 508.

Claim upon ante-nuptial contract.—A claim by a wife against her husband, arising out of an ante-nuptial contract, and based upon a judgment, examined and held to have been properly allowed as a prior claim against the husband's estate for the principal thereof, but that she is not entitled to interest. *Murphy v. McLoughlin* (C. C. A., 5th Cir.), 41 Am. B. R. 70, 248 Fed. 386.

Claim of wife for services.—Where bankrupt's wife, during the entire period for which she claimed compensation, acted as bookkeeper, collector and assistant in the business for her husband, an agreement to compensate her will be implied. In re *Cox* (D. C., N. Mex.), 29 Am. B. R. 456, 199 Fed. 952.

55. In re *Domenig* (D. C., Pa.), 11 Am. B. R. 552, 128 Fed. 146.

56. So also of child's claim for alleged services rendered a bankrupt father. In re *Brewster* (Ref., N. Y.), 7 Am. B. R. 456.

57. In re *Kyte* (D. C., Pa.), 21 Am. B. R. 110, 164 Fed. 302.

58. In re *Kaufman* (D. C., N. Y.), 5 Am. B. R. 104, 104 Fed. 768, construing section 21 of the New York Domestic Relations Law; In re *Suckle* (D. C., Ark.), 23 Am. B. R. 861, 176 Fed. 823, constituting Ark. Stats. (Kirby), § 5213.

59. In re *Winkles* (D. C., Wis.), 12 Am. B. R. 696, 132 Fed. 590, construing section 2343 of the Revised Statutes of Wisconsin, 1898. But see In re *Cox* (D. C., N. Mex.), 29 Am. B. R. 456, 199 Fed. 952.

60. *Moore v. Crandall* (C. C. A., 9th Cir.), 30 Am. B. R. 517, 205 Fed. 689.

61. In re *Goodman*, Fed. Cas. 5,540.

62. In re *Tucker* (D. C., Mass.), 17 Am. B. R. 247, 148 Fed. 928. But see *Tucker v. Curtin* (C. C. A., 1st Cir.), 17 Am. B. R. 354, 148 Fed. 929, as to loan certificates to firm of which the husband was a member.

not be allowed unless there is substantial proof of emancipation and that the son performed the services under a *bona fide* agreement as to payment therefor.<sup>64</sup>

i. **Provability as affected by fraud or preference.**—Here there is some confusion owing to doubt as to the exact meaning of "provable."<sup>65</sup> Since the amendment of § 57-g by the act of 1903, there can be little doubt; all preferences and the more common frauds, both constructive and in fact, being voidable. If the transaction upon which the debt is based was fraudulent as against the other creditors it is not provable.<sup>66</sup> But a creditor must have been guilty of some moral turpitude or some breach of duty whereby other creditors were deceived to their damage to constitute such a fraud as will estop him from sharing with them in the distribution of the proceeds of the estate of his debtor in bankruptcy. A wilful intent to deceive or such negligence as is tantamount thereto is an essential element of such an estoppel.<sup>67</sup> In short, if the fraud may be attacked under either § 60-b or § 70-e, the debt clearly is now not provable until the claimant surrenders his advantage. If the creditor compels the trustee to recover, the claim, because shorn of fraud, as it were, by force, continues not provable. The omission of claims due to the officers of a corporation, from a credit statement issued by the corporation to its creditors, will not estop the officers from proving such claims in the absence of a showing of knowledge of the fraud, or that any creditor extended credit relying on such statement.<sup>68</sup> If it is asserted that the contract upon which the claim was based was obtained by fraudulent representations, it must appear that the contract was seasonably disaffirmed; if the bankrupt had availed itself of the benefit of the contract for nearly four years after the fraud was discovered, the claim will not be vitiated.<sup>69</sup> The numerous cases under the former law are probably no longer in point.<sup>70</sup> So also of some of those under the new law, prior to the amendatory act.<sup>71</sup>

j. **Cross-references.**—In addition to the references in the preceding paragraphs, the practitioner will find much that bears on the provability of debts under § 17. He should also have in mind the doctrine of set-off, discussed under § 68.

### III. FIXED LIABILITY ABSOLUTELY OWING.

a. **In general.**—Subsection a (1) provides that debts may be proved and allowed which are "a fixed liability, as evidenced by a judgment or an instru-

63. *Matter of Haskell* (D. C., Mass.), 36 Am. B. R. 428, 228 Fed. 819.

64. *Matter of Kanter* (D. C., Maine), 32 Am. B. R. 776, 215 Fed. 276.

**Emancipation of child; claim for services.**—Where bankrupt employed his minor son at a stated salary, but it appeared that the son was at the time living with his parents, paying for his board out of the wages paid him by bankrupt, there was no such emancipation of the son as would justify the allowance of his claim for unpaid wages. *In re Riff* (D. C., Ark.), 30 Am. B. R. 594, 205 Fed. 406.

65. *In re Owings* (D. C., Mo.), 6 Am. B. R. 454, 109 Fed. 623. *Contra*: *In re Richard* (D. C., N. Car.), 2 Am. B. R. 507, 94 Fed. 633.

66. *Matter of Hawkins* (D. C., Ga.), 41 Am. B. R. 671, 249 Fed. 355; *In re Lansaw* (D. C., Mo.), 9 Am. B. R. 167, 118 Fed. 368; *In re Royce Dry Goods Co.* (D. C., Mo.), 13 Am. B. R. 267, 133 Fed. 100, holding that where property of a bankrupt corporation is traced to the hands of managing officer, and such officer fails to ac-

count for such property in excess of his demands against the corporation, his claim against the corporation should be rejected.

67. *Crouder v. Allen-West Commission Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 134, 218 Fed. 177.

68. *Spencer v. Lowe* (C. C. A., 8th Cir.), 39 Am. B. R. 876, 198 Fed. 361.

69. *Matter of Tear-off Bottle Seal Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 694, 224 Fed. 492.

70. For instance: *In re Black*, Fed. Cas. 1,459; *In re Schwartz*, Fed. Cas. 12,509; *In re Arnold*, Fed. Cas. 551; *In re Rundle et al.*, Fed. Cas. 12,138.

71. *In re Lazarovic* (Ref., Kan.), 1 Am. B. R. 476; *In re Norcross* (Ref., Mo.), 1 Am. B. R. 644.

ment in writing, absolutely owing at the time of the filing of the petition whether then payable or not, etc." In the former law, the words were: "debts \* \* \* existing." The words "fixed liability, absolutely owing" would, therefore, be an unfortunate limitation were it not for the broader words of subdivision (4).<sup>72</sup>

b. Whether then payable or not.—These words of the statute characterize the debt rather than the time of payment. To be provable under subdivision (1), a debt must be a fixed liability absolutely owing at the time the petition is filed;<sup>72a</sup> but the time of payment is immaterial.<sup>73</sup> The status of the debt at the time of filing the petition controls; if it be owing at that time it is provable.<sup>74</sup> This statutory provision is further emphasized by the provision for the allowance of interest to or a rebate of interest after the date of bankruptcy.<sup>75</sup> This phrasing has been most discussed in considering the provability of a contract of indorsement not fixed by default and protest until after the petition was filed,<sup>76</sup> and in respect to the provability of a claim for rent to accrue after bankruptcy under a lease for a term of years.<sup>77</sup> It has also been well considered in connection with a bond to secure an annuity.<sup>78</sup> Likewise, when the contract was one of yearly employment.<sup>79</sup> Indeed, the words "absolutely owing" seem to have been a stumbling block in the lower courts; the upper courts have found more equity in the words "founded \* \* \* upon contract, express or implied" in subdivision (4).<sup>80</sup>

c. Evidenced by a judgment.—(1) IN GENERAL.—It follows from the language of the section that, with the rare exception noted later, all judgments actually entered at the date of the bankruptcy are provable debts. A judgment is primarily absolutely owing when rendered and entered.<sup>81</sup> The rendering of a verdict is not, it seems, a judgment entitling such verdict to proof.<sup>82</sup> For instance, a verdict against a bankrupt for damages for personal

72. See under this section *post*, under title "Founded on Contract, Express or Implied."

72a. An agreement to pay out of an uncertain fund, as for example, out of net profits, is not a fixed liability absolutely owing at the time of the bankruptcy within the purview of this section. *Matter of Thirty-Five Per Cent. Automobile Supply Co.* (D. C., N. Y.), 41 Am. B. R. 101, 247 Fed. 377.

73. In *re Swift* (D. C., Mass.), 5 Am. B. R. 415, 111 Fed. 593. The provability of a claim depends upon its status at the time the petition is filed. In *re Pettingill & Co.* (D. C., Mass.), 14 Am. B. R. 7-8, 137 Fed. 143; *Matter of Jorammon-Oliver Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 467, 213 Fed. 623.

74. Debt "absolutely owing."—The status of a claim at the time of filing the petition in bankruptcy, and not at any subsequent time, fixes the right of the owner to share in the distribution of the estate of the bankrupt. If it be owing at the time of the filing of the petition it may be proved; but if it becomes due only after the filing of the petition, even if before adjudication, it is not a claim to be considered as absolutely owing." *Matter of Mullings Clothing Co.* (D. C., Conn.), 37 Am. B. R. 166, 230 Fed. 681. See also *Matter of Hatchcraft* (D. C., Ky.), 41 Am. B. R. 238, 247 Fed. 187.

Liability of building and loan association to shareholders.—The liability of a bankrupt building and loan association to shareholders for amounts paid in and proportions of profits, if any, is fixed, and provable in bankruptcy, notwithstanding the fact that it may require examination of books to ascertain the exact amount due to each shareholder. It is treated as

an anticipatory breach of a contract. *Merchants' National Bank v. Continental Building & Loan Association* (C. C. A., 9th Cir.), 37 Am. B. R. 439, 232 Fed. 828.

75. Compare, for similar words, Act of 1867, § 19, R. S., § 5067.

76. See discussion, *post*, under this section, subtitle, "Indorser and Surety Debts."

77. *Matter of Mullings Clothing Co.* (D. C., Conn.), 37 Am. B. R. 166, 230 Fed. 681. A claim for rent contingent upon the election of the lessor to enter and terminate the lease or to demand damages is not provable. *Cotting v. Hooper, Lewis & Co.*, 34 Am. B. R. 23, 107 N. E. 931.

78. *Cobb v. Overman* (C. C. A., 4th Cir.), 6 Am. B. R. 324, 109 Fed. 65, *revg. Bray v. Cobb* (D. C., N. Car.), 3 Am. B. R. 788, 100 Fed. 270, and holding that the bond of a bankrupt to secure the payment of an annuity for life is provable.

79. In *re Silverman Bros.* (D. C., Mo.), 4 Am. B. R. 83, 101 Fed. 219, *revg. a. c.* 2 Am. B. R. 15.

80. See in this section, *post*, subtitle "Continuing Contracts."

81. *Moore v. Douglas* (C. C. A., 9th Cir.), 36 Am. B. R. 740, 230 Fed. 399.

82. *Black v. McClelland*, Fed. Cas. 1,462.



injuries, where no judgment had been entered thereon prior to the bankruptcy proceedings is not a fixed liability evidenced by a judgment within this clause, and is not a provable debt.<sup>83</sup> It was the evident purpose of the provision relative to the provability of a fixed liability "as evidenced by a judgment," to cover judgments arising in tort as well as those arising upon other obligations or liabilities.<sup>84</sup> In some cases, as where the debt is for alimony, support of a bastard, and the like, the courts will look beyond the form of the judgment, and will ascertain the nature of the liability, the original cause of action.<sup>85</sup> This doctrine has not been strictly observed where the application was for an injunction to prevent the arrest of the bankrupt or injury to his estate.<sup>86</sup> If the judgment has resulted in a void or voidable lien, because within four months of the bankruptcy, it is still a provable debt, the lien only being affected.<sup>87</sup> Indeed, it seems the debt on which the judgment was founded, if otherwise provable, may be proved in its stead. A judgment is provable, even if an appeal has been taken thereon, but dividends on it should be withheld.<sup>88</sup> But where under a State statute a judgment is not final until

83. Effect of verdict of jury.—In the case of *Black v. McClelland*, Fed. Cas. 1,462, the court, in speaking of the effect of a verdict of a jury upon the provability of the amount thereof, said: "Now, a claim which has not obtained the condition of a fixed liability cannot be characterized as a debt due and payable, either presently or at a future day, and such is the immature character of a mere verdict before judgment. It is subject to the control and discretion of the court, and may be superseded altogether by arresting judgment upon it or by the allowance of a new trial. No action could be maintained upon it. It does not bear interest, and no determinate character is impressed upon it until the court has pronounced its judgment that the plaintiff do recover from the defendant the amount of it."

This case was discussed in the case of *In re Ostrom* (D. C., Minn.), 26 Am. B. R. 273, 185 Fed. 988, and held to be controlling under the present bankruptcy act. The court said: "The Act of 1867, under which the proceeding arose (Rev. St., section 5067), did not contain the words 'fixed liability' which appear in the present act. The decision of the Supreme Court of Minnesota in *Kent v. Chapel*, 67 Minn. 420, 70 N. W. 2, to the effect that after a verdict there is no further uncertainty about the claim, and the decision in the case of *Clay v. Railroad Company*, 104 Minn. 1, 115 N. W. 949, to the effect that a verdict becomes property and passes to the representatives the same as though it had been reduced to a judgment, are not controlling upon the national courts because this is not a case where those courts are bound to follow the decisions of the State court."

"Even if it can be said, in accordance with those decisions, that a verdict created a fixed liability, yet it is not a fixed liability evidenced by a judgment or instrument in

writing, conditions which must by the present act, be complied with before even a fixed liability can become a provable debt."

84. *Moore v. Douglas* (C. C. A., 9th Cir.), 36 Am. B. R. 740, 230 Fed. 399; *Jefferson Transfer Co. v. Hull* (Wis. Sup. Ct.), 40 Am. B. R. 841, 166 N. W. 1; *Matter of Lockwood* (D. C., N. Y.), 59 Am. B. R. 478, 240 Fed. 161; *Matter of Cunningham* (D. C., N. Y.), 42 Am. B. R. 560, 23 Fed. 663.

85. *Turner v. Turner* (D. C., Ind.), 6 Am. B. R. 289, 108 Fed. 785.

A decree for alimony is neither a fixed liability evidenced by a judgment nor a debt within the meaning of the bankrupt act. *Wetmore v. Wetmore*, 196 U. S. 68, 13 Am. B. R. 1, 49 L. Ed. 350, 25 Sup. Ct. 172.

A father's liability under an agreement with his divorced wife to pay her for the support of his minor children until they respectively become of age is not a provable debt against his estate. *Dunbar v. Dunbar*, 190 U. S. 340, 10 Am. B. R. 130, 47 L. Ed. 1064, 23 Sup. Ct. 757. See also *In re Hubbard* (D. C., Ill.), 3 Am. B. R. 528, 98 Fed. 710.

86. For instance: See *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 594, 99 Fed. 73; *In re Cole* (D. C., N. Y.), 5 Am. B. R. 780, 108 Fed. 837, and *In re Sullivan* (Ref., N. Y.), 2 Am. B. R. 30. And examine *In re Fife* (D. C., Pa.), 6 Am. B. R. 258, 109 Fed. 880.

87. See discussion under Section Sixty-seven of this work. *Doyle v. Heath* (Sup. Ct., R. I.), 4 Am. B. R. 763, 22 R. I. 213; *In re Pease* (Ref., N. Y.), 4 Am. B. R. 547; *Jefferson Transfer Co. v. Hull* (Wis. Sup. Ct.), 40 Am. B. R. 844, 166 N. W. 1.

88. *Matter of Berlin Dye Works and Laundry Co.* (D. C., Cal.), 34 Am. B. R. 823, 225 Fed. 683 (revg. 34 Am. B. R. 452), holding that a judgment of the Superior Court of California directing the payment of money, from which the defendant had appealed, but without giving a supersedeas bond, at the time a petition in bankruptcy was filed against him, is a final judgment and provable in bankruptcy; *affd.* sub. nom. *Moore v. Douglas* (C. C. A., 9th Cir.), 36 Am. B. R. 740, 230 Fed. 399; Compare *In re Yates* (D. C., Cal.), 8 Am. B. R. 60, 114 Fed. 365; *In re Sheehan*, Fed. Cas. 12,737. Compare *Matter of Kroeger Bros. Co.* (D. C., Wis.), 45 Am. B. R. 135, 262 Fed. 463, where a judgment in favor of the bankrupt in the trial court was reversed on appeal and a *nunc pro tunc* judgment entered against the bankrupt.

the action has terminated, and such action is pending until its final determination on appeal, or until the time for appeal has passed, such judgment is not a "fixed liability absolutely owing at the time of filing the petition" if an appeal was pending at such time.<sup>89</sup> A claim evidenced by a judgment recovered more than ten years prior to bankruptcy is not provable, unless renewed as required by statute.<sup>90</sup> A judgment barred by the statute of limitations is a provable claim, where it may be enforced under the State statute in the discretion of the court.<sup>91</sup> A judgment note, with a waiver of exemptions, is a provable claim.<sup>92</sup> And so is a judgment for damages for a breach of promise of marriage.<sup>93</sup> But a judgment for a penalty is not a provable debt.<sup>94</sup>

(2) IMPEACHING JUDGMENTS.—Here the English doctrine is much broader than our own.<sup>95</sup> Full faith and credit being necessarily given to the judgments of the State courts when pleaded in the Federal courts, it was, under the former law, held that a judgment of a State court could not be impeached when presented as a claim in bankruptcy, but resort must be had to the State court.<sup>97</sup> That it is conclusive between the bankrupt and the judgment creditor is elementary. But where the rights of general creditors have intervened, the English rule that such a judgment is but *prima facie* evidence of a provable debt is fairer. The law in the United States seems, however, to be that the trustee or a creditor may attack it in the bankruptcy proceeding for fraud or collusion, but not otherwise.<sup>98</sup> The rule that an adjudication is binding upon parties and privies as to questions which were in fact in controversy and determined, and as to those which should have been raised, though they were not, applies in courts of bankruptcy.<sup>99a</sup> A judgment not regular on its face, or by a court which did not have jurisdiction of the subject-matter, may of course be attacked anywhere; but jurisdiction need not affirmatively appear,<sup>99</sup> nor can the recitals of the judgment, as a rule, be contradicted in a collateral proceeding. Where the amount of a claim has been determined by a State court, and judgment entered therein, such judgment is conclusive upon the bankruptcy court, and the judgment creditor will not be permitted to prove for a greater amount.<sup>100</sup>

89. Matter of Berlin Dye Works and Laundry Co. (Ref., Cal.), 34 Am. B. R. 452, *affd. sub. nom.* Moore v. Douglas (C. C. A., 9th Cir.), 36 Am. B. R. 740, 230 Fed. 899, holding that under California Code of Civil Procedure, § 577 judgment is not final until time to appeal has passed, or a determination on appeal, in which the court said: "Cases in States where judgments become final and binding and may be resorted to and used as evidence and for all purposes for which a judgment may be resorted to, immediately upon their rendition, are clearly distinguishable from judgments rendered in the courts of the State of California and which are not final until their final determination upon appeal or until the time for appeal has passed. Such is the case of *Re Sheehan*, 8 N. B. R. 345, Fed. Cas. 12,737; *In re Lorde* (D. C., N. Y.), 16 Am. B. R. 201, 144 Fed. 320."

90. *In re Farmer* (D. C., N. Car.), 9 Am. B. R. 19, 116 Fed. 763.

91. *In re Rebmam* (C. C. A., 9th Cir.), 17 Am. B. R. 767, 150 Fed. 759.

92. *Claster v. Sobie*, 10 Am. B. R. 446, 22 Pa. Super. Ct. 631.

93. *In re McCauley* (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 223; *In re Fife* (D. C., Pa.), 6 Am. B. R. 268, 109 Fed. 890; *Finnegan v. Hall* (N. Y. Sup. Ct.), 6 Am. B. R. 648, 35 Misc. 773, 72 N. Y. Supp. 347.

94. Matter of Abrahamson and Flickhandler (C. C. A., 2d Cir.), 32 Am. B. R. 156, 210 Fed. 878.

95. See *In re Phelps* (Ref., N. Y.), 3 Am. B. R. 434; *affd.* on review without opinion, and cases cited; and in general, see cases digested Am. Bankr. Dig. § 820.

97. *In re Campbell*, Fed. Cas. 2,349; *McKinsey v. Harding*, Fed. Cas. 8,866; *In re Burns*, Fed. Cas. 2,183. *Contra*: *Ex parte O'Neill*, Fed. Cas. 10,527.

98. See *Candee v. Lord*, 2 N. Y. 269. Matter of Falsone (D. C., Fla.), 40 Am. B. R. 409, 247 Fed. 607. And compare *Hassell v. Wilcox*, 130 U. S. 493, 32 L. Ed. 1001, 9 Sup. Ct. 590.

Attack by creditors.—The reduction of an alleged debt to judgment in a state court before bankruptcy does not exempt it from attack by or on behalf of creditors who would be injuriously affected by its allowance, when such allowance is sought in bankruptcy proceedings. Matter of Continental Engine Co. (C. C. A., 7th Cir.), 37 Am. B. R. 102, 234 Fed. 58.

99a. *Murphy v. McLoughlin* (C. C. A., 5th Cir.), 41 Am. B. R. 70, 248 Fed. 385.

99. *In re Columbia Real Estate Co.* (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 965.

100. *Handian v. Walker* (C. C. A., 8th Cir.), 29 Am. B. R. 4, 200 Fed. 566.

Interest.—A judgment of the State court al-

d. Evidenced by an instrument in writing.—(1) *IN GENERAL*.—To be provable under this subdivision, a debt, if not a judgment, must rest on an instrument in writing.<sup>101</sup> An instrument in writing includes any document or written evidence of the agreement whence the debt arises, such as bonds for definite sums, and promissory notes, but it has been held not to include checks.<sup>101a</sup> A bill of sale to secure the purchase price of goods purchased by the bankrupt may be unenforceable against the other creditors, because unrecorded, but a claim for the unpaid purchase price is nevertheless provable as an unsecured claim against the bankrupt's estate.<sup>102</sup>

(2) *BILLS AND NOTES*.—(I) *In general*.—A note or bill of exchange is provable against the bankrupt maker; it is the debt evidenced by the note which is provable. A usurious note is not provable,<sup>103</sup> but where the claim could be established apart from such note and unaffected by it, the creditor should be permitted to prove it.<sup>104</sup> And so while the mere giving of notes to evidence or in prepayment of a clearly conditional obligation would not annul the condition or make an otherwise unprovable claim allowable in bankruptcy, the provision in the agreement that notes are to be given and that they shall be negotiable is evidence of the intention of the parties that the amounts stated in the notes are to be payable in any event.<sup>105</sup> Where a note is given for a gambling debt, and indorsed by the holder to the claimant, the burden is on him to show that he is a holder in due course.<sup>106</sup>

(II) *Who may prove because of promissory note*.<sup>107</sup>—The holder of a promissory note permitting him to prove it against the maker's estate is one who has a legal interest in it, and a mere dummy cannot be considered such holder.<sup>108</sup> Where one of two or more joint makers of a note is a bankrupt, each of the

allowing a wife interest on a claim against her husband under an ante-nuptial contract, is not *res judicata* upon proof of claim in the bankruptcy court, where the right to interest was not necessary to a decision of any of the issues involved in the State court. *Murphy v. McLoughlin* (C. C. A., 5th Cir.), 41 Am. B. R. 70, 248 Fed. 385.

101. As to sufficiency of instrument to bind parties, see *Matter of Structural Steel Co.* (Ref., Ohio), 13 Am. B. R. 373.

Return on cancellation of lease by lessor when property was obtained by a bankrupt under a lease terminable at the option of the lessor, and the lessee agreed to pay on the termination of the lease a fixed return charge, it was held that the lessor having terminated the lease within the time for proving claims, his action in so doing created a fixed liability or ascertained amount presently payable provable under section 63a(1) of the Bankruptcy Act. *Matter of Clark Shoe Company* (D. C., Mass.), 32 Am. B. R. 238, 211 Fed. 341.

Amount due under lease of personal property.—Where a storekeeper leases apparatus for conveying cash and carrying parcels under a contract providing that in case of default in making payments the whole amount shall become due without notice or demand for the entire period of the lease, and that the lessor may upon the bankruptcy of the lessee enter the premises and take possession of the apparatus, and it appears that the lessee has defaulted in the payment of an installment of rent payable in advance,

prior to his bankruptcy and that thereafter the lessor took possession of the apparatus thereby terminating the lease, the lessor is only entitled to prove his claim for the installment due at the date of the bankruptcy. *Matter of Miller Bros. Grocery Co.* (C. C. A., 6th Cir.), 33 Am. B. R. 704, 219 Fed. 851.

A claim for rent, due and payable on a lease from the claimant to the bankrupt, is founded upon an instrument in writing. *Matter of Keller* (D. C., Mich.), 42 Am. B. R. 601, 252 Fed. 942.

101a. *Matter of Keller* (D. C., Mich.), 42 Am. B. R. 601, 252 Fed. 942.

102. *In re Burlage Bros.* (D. C., Ia.), 22 Am. B. R. 410, 169 Fed. 1006.

103. *Matter of Wilde's Sons* (D. C., N. Y.), 13 Am. B. R. 217, 133 Fed. 562, stating the law as to the rights of banks in respect to usurious contracts.

104. *In re Robinson* (D. C. Mass.), 14 Am. B. R. 226, 136 Fed. 954.

105. *Matter of Wisconsin Engine Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 106, 234 Fed. 281.

106. *In re Hill & Sons* (D. C., Pa.), 26 Am. B. R. 133, 187 Fed. 214. See as to effect of loan of money to be used for gambling purposes, *In re Norris* (D. C., Minn.), 26 Am. B. R. 945, 190 Fed. 101.

107. As to proof of instruments generally, see Am. Bankr. Dig. § 823; as to claims of bankrupt's indorsers or guarantors, *Id.* § 825; as to claims against bankrupt as indorser, *Id.* § 826.

108. *Matter of Collins* (D. C., Ia.), 37 Am. B. R. 692, 235 Fed. 937.

Notes executed by licensee.—Provisions of a contract for an exclusive patent license examined and held that certain notes executed by the licensee were in consideration of the grant of the license and are provable

other joint obligors may prove against his estate for a proportionate share of the amount which they have been required to pay because of his insolvency.<sup>109</sup> Although a note has been paid by an endorser, the holder may prove it in full against the estate in bankruptcy of the maker, and receive dividends thereon. Any surplus over the amount actually due the holder will be held in trust for the endorser.<sup>110</sup> The holder of negotiable paper of a bankrupt cannot, by filing a claim based thereon and assigning the same to an innocent purchaser, defeat the right of the trustee in bankruptcy to assert defenses against the claim which he could have interposed had the claim not been assigned.<sup>111</sup> The holder of a note which did not mature until after the filing of petitions in bankruptcy against the maker and indorser may prove his claim against the latter, for the face of the note, less all payments made before maturity.<sup>111a</sup> Claims based upon notes which are endorsed by the payee as paid may be proved, where the circumstances are such as to show that the act of endorsement is voidable by the payee because of undue influence in obtaining it.<sup>111b</sup>

(III) *Notes of corporations.*—Notes of a bankrupt corporation, given for the purchase of stock of another corporation if authorized by its charter, and in the absence of fraud, are valid claims against it.<sup>112</sup> But a stockholder of a corporation will not be permitted to prove a claim against the corporation, based upon a promissory note given by the corporation in payment for capital stock purchased from the stockholder.<sup>112a</sup> A claim of an accommodation indorser on a note made for the benefit of a *de facto* corporation which he paid in full, may be allowed, in bankruptcy proceedings of the corporation.<sup>112</sup> A note given by a corporation for the indebtedness of another, for which it is in no way responsible, is not provable against the corporation.<sup>114</sup> Notes given by the executive officers of a corporation, in their individual names, the proceeds of which are used for corporate purposes, are provable against the corporation.<sup>115</sup> Notes given for the payment of corporate stock, transferred without being stamped as required by a State law, are provable in bankruptcy,

against the bankrupt estate of the licensee. *Matter of Wisconsin Engine Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 106, 234 Fed. 281.

109. *Wright v. Rumph* (C. C. A., 6th Cir.), 38 Am. B. R. 235, 238 Fed. 138.

110. *Young v. Gordon* (C. C. A., 4th Cir.), 38 Am. B. R. 522, 219 Fed. 168.

111. *Matter of Partridge Lumber Co.* (D. C., N. J.), 33 Am. B. R. 537, 215 Fed. 973.

111a. *Matter of Shats* (D. C., Pa.), 41 Am. B. R. 576, 251 Fed. 351.

111b. The pendency of proceedings by the claimant to open a guardianship account by the bankrupt, does not preclude the ward from relying on notes signed by the bankrupt guardian which she filed against the estate within the time allowed by the Act. *Beaven v. Stuart* (C. C. A., 5th Cir.), 41 Am. B. R. 81, 250 Fed. 972.

112. *In re N. Y. Car Wheel Works* (D. C., N. Y.), 15 Am. B. R. 571, 141 Fed. 430; s. c., 14 Am. B. R. 595, 139 Fed. 421. But see *In re Smith Lumber Co.* (D. C., Tex.), 13 Am. B. R. 123, 132 Fed. 618, holding that where the purchase of its own stock by a corporation renders it insolvent and results in a fraud upon the rights of creditors, a note given upon such purchase in the hands of the payee is not provable.

*Notes of bankrupt corporation.*—Notes signed by a bankrupt corporation by its president and secretary and which are under the corporate seal and were given for moneys indisputably advanced at the time, are *prima facie* a liability

of the bankrupt. *Spencer v. Lowe*. (C. C. A., 8th Cir.), 29 Am. B. R. 876, 198 Fed. 361.

112a. *Matter of Brueck & Wilson Co.* (D. C., N. Y.), 43 Am. B. R. 501, 258 Fed. 69; *Matter of O'Gara & Maguire, Inc.* (D. C., N. J.), 44 Am. B. R. 49, 259 Fed. 935. Compare *Matter of National Piano Co.* (D. C., Mass.), 42 Am. B. R. 111, 252 Fed. 950.

113. *Matter of Kelley & Co.* (D. C., Conn.), 33 Am. B. R. 877, 215 Fed. 155.

114. *Corporate notes for payment of debt of another.*—In the case of *Mapes v. German Bank* (C. C. A., 8th Cir.), 28 Am. B. R. 713, 176 Fed. 89, the court said: "The officers of a trading corporation undoubtedly have authority to make and deliver its promissory notes for the just debts of the corporation, and the acts of such officers in this regard are presumed to be lawfully done, when no notice to the contrary is received by the holder of the paper. But it is beyond the powers of the corporation and its officers alike to make accommodation paper, or to guarantee or to pay the obligations of others in which it has no interest, and from which it derives no benefit."

*Assumption of debts of old corporation by new corporation.*—Where a new corporation was organized, upon the failure of a prior corporation, the stockholders being different from the old in numbers and proportion of stock held, and the debts of the former corporation not having been assumed by the new corporation, nor the entire assets of the old taken over, and where a bank holding the notes of the old cor-

notwithstanding the State law forbids legal proceedings in the State court based on the transfer of stock for which the notes were given.<sup>116</sup>

(3) **STIPULATION FOR PAYMENT OF COLLECTION FEES.**—Collection fees stipulated to be paid in a promissory note due before the filing of the maker's petition in bankruptcy, but which was not placed in the hands of an attorney for collection until after such time, are not absolutely owing at the time of the filing of the petition and are not provable.<sup>117</sup> The stipulation to pay a certain sum as the expense of collection does not create a "fixed liability" where no services were rendered in making the collection before the bankruptcy.<sup>118</sup> Where such notes are placed in the hands of an attorney for collection prior to adjudication the fees stipulated are provable.<sup>119</sup>

(4) **INTEREST.**—Subdivision (1) permits the proof of a debt evidenced by a written instrument, "with any interest thereon which would have been recoverable at that date (the time of filing the petition) or with a rebate of interest upon such as were not then payable and did not bear interest." As a provable debt a note or other instrument in writing is limited to the principal and interest thereon that would have been recoverable at the time of the filing of the petition in bankruptcy.<sup>120</sup> The interest due at such time is a part of the provable debt.<sup>121</sup> Interest stops on all unsecured debts at such time.<sup>122</sup> But this rule has no application to estates which are solvent.<sup>123</sup> If the debt is due subsequent to bankruptcy only the interest due at the time the petition is filed can be added; the interest not then accrued must be rebated.<sup>124</sup>

poration took the notes of the new one with the proceeds of which the old notes were taken up, to the knowledge of the bank, there was no valuable consideration moving to the new corporation for taking up the notes of the old and the bank was chargeable with notice of such want of consideration and could not prove the new notes against the estate in bankruptcy of the new corporation. In re Standard Clothing Co. (D. C., Ala.), 26 Am. B. R. 124, 187 Fed. 172.

115. **Loans evidenced by notes of officers of bankrupt.**—A claim upon a loan, evidenced by the individual notes of the executive officers of the bankrupt corporation, is provable against the corporation, where it appears that the loan was actually made to and, and that the notes were taken by the officers merely for business reasons. *Flower v. Central National Bank* (C. C. A., 8th Cir.), 35 Am. B. R. 79, 223 Fed. 823; *Hogin v. Central National Bank* (C. C. A., 8th Cir.), 35 Am. B. R. 81, 223 Fed. 325. Claim by purchaser of a note, executed in the name of a bankrupt corporation by its president, disallowed. *Matter of Continental Engine Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 102, 234 Fed. 58. Compare *Moerschel v. O'Bannon* (C. C. A., 8th Cir.), 40 Am. B. R. 786, 246 Fed. 887.

116. *Matter of Wyllie, Jr.* (D. C., N. Y.), 32 Am. B. R. 145, 210 Fed. 954.

117. In re Keeton (D. C., Tex.), 11 Am. B. R. 367, 126 Fed. 426; s. c., 11 Am. B. R. 370, 126 Fed. 429; In re Garlington (D. C., Tex.), 8 Am. B. R. 602, 115 Fed. 999; In re Gebhard (D. C., Pa.), 15 Am. B. R. 381, 140 Fed. 571; In re Thompson Milling Co. (D. C., Tex.), 16 Am. B. R. 454, 144 Fed. 314; In re Hersey (D. C., Ia.), 22 Am. B. R. 863, 171 Fed. 998; *British & American Mortgage Co. v. Stuart* (C. C. A., 5th Cir.), 81 Am. B. R. 485, 210 Fed. 425, holding that a claim for attorney's fees based upon a mortgage which provides that the mortgagor shall pay attorney's fees and the costs of collection, is not provable where the mortgage was not due at the date of bankruptcy. See Am. Bankr. Dig. § 824.

118. *McCabe v. Patton* (C. C. A., 3d Cir.), 23 Am. B. R. 335, 174 Fed. 217.

A statute authorizing such a stipulation on a promissory note cannot be extended to include such a stipulation in a chattel mortgage.

But if the services of an attorney in the collection of such note had been performed prior to the filing of the petition the fees stipulated to be paid would have been provable as a debt against the estate of the bankrupt. In re Chadwick (D. C., Ohio), 15 Am. B. R. 528, 140 Fed. 674.

119. In re Edens & Co. (D. C., So. Car.), 18 Am. B. R. 643, 151 Fed. 940; *Merchants' Bank v. Thomas* (C. C. A., 5th Cir.), 10 Am. B. R. 299, 121 Fed. 806; *Matter of Ballard* (D. C., Tex.), 44 Am. B. R. 651.

Only reasonable fee allowed.—Where bankrupts gave to claimant bank certain notes which contained provisions that in case they were not paid when due and payable and if they were placed in the hands of an attorney for collection, the holder should be paid 10 per cent additional on the principal and interest due thereon, as an attorney's fee, such provision called for the payment only of a reasonable attorney's fee for services actually rendered in conformity with its terms. *Mechanics' American National Bank v. Coleman* (C. C. A., 8th Cir.), 29 Am. B. R. 396, 204 Fed. 24.

120. In re Chandler (C. C. A., 8th Cir.), 25 Am. B. R. 865, 184 Fed. 897; *Matter of Morrison* (C. C. A., 7th Cir.), 44 Am. B. R. 321, 261 Fed. 355. As to proof of interest generally, see Am. Bankr. Dig. § 848.

121. In re Fenn (D. C., Vt.), 22 Am. B. R. 833, 172 Fed. 620.

When interest allowable.—Interest is allowable on claims strictly against the assets of a bankrupt only up to the time of filing the petition in bankruptcy. Where the proceeds, derived from the sale by the trustee of the real property of the bankrupt's deceased husband, which descended to her subject to an equitable lien for his debts, are more than sufficient to pay the principal of his debts, interest should be allowed until the date of the sale. *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

122. *Sexton v. Dreyfus*, 219 U. S. 339, 25 Am. B. R. 363, 365, 55 L. Ed. 244, 31 Sup. Ct. 256; *Shawnee County v. Hurley* (C. C. A., 8th Cir.), 22 Am. B. R. 209, 94 C. C. A. 362, 169 Fed. 92.

123. *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

The rate of interest of course depends upon the State law; if the rate is usurious only the amount legally chargeable may be included as a part of the debt, unless the usury affects the validity of the note, in which case the entire debt is vitiated.<sup>125</sup>

**e. Indorser and surety debts.**—(1) **LIABILITY OF INDORSERS.**—The present statute contains no equivalent to § 5069 of the Revised Statutes;<sup>126</sup> and it was for some time doubted whether an indorser whose liability became fixed after the bankruptcy could prove against the bankrupt's estate.<sup>127</sup> It is now thought that, in spite of this omission and the persuasive argument based on the harmonies of the statute, *contra*,<sup>128</sup> such liabilities, because on "contract, express or implied," are provable. The rules of law applicable when the indorser or surety is already liable for a debt of the bankrupt have been considered.<sup>129</sup> His claim is in no sense contingent, for he proves the fixed liability of the bankrupt to the principal debtor. But where such person is merely an accommodation party, he will not be allowed to prove his debt.<sup>130</sup> Where the liability of an indorser becomes fixed after his petition is filed, and prior to the expiration of the time for proof of claims, it is provable as a debt.<sup>131</sup> Where the indorsers of the notes of a bankrupt corporation take

<sup>124</sup> In re Chandler (C. C. A., 7th Cir.), 25 Am. B. R. 863, 184 Fed. 887. See also In re Orne, Fed. Cas. 10,581.

<sup>125</sup> In re Worth (D. C., Ia.), 12 Am. B. R. 566, 130 Fed. 927. See In re Kellogg (C. C. A., 2d Cir.), 10 Am. B. R. 7, 121 Fed. 833.

<sup>126</sup> Act of 1867, § 19.

<sup>127</sup> See In re Schaefer (D. C., Pa.), 5 Am. B. R. 92, 104 Fed. 973, as overruled by the same judge in In re Gerson (D. C., Pa.), 5 Am. B. R. 69, 105 Fed. 891; the later ruling, *affd.* s. c., 6 Am. B. R. 11, 107 Fed. 897; Matter of Shatz (D. C., Pa.), 41 Am. B. R. 576, 251 Fed. 351. See also In re Marks (Ref., N. Y.), 6 Am. B. R. 641.

<sup>128</sup> Thus see Collier on Bankruptcy (3d ed.), pp. 382, 383.

<sup>129</sup> See discussion under Sections Sixteen and Fifty-seven of this work. Compare In re Smith (Ref., N. Y.), 1 Am. B. R. 37; Smith v. Wheeler, 5 Am. B. R. 46, 55 N. Y. App. Div. 170, 66 N. Y. Supp. 780; Hayer v. Comstock (Sup. Ct., Ia.), 7 Am. B. R. 493, 115 Iowa 187; In re Lamson (D. C., N. Y.), 22 Am. B. R. 635, 171 Fed. 516; Whitwell v. Wright (Sup. Ct., N. Y.), 23 Am. B. R. 747, 136 App. Div. 246, 120 N. Y. Supp. 1065.

<sup>130</sup> In re Dunningan, 2 N. B. N. Rep. 755. Compare, on this general subject, Zartman v. Hines (Ref., N. Y.), 6 Am. B. R. 139.

<sup>131</sup> Moch v. Market St. Nat. Bank (C. C. A., 8d Cir.), 6 Am. B. R. 11, 107 Fed. 897; In re Smith (D. C., R. I.), 17 Am. B. R. 112, 146 Fed. 912; In re Semmer Glass Co. (C. C. A., 2d Cir.), 14 Am. B. R. 25, 135 Fed. 77; Gorman v. Wright (C. C. A., 4th Cir.), 14 Am. B. R. 135, 136 Fed. 164; Heyman v. Third Nat. Bank (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685; Manheim v. Loewe (N. Y. App. Div.), 42 Am. B. R. 606, 185 App. Div. (N. Y.), 601, quoting Collier on Bankruptcy (11th ed.), 963.

**Payment of note of bankrupt.**—A claimant who had deposited collateral to secure a note of the bankrupt and had afterward paid the same at the bankrupt's request and for his benefit, *held* under the evidence to be entitled to have his claim therefor allowed against the bankrupt estate. Matter of Malman (D. C., Me.), 43 Am. B. R. 507, 256 Fed. 127.

**Reimbursement to indorsers.**—Where certain directors of a bankrupt corporation having indorsed notes which were discounted and the proceeds used in the company's business, paid the notes at maturity, they are as much entitled to reimbursement as if each had contributed his share in cash and will be permitted to prove a claim therefor against the

bankrupt's estate. In re Salvator Brewing Co. (C. C. A., 2d Cir.), 28 Am. B. R. 56, 193 Fed. 989.

**Trustee of indorser also trustee of maker.**—Where a partnership and each of its two members have been adjudicated bankrupt and the trustees of the firm are also trustees of each individual member, under the provisions of sections 172, 185 and 186 of the New York Negotiable Instruments Law, a claim, based upon notes made by one of the bankrupts and indorsed by the other member of the firm and which had not matured when bankruptcy intervened, is provable against the individual estate of such indorser, although no notice of non-payment was given to him. In re McIntyre & Co. (D. C., N. Y.), 28 Am. B. R. 459, 198 Fed. 579.

**Contingent liability of endorser.**—A surety or an indorser for a bankrupt, whose liability is contingent, cannot prove a claim of his own by reason of such liability. It is only the creditor's claim which is provable. An indorser on the note of a bankrupt who pays the note cannot prove a claim on the note and also on the implied promise of the bankrupt made at the time of the indorsement to repay him in case he is compelled to pay such note. A corporation prior to bankruptcy executed a trust mortgage to secure bonds issued and delivered to secure indorsers of its notes. On the foreclosure of the mortgage after bankruptcy of the corporation a deficiency judgment was entered, and the trustee under the mortgage filed a proof of claim based thereon. The notes were all assigned to one party who advanced money to the indorsers who paid said notes. *Held*, that the claim on the deficiency judgment should be rejected, but the claim on the notes should be allowed without deduction on account of the enforcement of the collateral; that on taking up the notes the indorsers were entitled to prove their claims for the full amount thereof and,

up the notes and the bonds of the corporation held as collateral are turned over to such indorsers, the latter are then in the attitude of sureties, having paid the principal debt of the principal, and are therefore subrogated to the collateral held by the creditor.<sup>132</sup> Where one of the indorsers, who pay the note or become liable therefor, is a bankrupt, the indorsers may prove a proportionate share of the note against the co-indorser.<sup>133</sup>

(2) SURETY AND CORPORATE BONDS.—Where the liability of the principal upon an administration bond has been legally liquidated and ascertained, both as to the amount and the person to whom due, so as to fix the liability of the surety thereon at the time of the filing of a petition in bankruptcy, by or against such surety, such liability is a provable debt.<sup>134</sup> The liability of a surety on a bond of an officer whose duty it is to collect and pay over public funds becomes fixed on the officer's failure to make payments of the money collected, and if such failure occurs prior to the adjudication of the bankrupt surety, such liability is provable against his estate.<sup>135</sup> And in the case of an indemnity bond to secure the performance of a building contract, a bankrupt principal is relieved from his obligation upon discharge, and the surety may pay it off and be subrogated to the rights of the creditor and have the pro rata part of the bankrupt's estate applied to the principal debt.<sup>136</sup> Where a surety pays the amount of the damages secured, he is entitled to share with all the creditors of the bankrupt, but not to the prejudice of the beneficiary obligees of the bond.<sup>137</sup> Corporate bonds issued under proper statutory authority to secure the payment of money borrowed for the transaction of the business of the corporation are valid claims.<sup>138</sup> The holders of the bonds of a corporation, secured by a trust mortgage on the property of the corporation,

receive a dividend on the full amount of such claims and then apply the proceeds of the mortgaged property applicable to the payment of the balance of the claim on the bonds or deficiency judgment. *Matter of Astoroga Paper Co.* (D. C., N. Y.), 37 Am. B. R. 761, 234 Fed. 792.

132. In such a case the indorsers, regarded as sureties, entitled to subrogation, can obtain no more from the collateral originally delivered to the creditor than the creditor itself could have done. They can claim only the amount paid by them with interest, and upon the payment of such sum the bonds and other bonds issued as interest thereon, will be liquidated. *Sauve v. Fleschutz* (C. C. A., 8th Cir.), 34 Am. B. R. 49, 219 Fed. 542.

133. *Wright v. Rumph* (C. C. A., 5th Cir.), 38 Am. B. R. 235, 236 Fed. 138.

134. *Hibbard v. Bailey* (C. C. A., 3d Cir.), 12 Am. B. R. 104, 129 Fed. 575, revg. 10 Am. B. R. 545, 123 Fed. 185. As to liability of firm on note given to surety of one of the members on an official bond, see *In re Speer Bros.* (D. C., Or.), 16 Am. B. R. 524, 144 Fed. 910. As to liability under bail bond to United States for person indicted for stealing funds of a bankrupt estate, see *In re Caponigri* (D. C., N. Y.), 27 Am. B. R. 513, 193 Fed. 291.

135. *Loeser v. Alexander* (C. C. A., 6th Cir.), 24 Am. B. R. 75, 176 Fed. 265.

136. *Williams et al. v. U. S. Fidelity Co.*, 236 U. S. 549, 34 Am. B. R. 181, 59 L. Ed. 713, 35 Sup. Ct. 289, revg. 28 Am. B. R.

802; *Murphy v. Nicholson* (N. J. Ct. of Errors and App.), 34 Am. B. R. 670, 94 Atl. 62; *United States v. Illinois Surety Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 880, 226 Fed. 653.

Distribution between surety of bankrupt and other creditors.—A surety company gave a bond securing persons furnishing labor or material to a municipal contractor. In express terms the obligation was joint and several. By a contemporaneous agreement the contractor indemnified the surety company against any payments that the latter might make under the bond. After the contractor had incurred debts exceeding the amount of the bond several creditors sued both the contractor and the surety in the State court and the surety was permitted to pay the amount of its liability on the bond into court, which was subsequently distributed, each creditor receiving about 50 per cent. of his debt. Thereafter the contractor was adjudged a bankrupt and its plant sold by the trustee. *Held*, that the surety's claim for the amount paid into court, for which it also held a judgment, should be allowed; but other creditors must credit the dividend received from the State court and confine themselves to the balance. *Matter of American Product Co.* (C. C. A., 3d Cir.), 35 Am. B. R. 54, 224 Fed. 401.

137. *Matter of American Product Co.* (D. C., Pa.), 34 Am. B. R. 367, 222 Fed. 126.

138. *In re Waterloo Organ Co.* (C. C. A., 2d Cir.), 13 Am. B. R. 477, 134 Fed. 341.

and not the trustee, are entitled to prove their individual claims on the bonds against the bankrupt corporation.<sup>139</sup>

f. **Liabilities for taxes.**—While taxes are not in a strict sense debts, they are so regarded for many purposes under the bankruptcy act, and they are legally due and owing on the day they are assessed, although not payable until after adjudication.<sup>140</sup> While technical proof of them is not required and they must be paid even if not presented for proof, they are to be treated as provable debts or demands embraced in the class “founded upon an open account or upon a contract express or implied,”<sup>141</sup> for various purposes—including that of computing the indebtedness of an alleged bankrupt.<sup>142</sup> A sum exacted by a State for the privilege of increasing the capital stock of a corporation is a provable debt entitled to a *pro rata* distribution with the debts of other general creditors.<sup>143</sup>

g. **Other debts falling within this paragraph.**—The liability of a director of a savings bank under a statute for loss of funds embezzled by an officer constitutes a “fixed liability absolutely owing,” within the meaning of this section.<sup>144</sup> An agreement by a son to pay interest on a certain sum to his father during his lifetime, and to pay the principal to the father’s heirs within five years after his death, is not a “fixed liability absolutely owing,” and the amount agreed to be paid is not a provable claim against the son’s bankrupt estate.<sup>145</sup>

#### IV. OPEN DEBT ACCOUNTS: CONTRACTS.

a. **Debt founded on open account.**—Subdivision 4 of this subsection makes a debt “founded on an open account” provable and allowable. These words, in view of the words that follow, seem almost unnecessary. It is meant thereby to permit a creditor to prove for a balance due on a running account between him and the bankrupt. If a debt is founded upon an open account its provability is not affected by the fact that the creditor has elected to sue as for a fraudulent conversion rather than for a balance due,<sup>146</sup> or for damages

139. *Mackay v. Randolph Macon Coal Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 719, 178 Fed. 881.

**Bonds payable only from surplus which has never existed.**—Where bonds of a bankrupt company expressly declare on their face that both the principal and interest are payable only out of certain named funds to be created out of the surplus earnings of the company, and there never have been any surplus earnings, there cannot be a fixed liability absolutely owing to the holders of the bonds. *Synnott v. Tombstone Consol. Mines Co.* (C. C. A., 9th Cir.), 31 Am. B. R. 421, 208 Fed. 251.

A provision in the bonds of a bankrupt corporation, that at maturity any surplus shall be divided between the bondholders, and stockholders, does not defeat the holders’ claim to prove as general creditors for principal and interest. *Matter of Interborough Realty Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 541, 223 Fed. 646.

140. *In re Sherwood* (C. C. A., 2d Cir.), 31 Am. B. R. 769, 210 Fed. 754; *Hecox v. Teller County* (C. C. A., 8th Cir.), 28 Am. B. R. 525, 198 Fed. 634; *In re Flynn* (D. C., Mass.), 13 Am. B. R. 720, 134 Fed. 145; *In re Fisher & Co.* (D. C., N. J.), 17 Am. B. R. 404, 148 Fed. 907. See Am. Bankr. Dig. § 849.

141. *In re United States Button Co.* (D. C.,

Del.), 15 Am. B. R. 390, 140 Fed. 495, *affd.* 17 Am. B. R. 565, 149 Fed. 48.

**Payment of taxes by mortgagee.**—Where the assignee of a third mortgage elects to sue out a judgment on a mortgage bond and have the mortgaged property sold without notice to the trustee in bankruptcy, the property will be held to have been sold subject to the tax burdens and the assignee will not be permitted to come into a court of bankruptcy, which is a court of equity, and recover from the general funds of the estate the amount of the taxes which he paid under the plea of their being a part of the expense of administration. *Matter of Gracey* (D. C., Pa.), 39 Am. B. R. 463, 241 Fed. 931.

142. *Kaw Boller Works v. Schull & Anderson* (C. C. A., 8th Cir.), 36 Am. B. R. 531, 230 Fed. 587.

143. *Matter of York Silk Mfg. Co.* (D. C., Pa.), 26 Am. B. R. 650, 188 Fed. 735.

144. *In re Brown* (C. C. A., 9th Cir.), 21 Am. B. R. 123, 164 Fed. 673; *In re Walker* (C. C. A., 9th Cir.), 21 Am. B. R. 132, 164 Fed. 669.

145. *In re Hartman* (D. C., Pa.), 21 Am. B. R. 610, 166 Fed. 776.

146. *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147, 25 Sup. Ct. 9, *revg.* 301 Ill. 581; *Krettlein v. Ferger*, 238 U. S. 21, 34 Am. B. R. 862, 59 L. ed. 118, 435 Sup. Ct. 695, *revg.* 28 Am. B. R. 908, 52 Ind. App. 199.



sustained in consequence of false and fraudulent representations.<sup>147</sup> Payments made by the bankrupt on an open account within the four months' period do not affect the provability of the balance due, provided the net result of transactions evidenced by the account is the enrichment of the bankrupt estate.<sup>148</sup>

b. Debt founded on a contract, express or implied.—(1) IN GENERAL.—Subdivision 4 also provides that a debt may be proved and allowed which is "founded on a contract, express or implied." These are the most generic and valuable words in the subsection. The contract must, of course, be founded on a legal consideration, not against public policy, and, if by a corporation, not *ultra vires*.<sup>149</sup> The claim need not be evidenced by a judgment or instrument in writing. But it is the debt resting on the contract, and not the contract liability that is provable. If there is no present liability under the contract when proof is made there can be no provable claim.<sup>150</sup> Where a contract is broken by the bankruptcy of the debtor, damages may be recovered for the breach.<sup>151</sup> But if the contract is of such a nature that it may be consummated notwithstanding the bankruptcy of one of the parties, such bankruptcy does not constitute a breach of the contract, nor does it authorize

147. *Tindle v. Birkett*, 205 U. S. 183, 18 Am. B. R. 121, 51 L. Ed. 762, 27 Sup. Ct. 493, affg. 15 Am. B. R. 179, 183 N. Y. 267, 76 N. E. 25.

148. *Wild & Co. v. Provident Life & Trust Co.*, 214 U. S. 292, 22 Am. B. R. 109, 53 L. Ed. 1003, 29 Sup. Ct. 619; *Jaquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 733, 47 L. Ed. 717, 23 Sup. Ct. 649. In the case of *Yaple v. Dahl-Millikan Grocery Co.*, 193 U. S. 526, 11 Am. B. R. 596, 48 L. Ed. 776, 24 Sup. Ct. 552. It was held where a creditor has a claim upon an open account for goods sold and delivered during the period of four months before the adjudication in bankruptcy, the account being made up of debits and credits, leaving a net amount due from the bankrupt estate, that payments made under such circumstances did not constitute preferences which the creditor was bound to surrender before proving his claim in bankruptcy.

149. As to illegal contracts see Am. Bankr. Dig. § 840; as to *ultra vires* acts of corporations, see *Idem*, § 850.

Illegal or immoral consideration.—In the absence of proof, an illegal or immoral consideration should not be assumed. *Matter of Wray* (C. C. A., 2d Cir.), 37 Am. B. R. 28, 233 Fed. 418.

Corporate contract by lumber company to guaranty the completion of a building contract held *ultra vires*. In *re Smith Lumber Co.* (D. C., Tex.), 13 Am. B. R. 118, 132 Fed. 618. See also *In re Waterloo Organ Co.* (C. C. A., 2d Cir.), 13 Am. B. R. 466, 134 Fed. 341; *Forsyth v. Woods*, 11 Wall. 484; *Buckner v. Street*, Fed. Cas. 2,098; *In re Chandler*, Fed. Cas. 2,590; *In re Young*, Fed. Cas. 18,145; *In re Jaycock*, Fed. Cas. 7,244; *In re Green*, Fed. Cas. 5,751. Compare

also *In re Ervin* (D. C., Pa.), 7 Am. B. R. 460, 114 Fed. 596.

Public policy not opposed by brewers' contract with bankrupt saloon keeper restricting the bankrupt from selling any other beer than that manufactured by the brewer. *Matter of Clark* (Ref., Cal.), 21 Am. B. R. 776.

Illegal contract for sale of liquors not established without proof that the sale was illegal at place where made. *Jacobs v. Balentine Breweries Co.* (C. C. A., 1st Cir.), 27 Am. B. R. 918, 193 Fed. 393. See also *Thompson, Belden & Co. v. Leisy Brewing Co.* (C. C. A., 8th Cir.), 41 Am. B. R. 682, 249 Fed. 462.

Agreement to repurchase capital stock.—Where a corporation, when selling shares of the capital stock to claimant, agreed to repurchase the same after the expiration of three years, upon claimant's giving notice that he so desired, such contract is invalid and cannot be made the basis of a claim in the bankruptcy proceedings of the corporation, especially in view of section 664 of the New York Penal Law forbidding the purchase by a corporation of its capital stock except out of surplus profits arising from the business of the corporation. *In re Tichenor-Grand Co.* (D. C., N. Y.), 29 Am. B. R. 408, 208 Fed. 720. Compare *Matter of National Piano Co.* (D. C., Mass.), 42 Am. B. R. 111, 252 Fed. 950.

150. *In re Ellis* (C. C. A., 6th Cir.), 16 Am. B. R. 221, 143 Fed. 103, where a subcontractor was held to have no claim provable in bankruptcy for materials furnished to a contractor, where the agreement between them required no payment, unless payment was made to the contractor by the owner.

151. *In re National Wire Corp.* (D. C., Conn.), 22 Am. B. R. 186, 166 Fed. 631; *In re Inman & Co.* (D. C., Ga.), 22 Am. B. R. 524, 175 Fed. 31; *Matter of Desnoyers Shoe Company* (D. C., Ill.), 32 Am. B. R. 51, 210 Fed. 533.

the rescission or abandonment of such contract.<sup>152</sup> The form of the contract is not material so long as it imposes a contractual obligation upon the debtor; as for instance, stock certificates issued by a corporation, entitling the holder to purchase merchandise, and to receive dividends thereon out of the profits of the corporation; such certificates being payable in merchandise after two years, are contracts of the corporation and the amount due thereon is provable against its estate.<sup>153</sup>

(2) GAMBLING TRANSACTIONS.—If the contract is illegal because in violation of a statute prohibiting betting and gaming, it may not be provable, but this rule will not prevent the allowance of a claim where money was fraudulently procured by the bankrupt to bet on horse races.<sup>154</sup> The rule applies to speculative contracts for the future delivery of cotton and grain, no actual delivery being intended.<sup>155</sup> The provability of claims based on "bucket shop" transactions will depend largely upon State statutes; if such transactions are unlawful, debts arising therefrom are not provable.<sup>156</sup> If the contract involves the purchase and the actual delivery of the stock or grain, it is not a gambling transaction, although it provides for future delivery, and the payment was "on a margin."<sup>157</sup>

152. *In re Morgantown Tin Plate Co.* (D. C., W. Va.), 25 Am. B. R. 836, 184 Fed. 109 (revd. in part, but on other grounds, 26 Am. B. R. 851, 191 Fed. 9), citing *Carey v. Nagle*, Fed. Cas. 2,403; *Vandegrift v. Cowles Eng. Co.*, 161 N. Y. 435, 444, 45 N. E. 941, 48 L. R. A. 685.

153. *In re Spot Cash Hooper Co.* (D. C., Tex.), 26 Am. B. R. 546, 186 Fed. 861.

154. *In re Arnold* (D. C., Mo.), 13 Am. B. R. 320, 133 Fed. 789.

Where bankrupt had issued to claimants certificates stating, in substance, that he had received certain sums of money in full payment for a specified number of shares in the "pool" of a company, under whose name bankrupt was doing business, and it was further provided in the certificates that the company would invest the money according to its judgment and pay the holders their *pro rata* shares of the profits on hand on the first of each month, claimants having the option to withdraw the whole or any part of their money on the first of any month upon ten days' notice of intention so to do and the company being privileged to cancel the certificate on the first day of any January upon thirty days' notice. It was held that the relation created was that of lender and borrower, and not that of partners, so that claimants were entitled to prove, in bankruptcy proceedings, for the money advanced, notwithstanding the fact that such money was intended to be used in a gambling enterprise. *In re Norris* (D. C., Minn.), 26 Am. B. R. 945, 190 Fed. 101.

155. *In re Aetna Cotton Mills* (D. C., S. Car.), 22 Am. B. R. 629, 171 Fed. 994.

156. Transactions with bucket shop.—In the case of *Streeter v. Lowe* (C. C. A., 1st Cir.), 25 Am. B. R. 774, 184 Fed. 263, it appeared that a customer of the bankrupt who was a stockbroker, filed a proof of claim for the balance due from the bank-

rupt on account of the purchase and sale of stock by the bankrupt for the account of such customer. The trustee objected to the claim on the ground that it was founded upon wagering contracts and therefore was invalid. It appeared that the bankrupt had rendered accounts to the creditor in which the transactions were treated as real sales and purchases and in these accounts he entered also certain cash payments actually made as margins by the creditor to the bankrupt. The evidence showed, however, that the bankrupt was the keeper of a bucket shop, neither making nor intending real sales and purchases of stock, but only wagers on its price, and that the creditor understood that the transactions were wagers and did not intend that the orders which he gave the bankrupt should be carried out by actual sale or purchase. It was held that the creditor was not entitled to prove a claim for the entire balance alleged to be due on account of purchases and sales, but that under Rev. Laws of Mass. Chap. 99, sec. 4, providing for the recovery of payments made on margins, the creditor was entitled to have his claim allowed to the extent of the cash payments actually made as margins and interest thereon.

157. Actual delivery contemplated.—Under section 8416 of the Revised Code of Montana subjecting to a penalty "any person conducting any brokerage business, bucket shop or office where grain or other securities are sold on margins," where bankrupt, a stockbroker, converted stock which had been left in his possession to secure the balance due him on the purchase price, about one-fourth of which had been paid, under an agreement stating that the stock had been sold "with the distinct understanding that actual delivery is contemplated," a claim against bankrupt's estate for the difference between the value of the

(3) **OWING AT TIME OF FILING PETITION.**—Subdivision 4 does not repeat the words "absolutely owing at the time of the filing of the petition against him," but it is provable that they should be read therein,<sup>158</sup> for it is evident that the status of a debt founded on a contract is to be determined as of the time when the petition was filed.<sup>159</sup> If it be owing at the time of the filing of the petition it may be proved; but if it becomes due only after the filing of the petition, even if before adjudication, it is not a claim to be considered as one absolutely owing.<sup>160</sup> For instance, where an agreement takes effect on a certain day, which is subsequent to the filing of a petition against the bankrupt, the indebtedness arising from such agreement is not a provable claim against his estate.<sup>161</sup>

(4) **BREACH OF WARRANTY.**—A claim for damages for breach of warranty upon a sale of personal property is for a debt founded upon a contract and is provable, although the amount thereof is undetermined.<sup>162</sup> And this rule obtains although because of actual fraud in the sale there might be an independent claim purely in tort.<sup>163</sup> But the term "represent and warrant" does not imply a promise to reimburse claimants for damages on account of the failure of a certain tract of land to cut as much timber as represented.<sup>164</sup>

(5) **BREACH OF EXECUTORY CONTRACT.**—(I) *In general.*—A claim for damages for the breach of an executory contract is provable, if it may be liquidated under section 63-b.<sup>165</sup> Such doubt as may have arisen as to the provability of such a claim is caused by the conflict in authorities as to whether an action will lie for damages for the breach of an executory contract before the stipulated time of complete performance has arrived.<sup>166</sup> If the damages resulting from the breach may be definitely ascertained there seems no good reason why a claim based thereon should not be admitted to proof.<sup>167</sup>

stock at the time of bankruptcy and the balance due is not illegal as based upon a contract prohibited by law. In re Dorr (C. C. A., 9th Cir.), 20 Am. B. R. 406, 186 Fed. 576.

158. In re Swift (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315. See also Matter of Jorolemon-Oliver Co. (C. C. A., 2d Cir.), 32 Am. B. R. 467, 218 Fed. 625.

159. In re Adams (D. C., Mass.), 12 Am. B. R. 368, 130 Fed. 789; In re Birgham (D. C., Vt.), 2 Am. B. R. 223, 96 Fed. 79; In re Pettingill (D. C., Mass.), 14 Am. B. R. 728, 137 Fed. 443. Compare In re Gerson (C. C. A., 3d Cir.), 6 Am. B. R. 11, 107 Fed. 897, holding that while the liability of an indorser on a note does not become fixed and absolute until after his bankruptcy, it may still be proved against his estate, if such liability has become fixed within the time limited for proving claims; Colman Co. v. Withoft (C. C. A., 9th Cir.), 28 Am. B. R. 328, 195 Fed. 250; Synnott v. Tombstone Consol. Mines Co. (C. C. A., 9th Cir.), 31 Am. B. R. 421, 208 Fed. 251; Cotting v. Hooper, Lewis & Co., 34 Am. B. R. 23, 107 N. E. 931.

160. Zavelo v. Reeves, 227 U. S. 625, 29 Am. B. R. 493, 57 L. Ed. 676, 33 Sup. Ct. 365; Phoenix Nat. Bank v. Waterbury, 197 N. Y. 161, 90 N. E. 435; Board of County Com-

missioners v. Hurley (C. C. A., 8th Cir.), 22 Am. B. R. 209, 169 Fed. 92; Matter of Mullings Clothing Co. (D. C., Conn.), 37 Am. B. R. 166, 230 Fed. 681.

161. Phoenix Nat. Park Bank v. Waterbury (N. Y., Ct. of App.), 23 Am. B. R. 250, 197 N. Y. 161, 90 N. E. 435.

162. In re Grant Shoe Co. (C. C. A., 2d Cir.), 12 Am. B. R. 349, 130 Fed. 881, affg. 11 Am. B. R. 48, 125 Fed. 576.

163. Grant Shoe Co. v. Laird Co. 212 U. S. 445, 21 Am. B. R. 484, 53 L. Ed. 591, 29 Sup. Ct. 332.

164. Switzer & Johnson v. Henking (C. C. A., 6th Cir.), 19 Am. B. R. 300, 153 Fed. 784.

165. In re Spittler (D. C., Conn.), 18 Am. B. R. 425, 151 Fed. 942; In re National Wire Corp. (D. C., Conn.), 22 Am. B. R. 186, 166 Fed. 631.

166. See discussion of this question and cases cited in In re Stern (C. C. A., 2d Cir.), 8 Am. B. R. 569, 16 Fed. 604.

167. In re Stoeber (D. C., Pa.), 11 Am. B. R. 345, 127 Fed. 304; In re Stern (C. C. A., 2d Cir.), 8 Am. B. R. 569, 116 Fed. 604; Matter of Spengler (D. C., Ia.), 39 Am. B. R. 64, 238 Fed. 862.

**Breach of written contract; measure of damages.**—A claim for damages arising out of the breach of a written contract whereby bankrupt was to purchase certain articles to be produced by claimant is provable; and

(II) *Anticipatory breach*.—It is well established that if a party to an executory contract has by his own act made compliance with such contract impossible, or had repudiated its terms, the doctrine of anticipatory breach applies, and the other party may elect to defer suit until the time of performance has elapsed, or he may sue at once for the breach.<sup>165</sup> Under this doctrine where a contract is renounced before performance is due, and the renunciation goes to the entire contract, and is absolute and unequivocal the breach is complete and a cause of action immediately arises on the contract.<sup>166</sup> Whether the intervention of bankruptcy proceedings, especially in case of involuntary proceedings, constitutes an anticipatory breach giving rise to a claim provable in bankruptcy has been variously determined;<sup>170</sup> but it has now been finally determined that bankruptcy proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement.<sup>171</sup> Bankruptcy is a

the measure of damages is the difference between the contract price and the cost of production. *Pratt v. Auto Spring Repairer Co.* (C. C. A., 1st Cir.), 28 Am. B. R. 483, 190 Fed. 495.

**Measure of damages under subscription with mercantile agency.**—Where a mercantile agency contracted with the bankrupts whereby it agreed to furnish information regarding the character and credit of persons in business in the United States and Canada to the bankrupts for the period February 1, 1910, to April 30, 1911, for the sum of \$150 "payable May 1, 1910," and from the date of the contract until a petition in bankruptcy was filed against the bankrupts on March 4, 1910, such agency did whatever it was called upon to do, but no service was rendered subsequent thereto, the agency was entitled to prove its claim for \$150 against the estate upon the theory that the written contract at the basis of the claim was a promise to pay a definite sum of money contained in a non-negotiable instrument in writing. *In re Glick* (D. C., N. Y.), 25 Am. B. R. 871, 184 Fed. 967, citing with approval decision of *Referee Hotchkiss in Matter of Buffalo Mirror & Beveling Co.* (Ref., N. N.), 15 Am. B. R. 122.

**163. Application and effect of doctrine.**—As stated by the court in *Board of Commerce v. Security Trust Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 762, 225 Fed. 454: "This doctrine was established in *Roehm v. Horst*, 178 U. S. 1, 44 L. Ed. 953, 20 Sup. Ct. 760, in which the English and American cases are reviewed; was declared by this court in *Weber v. Grand Lodge*, 169 Fed. 522, 536; in *El Paso Cattle Co. v. Stafford*, 176 Fed. 41, 47; was reaffirmed in *The Eliza Lines*, 199 U. S. 119, 129, 50 L. Ed. 115, 26 Sup. Ct. 8, and in *Citizens' Bank v. Davison*, 229 U. S. 212, 224, 57 L. Ed. 1153, 33 Sup. Ct. 625, and is the settled law in the United States and England. This rule is held to apply also to cases in which, by reason of bankruptcy, disability to perform results. In the case, *In re Neff* (C. C. A., 6th Cir.), 19 Am. B. R. 23, 157 Fed. 57, 61, 84 C. C. A. 561,

it was said by Mr. Justice Lurton, then a judge of this court: 'Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance.'

"He cited *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315, 50 C. C. A. 204, and *In re Pettingill* (D. C., Mass.), 14 Am. B. R. 728, 137 Fed. 143, in which Judge Putnam and Judge Lowell, respectively, expressed the same opinion. In these cases the authorities are carefully collated and considered."

**169. *Roehm v. Horst***, 178 U. S. 1, 44 L. Ed. 953, 20 Sup. Ct. 760; *Matter of Mullings Clothing Co.* (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58.

**170. In support of the provability of the claim.**—See *Ex parte Pollard*, 2 Low. 411; Fed. Cas. No. 11,252; *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315, 319, 321; *In re Stern* (C. C. A., 2d Cir.), 8 Am. B. R. 569, 116 Fed. 604; *In re Pettingill & Co.* (D. C., Mass.), 14 Am. B. R. 728, 137 Fed. 143, 146, 147; *In re Neff* (C. C. A., 6th Cir.), 19 Am. B. R. 23, 157 Fed. 57, 61; are referred to; and see *Pennsylvania Steel Co. v. New York City Ry. Co.* (C. C. A., 2d Cir.), 198 Fed. 721, 736, 744.

**To the contrary:** *In re Imperial Brewing Co.* (D. C., Mo.), 16 Am. B. R. 110, 143 Fed. 579; *In re Inman & Co.* (D. C., Ga.), 171 Fed. 185; a. c., 23 Am. B. R. 566, 176 Fed. 312; besides which a number of cases arising out of the relation of landlord and tenant are cited: *In re Ellis* (D. C., Mass.), 3 Am. B. R. 564, 96 Fed. 967; *In re Pennewell* (C. C. A., 6th Cir.), 9 Am. B. R. 490, 119 Fed. 139; *Watson v. Merrill* (C. C. A., 8th Cir.), 14 Am. B. R. 453, 136 Fed. 359; *In re Roth & Appel* (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed. 667; *Colman Co. v. Withoff* (C. C. A., 9th Cir.), 28 Am. B. R. 328, 195 Fed. 250.

**171. *Central Trust Company v. Auditorium Assn.***, 240 U. S. 581, 36 Am. B. R. 679, 60 L. Ed. 811, 36 Sup. Ct. 412; *Planters' Oil Co. v. Gresham, Tex. Ct. of Civ. App.*, 42 Am. B. R. 29, 202 S. W. 145.

complete disablement from performance of a contract, and the equivalent of an out and out repudiation, subject, of course, to the right of the trustee to carry out the contract for the benefit of the bankrupt estate.<sup>172</sup> It follows that a claim for breach of contract may be proved, although the time of performance had not arrived when the petition was filed, on the theory that the bankruptcy proceedings is an anticipatory breach and a complete disablement on the part of the debtor, thus making him liable for damages immediately upon filing the petition.<sup>173</sup> A claim for damages for the breach of an executory contract of lease where the lessee is a corporation and has voted to wind up and its stockholders have applied to the court for the appointment of a receiver to wind up its affairs and dissolve the corporation, is a claim founded upon a contract and provable in bankruptcy.<sup>174</sup>

(6) CONTINGENT CONTRACTUAL LIABILITIES.—While contingent contractual obligations may not be proved,<sup>175</sup> yet if liabilities thereunder mature by the happening of the contingent event upon which they depend, after the filing of the petition, and in time to admit of proof, they become provable debts.<sup>176</sup> The importance of these doctrines when applied to indorser and surety liabilities has already been considered.<sup>177</sup>

(7) CONTINUING CONTRACTS.—A discharge does not operate upon a contract of a continuing character in such a manner as to permit the bankrupt to enjoy the benefit arising therefrom after the filing of the petition, and at the same time exempt him from liability to pay for such subsequent enjoyment.<sup>178</sup> It seems that a bond to pay an annuity may be proved at the penalty of the bond, provided the latter is less than the value of the annuity based on the mortuary tables.<sup>179</sup> Bonds to secure the faithful performance of the duties of another, an officer, are of a continuing nature. There is a cause of action for each breach. The liability, because of those breaches which have occurred before the filing of the petition, is provable, but this does not destroy the continuing obligation of the bond.<sup>180</sup> The liability of a

172. In re Neff (C. C. A., 6th Cir.), 19 Am. B. R. 23, 157 Fed. 57; Planters' Oil Co. v. Gresham (Tex. Ct. of Civ. App.), 42 Am. B. R. 29, 202 S. W. 145.

Directors' liability.—Matter of Hutchcraft (D. C., Ky.), 41 Am. B. R. 238, 247 Fed. 187.

173. Wood v. Fisk & Robinson (N. Y. Sup. Ct.), 31 Am. B. R. 824, 156 N. Y. App. Div. 497, 141 N. Y. Supp. 342; Matter of Scott, etc., Co. v. Cent. Trust Co. (C. C. A., 7th Cir.), 32 Am. B. R. 417, 216 Fed. 308, mod. sub. nom. Central Trust Co. v. Auditorium Assn., 240 U. S. 531, 36 Am. B. R. 679, 60 L. Ed. 811, 36 Sup. Ct. 412.

174. Matter of Mullings Clothing Co. (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58.

175. In re Inman & Co. (D. C., Ga.), 22 Am. B. R. 524, 175 Fed. 312; Matter of Jorolemon-Oliver Co. (C. C. A., 2d Cir.), 32 Am. B. R. 467, 213 Fed. 625.

Liability on poor debtor's bond.—An action on a poor debtor's bond given under the statutes of Maine is not barred by the debtor's discharge in bankruptcy after a breach of the bond rendering the liability of the sureties thereon fixed and not contingent. Rice v. Murphy (Sup. Jud. Ct., Maine), 32 Am. B. R. 665, 82 Atl. 842.

176. In re Smith (D. C., R. I.), 17 Am. B. R. 112, 146 Fed. 923; In re James Dunlap Carpet Co. (D. C., Pa.), 20 Am. B. R. 882, 163 Fed. 541, holding that claims, although contingent when filed, may be proved if they become definite and capable of liquidation within a year of the adjudication. Compare In re Pettigill & Co. (D. C., Mass.), 14 Am. B. R. 728,

137 Fed. 143, holding that a claim for a breach of a contract to purchase stock at a fixed date, after the bankruptcy, is provable; In re Imperial Brewing Co. (D. C., Mo.), 16 Am. B. R. 110, 143 Fed. 579.

Claim for unpaid subscription of stock.—Where a corporation, for the stock of which the bankrupt had subscribed, made an assignment for the benefit of creditors, followed by a receivership, prior to the bankruptcy of the subscriber, a claim on such subscription is not "contingent." Matter of Thompson (D. C., Wash.), 42 Am. B. R. 142, 257 Fed. 140.

177. See subtitle "Indorser and Surety Debts," *ante*, p. 963.

178. Robinson v. Pesant, 8 N. B. R. 426, 53 N. Y. 419.

179. Cobb v. Overman (C. C. A., 4th Cir.), 6 Am. B. R. 324, 106 Fed. 65.

Claim for annuity under contract.—Where a bankrupt made a contract upon good consideration to pay a creditor a certain sum per day during the creditor's life, and there was no default at the time of adjudication, the creditor may prove the present worth of the sum during his expectation of life, as shown by the mortality tables. Matter of Miller (D. C., Mass.), 35 Am. B. R. 333, 225 Fed. 331.

180. Fowler v. Kendall, 44 Me. 448.

181. Clemmons v. Brinn (Sup. Ct., N. Y. App. T.), 7 Am. B. R. 714, 36 Misc. 157, 72 N. Y. Supp. 1066.

182. In re Daterson Publishing Co. (C. C. A., 3d Cir.), 26 Am. B. R. 582, 188 Fed. 64.

183. In re Silverman (D. C., Mo.), 4 Am. B. R. 83, 101 Fed. 219; In re Pollard, Fed. Cas.

defendant in replevin on his bond given to secure the return of the chattels is too contingent, even after judgment in replevin against him, and is thus neither provable nor dischargeable.<sup>181</sup> A conditional contract for the purchase of personal property, whereby the purchaser agrees to pay a stipulated monthly rental, based on rates of payment, is a continuing contract, but it does not necessarily bind the purchaser's trustee in bankruptcy to continue payment under the contract, regardless of the extent or value of the trustee's use of the property.<sup>182</sup>

(8) **CONTRACT OF EMPLOYMENT AND FOR COMMISSIONS.**—Where contracts of employment are made for specified periods of time which are breached by the bankrupt before the expiration thereof, the damages resulting therefrom are provable although at the time of the bankruptcy the contract was not terminated.<sup>183</sup> A contract for services to be rendered for a bankrupt is executory, and under the principles before stated, the employee may claim damages for the anticipatory breach caused by the probable failure of the employer to perform on account of his bankruptcy.<sup>184</sup> It has been held in contravention of this doctrine that a contract of employment in force at the time of bankruptcy is terminated by operation of law, and that the employee's claim of damages therefor is contingent and not provable.<sup>185</sup> But the decision of the Supreme Court in respect to anticipating breaches of personal contracts has decisively overruled this declaration.<sup>186</sup> So also where a contract has been made for the sale of goods on commission for a specified time a breach either by some act of the bankrupt or by the bankruptcy will give rise to a claim for damages, which is provable.<sup>187</sup> The reason is: There is a contract by which the liability is fixed, that being broken by the bankrupt during the course of performance, amounts to a rescission, a right of action thus vesting immediately in the creditor. A contract or agreement made by directors of a corporation with an officer, to pay compensation for services rendered by such officer, unauthorized by the laws of the State under which the corporation was operating, is not the basis of a valid claim against the corporation.<sup>188</sup> However, it has been held that an attorney may recover for the reasonable value of services rendered at the request of an officer and director of a corporation, and with knowledge of the other directors, although his employment was not the result of direct corporate action.<sup>189a</sup>

11,252, *Orr v. Ward*, 73 Ill. 318; *Sturgiss v. Meurer* (C. C. A., 4th Cir.), 26 Am. B. R. 851, 191 Fed. 9, rev'g in part 25 Am. B. R. 886, 184 Fed. 100. As to breach of employment and commission contracts, see Am. Bank. Dig. § 839.

184. *Matter of Schultz & Guthrie* (D. C., Mass.), 37 Am. B. R. 604, 235 Fed. 907.

185. *In re Inman & Co.* (D. C., Ga.), 22 Am. B. R. 524, 175 Fed. 312.

Installments of salary which have not been earned and are not due at the time of the filing of a petition in bankruptcy against the employer are not debts then absolutely owing and are not provable. *Matter of Levy & Sons* (D. C., Md.), 31 Am. B. R. 25, 208 Fed. 479.

186. *Central Trust Co. v. Auditorium Assn.*, 240 U. S. 581, 36 Am. B. R. 679, 60 L. Ed. 811, 38 Sup. Ct. 412.

187. As to claim for commissions on contract repudiated by bankrupt, see *In re Saxton Furnace Co.* (D. C., Pa.), 15 Am. B. R. 445, 142 Fed. 293. As to effect of bankruptcy of corporation upon contract containing provisions for revocation in case of dissolution, see *In re Sweetser* (C. C. A., 2d Cir.), 15 Am. B. R. 650, 142 Fed. 131. Claim only allowed for commis-

sions on orders filled by the bankrupt. *In re Ladue Tate Mfg. Co.* (D. C., N. Y.), 14 Am. B. R. 235, 135 Fed. 910.

188. *In re McCarthy Portable Elevator Co.* (D. C., N. J.), 28 Am. B. R. 45, 196 Fed. 247, in which case it was also held that the mere rendition of service does not necessarily carry the right to compensation; but where not performed on the request of the party sought to be charged therewith, the circumstances of its rendition must be such that, in law, it will be presumed to have been rendered for the benefit of such party and not the party rendering it.

**Claim by employee for services and expenses.**—Claim by a person employed by a bankrupt company, more than three weeks before filing its petition in bankruptcy, to investigate the operations of the company at a certain place, examined and held to exclude any idea of the claimant having been employed by the receivers of the bankrupt, and that the claim for services and expenses should be disallowed. *Matter of Union Dredging Co.* (D. C., Del.), 35 Am. B. R. 555, 225 Fed. 188.

The annual fee to be paid under a contract with a mercantile agency is a provable debt although only a part of the year has elapsed.<sup>180</sup>

(9) **BREACH OF COVENANT IN LEASE.**—Where the trustee of a bankrupt tenant dispossesses a sub-tenant, a claim of the latter for breach of a covenant of quiet enjoyment contained in his lease, is not a provable debt against the tenant's estate, since it did not constitute "a fixed liability absolutely owing at the time of the filing of the petition."<sup>180</sup> Amounts due for rent of premises used by a bankrupt tenant, as well as any periodical payments reserved in a lease which have accrued at the time of the filing of the petition in bankruptcy are claims presentable and allowable against the estate because they are definite and fixed liabilities owing at the time of the commencement of the bankruptcy proceedings.<sup>181</sup> There is no doubt about the bankrupt's liability if he continues to use the premises. Of course it would be different, if by the terms of the contract the rent was all payable in advance and had become due before the petition, although the terms extended beyond that time. So a continuing covenant to pay taxes as they might be assessed throughout a period of years to come, would not be provable in bankruptcy. Failure to pay instalments prior to the petition would give rise to a debt which would be provable, but it would not release the covenantor from liability to pay subsequent assessments.<sup>182</sup> So since covenants that one will warrant and defend a title are not broken until a paramount title is asserted and established, there is no provable debt until that time, notwithstanding there may be adverse claimants; and there being no provable debt the covenantor is not released from the obligation. But if the covenant has been broken, then the party may prove his claim in bankruptcy. A covenant against incumbrances being broken at the time of the conveyance, if an incumbrance did then exist, is a debt provable in bankruptcy. The bankruptcy court has ample power to liquidate the damages.<sup>183</sup> A breach of a covenant in a lease against an assignment is waived by an unqualified demand and receipt of rent from the assignee after the assignment.<sup>183a</sup> We will consider hereafter under unliquidated claims the provability of claims for accruing instalments of rent.

(10) **IMPLIED CONTRACTS.**—This means the same as quasi-contracts. If the view expressed, *ante*, that, since the amendatory acts, all torts can be liquidated and then proved, ultimately prevails, the doctrine permitting the creditor to waive the tort and proceed on the theory of an implied contract, becomes of little importance.<sup>184</sup> If a promise to pay in the form of a due

180a. Evidence of value of services.—An attorney who files a claim for services rendered a bankrupt corporation, must clearly establish the value of his services. And it seems that the value is to be fixed according to the standard of value in the State where the corporation was organized. *Matter of United States Molybdenum Co.* (D. C., Me.), 43 Am. B. R. 401, 255 Fed. 790.

180. *Matter of Buffalo Mirror & Beveling Co.* (Ref., N. Y.), 15 Am. B. R. 122; *In re Gilck* (D. C., N. Y.), 25 Am. B. R. 871, 184 Fed. 967.

180. *In re Pennewell* (C. C. A., 6th Cir.), 9 Am. B. R. 490, 119 Fed. 139. See also *In re Miller* (D. C., Vt.), 13 Am. B. R. 87, 132 Fed. 414. See Am. Bankr. Dig. § 836.

191. *Matter of Mullings Clothing Co.* (D. C., Conn.), 37 Am. B. R. 166, 230 Fed. 681, holding that a claim for damages to be measured by the differences in the amount of rent which a bankrupt agreed by lease to pay for the whole term

and the amount which a new tenant agrees to pay for the balance of the term is a claim for rent. *Matter of Cort & Gold* (D. C., Ohio), 39 Am. B. R. 607.

192. *Murray v. De Rottenham*, 6 Johns. Ch. 52.

193. *Parker v. Bradford*, 45 Ia. 311.

193a. *Ratchesky v. Whiting* (C. C. A., 1st Cir.), 41 Am. B. R. 640, 251 Fed. 268.

194. Compare generally *Keener on Quasi-Contracts*.

**Waiver of tort.**—Though a suit on which a capias was issued was in tort that alone will not exclude it from claims provable in bankruptcy, for the tort may be waived, and a judgment had, as upon an implied contract. *Barrett v. Prince* (C. C. A., 7th Cir.), 16 Am. B. R. 64, 143 Fed. 302.

**Claim for moneys collected by bankrupt.**—A claim against a bankrupt arising out of the collection and conversion to his own use of

bill is unenforceable because in violation of a State law, relative to the "doing of business" in a State by a foreign corporation, the claim may not be proved upon the theory of an implied contract.<sup>195</sup> A statutory liability may be contractual in its nature and give rise to a provable claim as one based upon an implied contract; for instance it has been held that the liability of a stockholder of a banking corporation under a State statute, arises upon an implied contract, entered into when he acquires his stock, that he will be liable in the manner and to the extent prescribed by the statute.<sup>196</sup> A claim for expenses incurred in securing the return of stock loaned to the bankrupt to be used as collateral to secure a loan is provable on the ground of implied contract for reimbursement.<sup>196a</sup>

#### V. JUDGMENTS ENTERED AFTER BANKRUPTCY.<sup>197</sup>

Subdivision 5 of subsection *a* permits the proof and allowance of debts "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, etc." This clause gives statutory recognition to the doctrine of *Boynnton v. Ball*,<sup>198</sup> which settled a controversy under the law of 1867, that outlasted the statute itself. The contention was that the debt, being merged in the judgment, and the latter post-dating the bankruptcy, became a new debt which could not be proved, and was, therefore, not discharged.<sup>199</sup> There can now be no doubt. The debt, whether merged or not—and it seems it is not—may be proved in the form of the judgment, provided costs and interest after the bankruptcy are credited.<sup>199a</sup> But the judgment must (1) be founded upon a provable debt, and (2) be entered before "the consideration of the bankrupt's application for a discharge," *i. e.*, before the day on which the show cause order returnable thereon is called and heard. This provision manifestly does not include liabilities for torts.<sup>200</sup>

#### VI. CLAIMS FOR COSTS.

**a. In general.**—Subdivisions 2 and 3 of subsection *a* are for the purpose of permitting the proof and allowance of debts founded on a claim for costs incurred prior to the bankruptcy in an action by or against the bankrupt, but which has not yet been taxed. These subdivisions, in a sense, extended the doctrine of *Boynnton v. Ball* to costs which were not taxable at the time of the bankruptcy. Costs taxed prior to that time are debts and may be proved as such.<sup>201</sup> Costs taxed subsequently are not, unless within the terms of

money due on a promissory note which he had assigned to the claimant as collateral security is founded on an implied contract to pay over any money that he might collect on the note, and being a fixed sum absolutely owing, is provable in bankruptcy. *Sabinal Nat. Bank v. Bryant* (Tex. Civ. App.), 39 Am. B. R. 304, 191 S. W. 1179.

<sup>195.</sup> *In re Montello Brick Works* (D. C., Pa.), 23 Am. B. R. 375, 174 Fed. 498.

<sup>196.</sup> *Van Tuyl v. Schwab* (N. Y. App. Div.), 38 Am. B. R. 161, 174 App. Div. 666, 161 N. Y. Supp. 326.

<sup>196a.</sup> *Walter v. Atha* (C. C. A., 3d Cir.), 45 Am. B. R. 150, 262 Fed. 75.

<sup>197.</sup> For cases digested as to judgments after petition is filed, see Am. Bankr. Dig. § 843.

<sup>198.</sup> 121 U. S. 457.

<sup>199.</sup> See *In re Pinkel* (Ref., N. Y.), 1 Am. B. R. 333; *In re McBryde* (D. C., N. Car.), 3 Am. B. R. 729, 90 Fed. 686; *Chase v. Farmers & Merchants Nat. Bank* (C. C. A., 3d Cir.), 30 Am. B. R. 200, 202 Fed. 904.

<sup>199a.</sup> *Gordon v. Texas Co.* (Me. Sup. Ct.), 45 Am. B. R. 157, 109 Atl. 368, citing *Collier on Bankruptcy* (4th ed.), 449.

<sup>200.</sup> *Matter of N. Y. Tunnel Co.* (C. C. A., 2d Cir.), 20 Am. B. R. 25, 159 Fed. 688, holding that a claim for damages for causing death by wrongful act is not provable against the estate in bankruptcy of the alleged wrongdoer.

<sup>201.</sup> *Ex parte Foster*, Fed. Cas. 4,960; *In re O'Neill*, Fed. Cas. 10,527; *Graham v. Pierson*, 6 Hill (N. Y.), 247; *Matter of Ballard* (D. C., Tex.), 44 Am. B. R. 651.



subsection *a* (2) or subsection *a* (3).<sup>202</sup> Costs paid by a surety on an appeal bond given by a bankrupt are provable against his estate.<sup>203</sup>

**b. Costs against an involuntary bankrupt.**—By subdivision 2 costs taxable against an involuntary bankrupt who was a plaintiff, at the time of the filing of the petition against him, in a cause of action which would pass to the trustee, but which he declines to prosecute after notice, are provable debts. There are no cases directly applicable to this subdivision. Clearly such costs to be provable must, however, be against one who, when the petition was filed, was a plaintiff in an action which, on the adjudication, passed to the trustee, but which the trustee declines, after notice, to prosecute any further.

**c. Costs incurred in good faith in an action to recover a provable debt.**—Under subdivision 3 a debt may be proved and allowed which is founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition, in an action to recover a provable debt.<sup>204</sup> There was no similar provision in the law of 1867. Thus neither the party litigant nor the sheriff had a provable debt against the estate for the costs or disbursements on an attachment or judgment dissolved or set aside by the bankruptcy.<sup>205</sup> On the other hand where such annulled liens were shown to be similar to, and in aid of, the bankruptcy proceeding, the sheriff, or the creditor who had paid him, was often, for equitable reasons, awarded such costs and disbursements out of the estate.<sup>206</sup> It is not thought that subdivision (3) has modified these rules. The party litigant now has by statute

<sup>202</sup> See *In re Marcus* (D. C., Mass.), 5 Am. B. R. 19, 104 Fed. 331; *Aiken v. Haskins*, 6 Am. B. R. 46, 34 N. Y. Misc. 505, 70 N. Y. Supp. 293.

**Provableity of costs in suit against bankrupt.**—Where, long before bankruptcy proceedings were instituted, claimant had brought an equity suit against bankrupt in the State court, to enjoin the use of a certain word in connection with their business, in which it had been stipulated between the parties that the referee should not be limited to the statutory allowance, but that his fees should be fixed at a certain rate per hour and that each side should pay one-half of the stenographer's bill, the prevailing party to be allowed to tax his share as a disbursement in the case, the claimant, having had a decision in his favor and having paid the stenographer's fees and the referee's fees having been paid prior to the filing of the petition in bankruptcy, was entitled under section 63-a of the bankruptcy act to prove a claim against the bankrupt's estate for these items, the same to be considered as costs in the equity suit rather than as a debt due prior to the institution of bankruptcy proceedings upon a contract express or implied. *In re Brewster & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 838, 180 Fed. 109.

**Liability of customers of bankrupt stockbrokers for costs and expenses.**—Customers of bankrupt stockbrokers who find their property in loans while they are entitled to a credit balance, ought not to be called on to

pay any part of the disbursements and should have a docket fee. But customers carrying stocks on margin thereby give the broker the right to pledge them as collateral, and should bear the expense of disentangling the resulting rights in proportion to their interests, but are not entitled to a docket fee. Those customers who fail to establish any claim should not bear any costs. *Matter of Pierson, Jr. & Co.* (D. C., N. Y.), 35 Am. B. R. 213, 25 ed. 889.

<sup>203</sup> *In re Lyons Beet Sugar Refining Co.* (D. C., N. Y.), 27 Am. B. R. 610, 192 Fed. 445.

<sup>204</sup> **Costs incurred in good faith.**—The mere fact that a creditor believes his debtor to be in financial straits does not preclude him from asserting his legal rights, or impute bad faith to him in so doing, so as to bar his claim for costs where he prosecuted his claim to judgment, issued execution and was proceeding to sell property levied under the execution when the debtor filed a voluntary petition in bankruptcy. *In re Harnden* (D. C., N. Mex.), 29 A. M. B. R. 504, 200 Fed. 173.

<sup>205</sup> *Gardner v. Cook*, Fed. Cas. 5,226; *In re Ward*, Fed. Cas. 17,145; *In re Davis*, Fed. Cas. 3,616. See *Matter of Thompson Mercantile Co.* (Ref., Min.), 11 Am. B. R. 579.

<sup>206</sup> *In re Williams*, Fed. Cas. 17,705; *In re Welch*, Fed. Cas. 17,367; *In re Jenks*, Fed. Cas. 7,276; *Zeiber v. Hill*, Fed. Cas. 18,206; *In re Holmes*, Fed. Cas. 6,631.

a provable debt for his taxable costs and disbursements; so, perhaps, has the sheriff, if the party does not pay him. But that either has, where the costs and disbursements are incident to a lien dissolved by § 67-f, may be doubted.<sup>207</sup> The cases as a rule discuss the right to priority rather than the right to prove.<sup>208</sup> There can be no priority under § 64-b (5) where there is no "debt."<sup>209</sup> However, the words of the subdivision make it clear that costs can be proven under it only (1) if taxable, (2) in a suit brought by a creditor, (3) on a provable debt, (4) before the filing of the petition, and (5) incurred in good faith. Lacking one or more of these elements, costs are not provable unless within the meaning of subdivision (2).<sup>210</sup>

**d. Costs in attachment suits.**—The costs and disbursements in an attachment suit pending against a bankrupt at the time of the filing of the petition, the attachment lien being dissolved by the adjudication, are not a claim which should be paid by the trustee out of the bankrupt's estate. The costs and disbursements are a mere incident of the lien and fail with the lien.<sup>211</sup> But it has been held that such a claim incurred in good faith by a creditor though within four months of the bankruptcy, is a provable claim against the estate though the lien is dissolved,<sup>212</sup> and this seems to be the better authority under the present law. That the costs and disbursements in an attachment suit cannot be proven as a debt against the bankrupt and that the lien for the costs fails with the attachment lien, see the cases, under the act of 1867, cited in the foot-note.<sup>213</sup> An examination of the cases under such note shows, however, that in many of them, although it was held that the lien for costs failed with the attachment lien, and although there was no claim therefor against the bankrupt, still the bankruptcy court may, in the exercise of its equitable jurisdiction, require the trustee to pay such charges as have benefited the estate in his hands, though incurred before the bankruptcy; if he received the benefit of the attachment he was obliged to sustain the burden.<sup>214</sup>

## VII. UNLIQUIDATED CLAIMS.

**a. In general.**—Subsection *b* permits the liquidation, and subsequent proof and allowance, of an unliquidated claim against the bankrupt. Our earlier Bankruptcy Acts invariably have been regarded as excluding from consideration unliquidated claims arising purely *ex delicto*.<sup>214a</sup> The law of 1867 per-

<sup>207</sup>. In re Young (D. C., N. Y.), 2 Am. B. R. 673, 96 Fed. 606; In re Jennings (Ref., N. Y.), 8 Am. B. R. 358. Compare Matter of Hessler Foundry & Mfg. Co. (D. C., N. Y.), 43 Am. B. R. 246.

<sup>208</sup>. Compare In re Allen (D. C., Cal.), 3 Am. B. R. 38, 96 Fed. 512; In re Lewis (D. C., Mass.), 4 Am. B. R. 51, 96 Fed. 985. And generally under § 64-b (5).

<sup>209</sup>. See Bankr. Act, § 1 (11).

<sup>210</sup>. Text cited with approval in In re Harneden (D. C., N. Mex.), 29 Am. B. R. 504, 200 Fed. 173.

<sup>211</sup>. In re Young (D. C., N. Y.), 2 Am. B. R. 673, 96 Fed. 606.

<sup>212</sup>. In re Allen (D. C., Cal.), 3 Am. B. R. 38, 96 Fed. 512.

**Costs of attachment suit under laws of State.**—A claim for costs actually and necessarily expended by claimant in an attachment suit brought against the bankrupt in good faith before the filing of the petition in bankruptcy, is a provable claim under section 63 (3) of the bankruptcy act and is entitled to priority under section

64-b (5), where, as in California, the State law provides that the legal costs and disbursements of an attachment suit brought before the commencement of proceedings in insolvency shall be a preferred debt. In re Amoratis (C. C. A., 9th Cir.), 24 Am. B. R. 565, 178 Fed. 919.

<sup>213</sup>. In re Fortune, 2 N. B. R. 662, Fed. Cas. 4,955, 1 Low. 306; Gardner v. Cook, 7 N. B. R. 346, Fed. Cas. 5,226; In re Geo. S. Ward, 9 N. B. R. 349, Fed. Cas. 17,145; In re Hatje, 12 N. B. R. 548, Fed. Cas. 6,215, 6 Biss. 436; In re Preston, 6 N. B. R. 545, Fed. Cas. 11,394. See, however, apparently contra, In re Foster, Fed. Cas. 4,960, 2 Story. 131; In re Hausberger, 2 N. B. R. 92, 2 Ben. 504; London v. King, 50 Ga. 302; In re Preston, 5 N. B. R. 293.

<sup>214</sup>. See In re Fatune, 2 N. B. R. 662, Fed. Cas. 4,955; Garden v. Cook, 7 N. B. R. 346, Fed. Cas. 5,226; In re Ward, 9 N. B. R. 349, Fed. Cas. 17,145; In re Jenks, 15 N. B. R. 301, Fed. Cas. 7,276; Zelber v. Hill, 8 N. B. R. 239, Fed.

mitted the liquidation of damages for conversion only; that, as has been shown, was (aside from debts grounded in fraud or embezzlement) the only tortious liability provable. The words of the present law are much broader and seem to be taken from R. S., § 5068, which regulated the liquidation of "contingent debts and contingent liabilities."

**b. Effect and purpose of subsection.**—Subsection *b* adds nothing to the class of debts which may be proved under subsection *a*; its purpose is to permit an unliquidated claim, coming under the provisions of subsection *a*, to be liquidated as the court shall direct.<sup>215</sup> It should be taken as evidence of an intent that contingent debts whose present value is capable of ascertainment are provable and that those whose present value is not so capable of ascertainment are not provable.<sup>216</sup> Unliquidated claims based upon a mere tort are not provable<sup>217</sup> but where the tort-feasor obtains something of value for which an equivalent price ought to be paid, even if the tort as such be forgiven, there may be a provable claim *quasi ex contractu*.<sup>217a</sup> A claim for unliquidated damages for loss of future profits is provable in bankruptcy, where it is based on a contract right.<sup>218</sup> If the nature of the claim is such that it can only be liquidated in a court having exclusive jurisdiction conferred by statute, it cannot be proved.<sup>219</sup> Cases under the former law will be found in the foot-note.<sup>220</sup>

**c. Injuries to person or property.**—A claim for unliquidated damages for personal injuries alleged to have been caused to a servant by the failure of a master to furnish safe appliances, arises *ex delicto* and is not of such a

Cas. 18,206; In re Holmes, 14 N. B. R. 498, Fed. Cas. 6,631.

<sup>214a</sup> Schall v. Camors (U. S. Sup. Ct.), 44 Am. B. R. 547, 40 Sup. Ct. 135.

<sup>215</sup> Dunbar v. Dunbar, 190 U. S. 340, 349, 10 Am. B. R. 139, 47 L. Ed. 1064, 23 Sup. Ct. 757; Schall v. Camors (U. S. Sup. Ct.), 44 Am. B. R. 547, 40 Sup. Ct. 135. Matter of Hutchcraft (D. C., Ky.), 41 Am. B. R. 238, 247 Fed. 187.

An unliquidated claim will only be allowed under section 63-b, upon application to the court to direct the manner of liquidation. In re Silverman Bros. (D. C., Mo.), 4 Am. B. R. 83, 101 Fed. 219.

**Class of provable debts not enlarged by section 63-b.**—Section 63-b of the bankruptcy act, providing for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate, adds nothing to the class of debts which may be proved under paragraph *a* of the same section, its purpose being to permit an unliquidated claim coming within the provisions of section 63-a, to be liquidated as the court should direct. Matter of Roth & Appel (C. C. A., 2d Cir.), 24 Am. B. R. 538, 181 Fed. 667; In re Southern Steel Co. (D. C., Ala.), 25 Am. B. R. 358, 183 Fed. 498; Matter of Mullings Clothing Co. (C. C. A., 2d Cir.), 88 Am. B. R. 189, 238 Fed. 58; Moore v. Douglas (C. C. A., 9th Cir.), 36 Am. B. R. 740, 230 Fed. 399, affg. 34 Am. B. R. 823, 225 Fed. 683.

**Taxes and premiums of insurance,** if they are not a fixed liability, are not such unliquidated claims against the bankrupt as can be proved, for only those claims can be admitted to proof under this provision which can be liquidated by legal proceedings instituted at the time of the bankruptcy. Matter of Pittsburg Drug Co. (D. C., Pa.), 20 Am. B. R. 227, 164 Fed. 482.

**Agreement of tenant to repair.**—A discharge in bankruptcy of a tenant who has agreed to keep the property in repair operates as a discharge of any unliquidated demand for failure to comply with such agreement. Kellogg v. King (Miss. Sup. Ct.), 39 Am. B. R. 762, 76 So. 134.

<sup>216</sup> Dunbar v. Dunbar, 190 U. S. 340, 10 Am. B. R. 139, 47 L. Ed. 1064, 23 Sup. Ct. 757; Matter of Hutchcraft (D. C., Ky.), 41 Am. B. R. 238, 247 Fed. 187.

<sup>217</sup> Schall v. Camors (U. S. Sup. Ct.), 44 Am.

B. R. 547, 40 Sup. Ct. 135, wherein the court, speaking through Mr. Justice Pitney, said: "Can it be supposed that the present Act was intended to depart so widely from the precedents as to include mere tort claims among the provable debts? Its sixty-third section does not so declare in terms, and there is nothing in the history of the Act to give ground for such an inference. It was the result of a long period of agitation, participated in by commercial conventions, boards of trade, chambers of commerce, and other commercial bodies. To say nothing of measures proposed in previous Congresses, a bill in substantially the present form was favorably reported by the committee on the judiciary of the House of Representatives in the first session of the Fifty-Fourth Congress. Having then failed of passage it was submitted again in the second session of the Fifty-Fifth Congress as a substitute for a Senate bill after disagreeing votes of the two houses, it went to conference and as the result of a conference report became law. It is significant that section 63, defining 'Debts Which may be Proved,' remained unchanged from first to last, except for a slight and insignificant variance in clause (5) in the final print; the word 'interests' having been substituted for 'interest.' House Rept. No. 1228, 54th Cong., 1st Sess., p. 39; House Rept. No. 65, 55th Cong., 2d Sess., p. 21; Senate Doc. No. 294, 55th Cong., 2d Sess., p. 22. Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract, express or implied, often require to be liquidated, some provision for procedure evidently was called for. Clause *b*, fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely *ex delicto*. Such claims might easily have been mentioned if intended to be included. Upon every consideration we are clear that claims based upon a mere tort are not provable." See also In re Hirschman (D. C., Utah), 4 Am. B. R. 715, 104 Fed. 69; In re Flier (Ref., N. Y.), 5 Am. B. R. 582; Matter of United Button Co. (D. C., Del.), 15 Am. B. R. 390, 140 Fed. 495; Matter of Griffin (D. C., Mass.), 33 Am. B. R. 894, 188 Fed. 389; Boyd v. Applewhite (Miss. Sup. Ct.), 45 Am. B. R. 325, 84 So. 16.

nature as to authorize a waiver of the tort and a recovery upon the quasi-contract, and is, therefore, not provable against the master's estate in bankruptcy.<sup>221</sup> So, a judgment, in an action under an employer's liability act to recover for personal injuries, is not a provable claim against the bankrupt's estate.<sup>222</sup> A claim for unliquidated damages, resulting from injury to the property of another, not connected with or growing out of any contractual relation, is not a provable debt in bankruptcy.<sup>223</sup>

d. Liquidation, how accomplished.—The liquidation is usually accomplished by a suit in the proper State court, but it can be in the bankruptcy court when all the facts are admitted.<sup>224</sup> The proof of the claim, though unliquidated, may be filed, and thereupon the claim is before the court to be dealt with as the interests of the parties may require; there must be liquidation before proof by such means as the court or referee may direct.<sup>225</sup> If it seems best the referee may withhold action on the claim or postpone the dividend thereon until the status of the claim is fully determined.<sup>226</sup> Unliquidated claims may be liquidated either by a hearing before the referee, by a plenary suit in any court of competent jurisdiction, or by permitting a pending action upon such claims to proceed to judgment.<sup>227</sup> It is not necessary to declare the rules for determining the amount due upon unliquidated claims; ordinarily such determination will be based upon the principles controlling the ascertainment of damages in other cases where there have been breaches of contractual obligations.<sup>228</sup>

e. Contingent liabilities.—There is a broad distinction between "unliquidated damages" and "contingent liabilities."<sup>229</sup> The phrase "unliquidated claims" may refer to both. The former law provided for the liquidation of contingent debts and liabilities,<sup>230</sup> and the cases under it, as well as those

217a. *Schall v. Camors* (U. S., Sup. Ct.), 44 Am. B. R. 547, 40 Sup. Ct. 135.

218. *Matter of Manhattan Ice Co.* (D. C., N. Y.), 7 Am. B. R. 408, 114 Fed. 400-n, *affd.* 8 Am. B. R. 569, 116 Fed. 604.

219. *In re Hawley* (D. C., Wash.), 28 Am. B. R. 58, 194 Fed. 751, in which a claim by a sub-contractor against a United States contractor, based upon the bond given by the contractor, was held not provable, because under the statute requiring the bond actions thereon can only be brought in the circuit court.

220. *In re Smith*, Fed. Cas. 12,975; *In re Cook*, Fed. Cas. 3,151; *Ex parte Lake*, Fed. Cas. 7,991; *Abbott v. Rowan*, 33 Ark. 593. See discussion *ante*, subtitle "Implied contracts."

221. *Matter of Urglone & Sons Co.* (Ref., Cal.), 10 Am. B. R. 661. See *ante*, II, d (4) "Claims tortious in character."

222. *In re Crescent Lumber Co.* (D. C., Ala.), 19 Am. B. R. 112, 154 Fed. 724.

A claim by an employee for personal injuries, unliquidated and not reduced to judgment, until after the adjudication in bankruptcy of the employer, is not a debt provable in the bankruptcy proceedings. *Eberlein v. Fidelity & Deposit Co.* (Wis. Sup. Ct.), 37 Am. B. R. 614, 159 N. W. 553.

A claim by the New York State Industrial Commission based upon an award against the bankrupt for personal injuries to an employee, made nearly seven months after bankruptcy and not reduced to judgment, is not provable under this section. *Matter of Rock-away Soda Water Co.* (D. C., N. Y.), 36 Am. B. R. 640.

223. *Brown & Adams v. United Button Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 565, 149 Fed. 48, *affg.* 15 Am. B. R. 390, 140 Fed. 495.

224. *In re Rouse* (Ref., Ohio.), 1 Am. B. R. 393.

225. *In re Rubel* (D. C., Wis.), 21 Am. B. R. 566, 170 Fed. 1021.

226. *In re Mertens* (C. C. A., 2d Cir.), 16 Am. B. R. 825, 144 Fed. 818.

227. *In re Buchanan's Soap Corp.* (D. C., N. Y.), 22 Am. B. R. 382, 169 Fed. 1017.

Accounting before referee to determine claim of solvent partner.—Where one partner has paid all the debts of a partnership whose other member has been adjudged a bankrupt, the sum which may be shown upon a partnership accounting to be due him from such other member is a debt which will be discharged by bankruptcy, and therefore provable against the estate of the bankrupt partner. In such case, an accounting being necessary to make proof of claim, the court has power under section 63-b of the bankruptcy act, to order the claim liquidated before the referee. *Matter of Hirth* (D. C., Minn.), 26 Am. B. R. 666, 189 Fed. 926.

228. See *Matter of Structural Steel Car Co.* (Ref., Ohio), 13 Am. B. R. 373; *In re Kenney* (D. C., Ind.), 14 Am. B. R. 611, 136 Fed. 451.

229. Consult *Zimmer v. Schleeauf*, 115 Mass. 52.

230. Bankr. Act, 1867, § 19 (R. S., § 5068), provided as follows: "In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividends; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove the amount so ascertained."

under its predecessor, drew a clear distinction between demands whose existence depended on a contingency and existing demands where the cause of action depended on a contingency; the former not being provable in any event and the latter only when liquidated.<sup>231</sup> The present law has no similar clause and it has been vigorously asserted that contingent claims cannot now be liquidated or proven.<sup>232</sup> We have already seen, however, that an indorser or a surety may have a provable claim, even if the contingency fixing it does not happen until after the bankruptcy. The same reasoning will doubtless extend to all existing demands based on contract where only the cause of action depends on a contingency. Such a construction harmonizes the statute both as to distribution of assets and to the dischargeability of debts, and explains an omission for which there was no reason, in fact, which, if intentional, was wrong. Such a contingency may, it is thought, be liquidated under the terms of subsection *b*; with, however, this limitation, that both (1) the contingency must happen and (2) the liquidation be accomplished during the time within which a claim may be proven.<sup>233</sup> The test as to whether a

231. *Raggin v. Magwire*, 15 Wall. 549; *French v. Morse*, 68 Mass. 111; *Jamison v. Blowers*, 5 Barb. (N. Y.) 686; *McNeil v. Knott*, 11 Ga. 142; *In re Mead*, 14 Fed. 287.

232. *In re Imperial Brewing Co.* (D. C., Mo.), 16 Am. B. R. 110, 143 Fed. 579; *In re American Vacuum Cleaner Co.* (D. C., N. J.), 26 Am. B. R. 621, 192 Fed. 939.

Effect of distinction between present act and act of 1867.—Mr. James W. Eaton, the able editor of the third edition of *Collier on Bankruptcy*, uses the following language in commenting upon the inferences to be drawn from the failure of the present act to provide for proof of contingent liabilities as was done under the act of 1867: "The provisions of the act of 1898 concerning the proof of contingent claims differ materially from those contained in the acts of 1841 and 1867. Section 63-a (1) provides for fixed liabilities absolutely owing at the time of the petition but not then payable. Section 57-i provides for the proof of contingent claims of the surety of the bankrupt where the creditor has not proved his claim. G. O. 21 (4) has only to do with the claims of a surety. Apart from these provisions there is nothing in the act of 1898 or the General Orders which refers expressly to contingent claims. It must therefore be assumed that Congress did not intend to include such claims among provable debts. (See cases cited under the preceding paragraph.) This will be seen by a comparison with the terms of the preceding act. Revised Statutes, section 5069 (section 19 of the act of 1867), reads: (Section inserted as in Note 230).

"Clearly, then, in enacting this paragraph (subdivision 1), Congress must have had in mind this liability of sureties and other persons in similar relations, as well as other contingent liabilities, and under the present law such claims or debts cannot be proved unless the liability has become fixed and absolutely owing before the com-

mencement of the proceedings in bankruptcy. Subdivision 4 provides that 'debts are provable which are founded upon an open account or upon a contract express or implied.' But contingent liabilities are not in any proper sense debts; they are mere contracts, and do not become debts until the contingencies happen on which demand for payment can be made. Those contingencies may indeed happen pending proceedings in bankruptcy, but there is no provision in the present act for the proof of such a debt if the liability becomes fixed after the commencement of proceedings but before final dividend. The statute of 1867 did permit proof in such cases, but it is believed that under the present statute it cannot be done. Inasmuch as in all previous bankruptcy acts legislators have thought it necessary to insert an express provision in order to give to one the right to prove such contingent debts and contingent liabilities, the omission of such provisions from the present act seems to show an intention on the part of Congress to leave the liability of the bankrupt on such contracts unaffected. Such construction of the statute cannot be assailed as not in conformity with the spirit and tendency of bankruptcy legislation. It is true that such liabilities, if not provable, are not in any way affected by a discharge. And there may be many liabilities which, in consequence, will remain outstanding against the bankrupt after the proceedings in bankruptcy. But to a certain extent that was true under the former act. Under all bankruptcy laws there is a certain date fixed after which debts which come into existence may be collected from the after-acquired property of the bankrupt. That time, under the present act, is the date of filing the petition."

233. Bankr. Act, § 57-n, and discussion under Section Fifty-seven of this work, subtitle "*Time limitation on allowance of claims.*"

claim is really contingent or simply one unliquidated by legal proceedings is this: Have all the facts necessary to be proved to fasten liability already occurred? If so the claim is not contingent. But as long as it remains uncertain whether a contract will ever give rise to an actual liability and there is no manner of removing the uncertainty by calculation, it is too contingent to be a provable debt.<sup>234</sup> Thus, it has been held, in respect to leases, that, although a landlord's claim was not a fixed liability at the time the petition was filed, if it was liquidated within the year, it became a provable debt.<sup>235</sup> A claim for future services under a written contract with the bankrupt for a term of years is a contingent liability and not provable in bankruptcy.<sup>236</sup> The conditional preliminary proof authorized by the former law should, however, not be permitted.<sup>237</sup> A claim cannot be proved for a breach of a covenant in a lease to the effect that the lessee would after re-entry indemnify the lessor against all loss of rents and other payments which might occur by reason of the termination of the lease, since in such a case the damages, if any, could not be ascertained until the term of the lease had expired as originally limited, or there had been a reletting.<sup>238</sup>

#### VII. WHAT DEBTS ARE NOT PROVABLE.

a. In general.—From what has already been said, it results that substantially all liabilities either *ex contractu* or *ex delicto*, provided they are liquidated either before the bankruptcy, or, if not, thereafter, are provable debts under the terms of subsection b. There are exceptions, which, and the reasons for them, are considered here.

b. Judgments for fines and penalties.—These are not provable,<sup>239</sup> though there is authority the other way.<sup>240</sup> Penalties imposed under a State statute *after adjudication* of a corporation in bankruptcy, for failure to file reports and the like, are not fixed liabilities absolutely owing at the time of the filing of the petition, and are not provable debts.<sup>241</sup> Fines are provable, if at all, only because "a fixed liability absolutely owing." But the criminal

<sup>234</sup>. *Matter of Mullings Clothing Co.* (D. C., Conn.), 87 Am. B. R. 106, 230 Fed. 661; decree set aside (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58; *Matter of Hutchcraft* (D. C., Ky.), 41 Am. B. R. 238, 247 Fed. 187.

<sup>235</sup>. *Moch v. Market Street Bank* (C. C. A., 3d Cir.), 6 Am. B. R. 11, 107 Fed. 897; *In re Dunlap Carpet Co.* (D. C., Pa.), 20 Am. B. R. 882, 163 Fed. 541; *In re Coloris Mfg. Co.* (D. C., Pa.), 24 Am. B. R. 609, 179 Fed. 722.

*Allowance of contingent claims; claim for salary due after bankruptcy.*—In the absence of statutory language expressly directing the allowance of contingent claims, the holder thereof will not be permitted in bankruptcy proceedings to share in the distribution of the assets with those creditors whose claims were absolute at the time of the filing of the petition. Thus, where one was employed by a bankrupt under an executory contract, which at the time of the filing of an involuntary petition had a number of months to run, and had been paid up to that date, a claim for salary for the month following the filing of the petition, during which time claimant was unemployed, cannot be proven under section 63 of the bankruptcy act of 1898. *In re American*

*Vacuum Cleaner Co.* (D. C., N. J.), 26 Am. B. R. 621, 192 Fed. 939.

<sup>236</sup>. *Matter of Montague & Gillet, Inc.* (D. C., N. Y.), 32 Am. B. R. 106, 212 Fed. 452.

<sup>237</sup>. Compare foot-note 230, *ante*.

<sup>238</sup>. *In re Shaffer* (D. C., Mass.), 10 Am. B. R. 633, 124 Fed. 111; *In re Ellis* (D. C., Mass.), 3 Am. B. R. 564, 98 Fed. 967. See also *Evans v. Lincoln Co.*, 10 Am. B. R. 401, 204 Pa. St. 448, 54 Atl. 321. Compare *Matter of Mullings Clothing Co.* (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58.

<sup>239</sup>. *In re Sutherland*, 3 N. B. R. 314, Fed. Cas. 13,639; *People v. Spaulding*, 10 Paige 284, affd. 4 How. 21; *In re Moore* (D. C., Ky.), 6 Am. B. R. 590, 111 Fed. 145; *In re Southern Steel Co.* (D. C., Ala.), 25 Am. B. R. 358, 183 Fed. 498; *Matter of Francisco* (D. C., N. Y.), 41 Am. B. R. 87, 245 Fed. 216.

<sup>240</sup>. *In re Alderson* (D. C., W. Va.), 3 Am. B. R. 544, 98 Fed. 588, holding that a judgment obtained in a State court against a bankrupt for fines upon indictments is a dischargeable judgment. This does not seem to be good law.

<sup>241</sup>. *Matter of York Silk Mfg. Co.* (D. C., Pa.), 26 Am. B. R. 650, 188 Fed. 785.

does not "owe" a fine; it is not a debt, but a punishment. Further, if provable, they are, under § 17, dischargeable. The courts will hardly impute to Congress an intention thus to grant amnesty to criminals whose punishment consists of a fine.<sup>242</sup> The opposite rule doubtless applies when the judgment is for a penalty or forfeiture.

c. *Alimony due or to accrue.*—Were *Audubon v. Schufeldt*<sup>243</sup> national in its scope, alimony, whether in arrears or to accrue, would not be a provable debt. As it is, there may still be some doubt in those States where it, when decreed by a court, is a debt merely.<sup>244</sup> That it is a duty measured up in dollars is the almost universal view, a reason alone sufficient to take it out of the meaning of § 63. Further, alimony to accrue is never a fixed liability, being always subject to change by the court that decrees it. Still further, it is not a judgment in the ordinary sense, the method of collection being far different. It is true that in this view, the amendment of 1903, exempting alimony from the effect of a discharge,<sup>245</sup> is superfluous. Now, however, alimony, whether due at the time of bankruptcy or accrued or to accrue thereafter, is not a provable debt.<sup>246</sup>

d. *Rent to accrue.*—The law of 1867 contained a clause which limited the proof of "rent or any other debt falling due at fixed and stated periods" to the moment of bankruptcy.<sup>247</sup> Under it, it was often held that rent to accrue was not provable.<sup>248</sup> Though there is no such clause in the present law, the great weight of authority is that rent to accrue is not even a contingent claim,<sup>249</sup> and is, therefore, not capable of proof.<sup>250</sup> The reasons given are various, but that asserting that the adjudication amounts to a breach of the lease has already been challenged and may be doubted.<sup>251</sup> The only "fixed liability" under the lease is the rent due at the time of filing the petition.<sup>252</sup> Rent to accrue is not a fixed liability absolutely owing, but is a

<sup>242</sup> See 1 N. B. 48, 57.

<sup>243</sup> 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1009, 21 Sup. Ct. 735.

<sup>244</sup> For instance, in Kentucky, see *In re Houston* (D. C., Ky.), 2 Am. B. R. 107, 94 Fed. 119.

<sup>245</sup> See Bankr. Act, § 17-a (2).

<sup>246</sup> See under Section Seventeen of this work; *Wetmore v. Markoe*, 196 U. S. 68, 13 Am. B. R. 1, 49 L. Ed. 390, 25 Sup. Ct. 172.

<sup>247</sup> Act of 1867, § 19, R. S., § 5071.

<sup>248</sup> *In re May*, Fed. Cas. 9,325; *In re Hufnagel*, Fed. Cas. 6,837; *In re Cronney*, Fed. Cas. 3,411.

<sup>249</sup> Compare *Ex parte Houghton*, Fed. Cas. 6,725. Text cited with approval in *Matter of Cress-McCormick Co.* (Ref., Miss.), 25 Am. B. R. 464.

<sup>250</sup> *In re Jefferson* (D. C., Ky.), 2 Am. B. R. 206, 93 Fed. 948; *In re Arnstein* (D. C., N. Y.), 4 Am. B. R. 246, 101 Fed. 706; *In re Collignon* (Ref., N. Y.), 4 Am. B. R. 250; *In re Mahler* (D. C., Mich.), 5 Am. B. R. 453, 105 Fed. 428; *Atkins v. Wilcox* (C. C. A., 5th Cir.), 5 Am. B. R. 313, 105 Fed. 695; *In re Ellis* (D. C., Mass.), 3 Am. B. R. 564, 98 Fed. 967; *In re Hays, etc., Co.* (D. C., Ky.), 9 Am. B. R. 144, 117 Fed. 879; *In re Winfield Mfg. Co.* (D. C., Pa.), 15 Am. B. R. 24, 137 Fed. 984; *Watson v. Merrill* (C. C. A., 8th Cir.), 14 Am. B. R. 453,

136 Fed. 359; *In re Rubel* (D. C., Wis.), 21 Am. B. R. 566, 170 Fed. 1021; *In re Roth & Appel* (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed. 667; *In re Sapinsky & Sons* (D. C., Ky.), 30 Am. B. R. 416, 206 Fed. 523; *Colman Co. v. Withoff* (C. C. A., 9th Cir.), 28 Am. B. R. 328, 195 Fed. 250. Apparently *contra*, *In re Goldstein* (Ref., Pa.), 2 Am. B. R. 603. Compare *Matter of Mullings Clothing Co.* (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58, following doctrine in *In re Roth & Appel* (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed. 667, but holding that it was not applicable to a case when prior to bankruptcy a corporation was dissolved thus terminating a lease.

<sup>251</sup> Compare *In re Jefferson* (D. C., Ky.), 2 Am. B. R. 206, 93 Fed. 948, with *In re Ellis* (D. C., Mass.), 3 Am. B. R. 564, 98 Fed. 967.

An adjudication in bankruptcy against a partnership operates to transfer by operation of law to the trustee a lease held by one of the partners, and authorizes the lessor to avoid the lease for a transfer "by operation of law" without his consent, in violation of a covenant of the lease. *Matter of Georgalas Brothers* (D. C., Ohio), 40 Am. B. R. 168, 245 Fed. 129.

A lease is not terminated *ipso facto* by an adjudication of bankruptcy. *In re Pennewell* (C. C. A., 6th Cir.), 9 Am. B. R. 490, 119 Fed. 139; *Watson v. Merrill* (C. C. A., 8th Cir.), 14 Am. B. R. 453, 136 Fed. 359; *In re Adams* (D. C., Conn.), 14 Am. B. R. 23, 134 Fed. 142.

<sup>252</sup> *Matter of Roth & Appel* (D. C., N. Y.), 22 Am. B. R. 504, 174 Fed. 64, *affd.* 24 Am. B. R. 588, 181 Fed. 667.

Rent accruing subsequent to bankruptcy and damages for breach.—In the case of

mere possible future demand contingent upon uncertain events,<sup>253</sup> and there may be a change in the relation of the parties by consent or breach at any time.<sup>254</sup> It does rest upon a contract,<sup>255</sup> and, therefore, could be liquidated, were it not for the fact that "its very existence depends on a contingency,"<sup>256</sup> no claim of which character can or ever has been capable of liquidation and proof.<sup>257</sup> It has been held that notes given by a bankrupt for rent accruing subsequent to adjudication are without consideration, since the rent or debt for which they were given cannot possibly come into existence, and such notes cannot, therefore, be proved against the estate of the bankrupt lessee.<sup>258</sup> And any other arrangement whereby the bankrupt became liable for future rent, although made between the bankrupt and a person other than the landlord to secure reimbursement of rent to be paid by such person, does not

*Matter of Sterne & Levi* (Ref., Tax.), 26 Am. B. R. 535, it was held that rents which a bankrupt has agreed to pay subsequent to the filing of a petition do not constitute the basis of a claim provable in bankruptcy, because not a "fixed liability—absolutely owing" at the time of the filing of the petition; and that damages for the breach of a bankrupt's contract to pay rent in the future may not be made the basis of a provable claim. (Citing text with approval.) And see *Ellis v. Rafferty* (C. C. A., 3d Cir.), 29 Am. B. R. 192, 199 Fed. 80.

**253. Rent to accrue contingent upon uncertain events.**—In the case of *Matter of Roth & Appel* (C. C. A., 2d Cir.), 24 Am. B. R. 586, 181 Fed. 667, the court said: "Rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is the consideration for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time stipulated for the payment arrives. The lessee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of *debitum in praesenti solvendum in futuro*. On the contrary, the obligation upon the rent covenant is altogether contingent. Citing *Watson v. Merrill* (C. C. A., 8th Cir.), 14 Am. B. R. 453, 136 Fed. 302; *Coke on Littleton*, 232-b; *Wood v. Partridge*, 11 Mass. 492; *Bordman v. Osborn*, 23 Pick. (Mass.) 299. It follows from these principles that rent accruing after the filing of a petition in bankruptcy against the lessee is not provable against his bankrupt estate as a fixed liability—absolutely owing at the time of the filing of the petition, within the meaning of § 63-a (1) of the bankruptcy act of 1898. It is not a fixed liability, but is

contingent in its nature. It is not absolutely owing at the time of the bankruptcy, but is a mere possible future demand. Both its existence and amount are contingent upon uncertain events." Citing *Atkins v. Wilcox* (C. C. A., 5th Cir.), 5 Am. B. R. 313, 105 Fed. 595; also *In re Rubel* (D. C., Wis.), 21 Am. B. R. 566, 166 Fed. 131; *In re Mahler* (D. C., Mich.), 5 Am. B. R. 453, 105 Fed. 428; *In re Hays, etc., Co.* (D. C., Ky.), 9 Am. B. R. 144, 117 Fed. 879; *In re Arnstein* (D. C., N. Y.), 4 Am. B. R. 246, 101 Fed. 706; *In re Jefferson* (D. C., Ky.), 2 Am. B. R. 206, 93 Fed. 948; *In re Inman & Co.* (D. C., Ga.), 22 Am. B. R. 624, 171 Fed. 185.

A claim under a mining lease for royalties to become due in the future, which is contingent upon the continuance of the lease, and by the terms of the lease itself cease to be due in the event of strikes, car shortage, etc., is not provable against the estate in bankruptcy of the lessee. *In re Gallagher Coal Co.* (D. C., Ala.), 29 Am. B. R. 766, 205 Fed. 183.

Rent is contingent after an assignment for benefit of creditors under which the lessors have the right to enter upon the premises and terminate the lease, or at their election to demand damages. *Cotting v. Hooper, Lewis & Co.*, 34 Am. B. R. 23, 107 N. E. 931.

**254. Matter of Cress-McCormick Co.** (Ref., Miss.), 25 Am. B. R. 464; *In re Calons's Mfg. Co.* (D. C., Pa.), 24 Am. B. R. 609, 179 Fed. 722.

**255. Bankr. Act, § 63-a (4).**

**256. Deane v. Caldwell**, 127 Mass. 242.

**257. Compare** *In re Mahler* (D. C., Mich.), 5 Am. B. R. 453, 105 Fed. 428.

**258. In re Curtis** (Sup. Ct., La.), 9 Am. B. R. 286, 33 So. 125. It was held upon rehearing in this case that the indorser on notes given for such rent was liable thereon upon the theory that although such notes were not provable against the bankrupt's estate, the consideration was not affected by the bankruptcy of the lessee, the non-provability of the notes being based upon the contingent nature of the claim.



modify the contingent character of the claim and make it provable.<sup>250</sup> Where a receiver in bankruptcy continues in occupation of leased premises, from the filing of the petition until the tenant's adjudication as a bankrupt, it has been held that the landlord may prove for rent down to the time of the adjudication, as for a debt founded upon an express contract.<sup>250</sup> It has been held that a covenant in a lease, making the rent for the entire period fall due upon a breach by the lease, creates a fixed liability within the meaning of § 63-a (1).<sup>251</sup> It has also been held that where a lease gives a lien for the rent upon property on the premises and such lien is recognized by a State statute, a claim for rent accruing after the bankruptcy of the tenant is provable against the particular property, but not against the general estate of the bankrupt.<sup>252</sup> But it has also been held that a provision in a lease, authorizing the landlord to re-enter upon the bankruptcy of the tenant, and permitting the landlord to recover the difference between the rent reserved and the rent collected by the landlord from other sources, does not enable the landlord to prove a claim for rent accruing subsequent to the bankruptcy of the tenant.<sup>253</sup> If the trustee elects to assume the lease and sell the same and the landlord acquiesces, the trustee steps into the bankrupt's shoes, and the question here discussed will not arise.<sup>254</sup> The trustee, however, usually retains possession

<sup>250.</sup> *Claim for contribution by joint lessee.*—Bankrupt and claimant were jointly liable on a lease which had not expired at the time of bankrupt's adjudication. They assumed as between themselves a several liability for one-half the rental reserved in the lease, and, before bankruptcy intervened, entered into an agreement that claimant should procure, if possible, a rescission of the lease for which it might pay a sum not to exceed \$100 per month for each month of the unexpired term and the bankrupt would pay claimant one-half the sum so paid, or agreed to be paid, by it for such rescission. After bankrupt's adjudication upon a voluntary petition, claimant paid the next month's rent and thereafter paid the lessors a certain sum and secured a cancellation of the lease. *Held*, that a claim for one-half of the sums so paid by claimant was not provable, since bankrupt's liability therefor at the time when the petition was filed was not due and owing, but contingent. *Colman Co. v. Withoft* (C. C. A., 9th Cir.), 28 Am. D. R. 328, 195 Fed. 250.

<sup>251.</sup> *Matter of Hinckel Brewing Co.* (D. C., N. Y.), 10 Am. B. R. 484, 123 Fed. 942. But see, *contra*, *In re Adams* (D. C., Mass.), 12 Am. B. R. 368, 130 Fed. 381.

<sup>252.</sup> *Matter of Pittsburg Drug Co.* (D. C., Pa.), 20 Am. B. R. 227, 234, 164 Fed. 482. See *Martin v. Orgain* (C. C. A., 5th Cir.), 23 Am. B. R. 454, 174 Fed. 772.

Under the law of Pennsylvania where a lease provides in effect that if the lessee shall become bankrupt the amount of the rent for the unexpired term shall become due, the landlord, on refusing to surrender of the lease has a provable claim for the rent for the unexpired period. *Rosenblum v. Uber* (C. C. A., 3d Cir.), 43 Am. B. R. 480, 250 Fed. 584.

<sup>253.</sup> *In re Scrubbs* (D. C., Ala.), 31 Am. B. R. 94, 205 Fed. 673; citing *Martin v. Orgain* (C. C. A., 5th Cir.), 23 Am. B. R. 454, 174 Fed. 772; *Lontos v. Coppard* (C. C. A., 5th Cir.), 40 Am. B. R. 515, 246 Fed. 808.

<sup>254.</sup> *Matter of Roth & Appel* (D. C., N. Y.), 22 Am. B. R. 504, 174 Fed. 64, *affd.* 24 Am. B. R. 588, 181 Fed. 667; *In re Abrams* (D. C., Iowa), 29 Am. B. R. 590, 200 Fed. 1005; *Matter of Mullings Clothing Co.* (D. C., Conn.), 41 Am. B. R. 756, 252 Fed. 667.

**Re-entry and recovery of damages in**

**case of bankruptcy.**—Where a landlord's claim was founded upon a provision in his lease to bankrupt that if the tenant should petition to be or be declared bankrupt, the landlord might enter into and repossess the premises and terminate the lease, in which case the tenant agreed to pay to the landlord, as damages, a sum which at the time of such termination represented the difference between the rental value of the premises and the rent and other payments therein named for the residue of the term, the claim was not provable, since there was no "fixed liability . . . absolutely due and owing at the time of filing the petition" in bankruptcy, the lease being terminable by the entry of the landlord, which by the terms of the lease could not be made until after bankruptcy. *Slocum v. Soliday* (C. C. A., 1st Cir.), 25 Am. B. R. 460, 183 Fed. 410.

**Claim against tenant for rent after surrender.**—Where before the filing of a petition in bankruptcy against a tenant, a levy was made upon his personal property, and subsequently the landlord accepted a surrender of the premises, he cannot claim against the bankrupt estate of the tenant for the whole of the unexpired term of the lease, although it provided that upon a levy against the tenant the whole rent for the unexpired portion of the term should become due. *Matter of Heilbron Brothers* (D. C., Pa.), 35 Am. B. R. 568, 226 Fed. 803.

<sup>254.</sup> *Matter of Sherwoods, Inc.* (C. C. A., 2d Cir.), 31 Am. B. R. 769, 210 Fed. 754; *In re Sapinsky & Sons* (D. C., Ky.), 30 Am. B. R. 416, 206 Fed. 523.

Where a bankrupt's trustee elects to give up the lease and the landlord's agent re-enters, but agrees to permit the occupancy

for a brief period, paying on a *quantum meruit* basis meanwhile.<sup>265</sup> The principles applicable to rent due for the occupancy of real property do not apply to the same extent in the case of a lease of personal property, where by the terms of the lease the whole amount becomes due in case of a default; in such a case the lessor may prove his claim for the whole amount due as a fixed liability.<sup>266</sup>

e. Debts outlawed by a statute of limitations.—Such debts are not provable. The limitation period depends upon the law of the State in which the action could be brought. There was some conflict on this question under the law of 1867, high authority holding that the provability of such a debt turned on whether the statute of limitations urged against it went merely to the remedy or actually destroyed the obligation.<sup>267</sup> But the weight of authority under that law was the other way.<sup>268</sup> The cases under the law of 1898 are to the same effect.<sup>269</sup> The reason for this doctrine seems to be one of abstract equity. Strictly, an outlawed debt is within the terms of § 63-a (1) and, therefore, provable. But, since such a debt could not have been asserted before bankruptcy against the objection of the debtor, the law prevents its proof against the other creditors and the consequent reduction of their *pro rata* by an interloper whose remedy has been lost by his own *laches*.<sup>270</sup> An insolvent person, intending to go through bankruptcy, may make an acknowledgment of an existing indebtedness, the right to recover which is barred by the statute of limitations, but against which the statute has not been pleaded, so as to

of the premises pending the determination of a controversy as to the ownership of certain personal property located on the premises, the lease is nevertheless terminated, and the estate is not liable for the rent. In *re* Desmond & Co. (D. C., Ala.), 28 Am. B. R. 456, 198 Fed. 581.

Effect of landlord's right to re-enter.—Where bankrupt held under a lease authorizing the landlord to re-enter upon default in the payment of rent, and providing that bankrupt should surrender the premises upon breach of the covenant to pay rent, and it appeared that bankrupt had defaulted in payment of rent before bankruptcy intervened, a claim for rent accruing after the filing of the bankruptcy petition is not a debt due and owing to the landlord when the petition was filed, and therefore is not provable in the bankruptcy proceedings of the lessee. In *re* Abrams (D. C., Iowa), 29 Am. B. R. 590, 200 Fed. 1005.

Re-entry by landlord; effect on claim.—Where, after a tenant's receiver in bankruptcy had sold personal property which was upon premises leased by a bankrupt for one year, allowing the purchaser a reasonable time within which to remove the goods, the landlord, acting under a provision in the lease, instituted ejectment proceedings against the purchaser, wherein he declared that the lease had absolutely ceased and determined, and he was put in possession of the premises under a writ issued in such ejectment proceedings, his claim for rent for the unexpired term of the lease will be disallowed. *South Side Trust Co. v. Watson*

(C. C. A., 3d Cir.), 29 Am. B. R. 446, 200 Fed. 50; Followed in *Matter of Lasker Co. Inc.* (C. C. A., 3d Cir.), 42 Am. B. R. 234, 251 Fed. 53.

<sup>265.</sup> *Matter of Frasin & Oppenheim* (C. C. A., 2d Cir.), 24 Am. B. R. 908, 183 Fed. 23. *Reynolds v. Hourigan* (C. C. A., 3d Cir.), 43 Am. B. R. 75, 254 Fed. 690. See discussion under Section Seventy of this work, subtitle "Trustee vested with title of bankrupt."

<sup>266.</sup> *Matter of Caswell-Massey Co.* (D. C., N. Y.), 31 Am. B. R. 426, 208 Fed. 571; *Matter of Miller Bros. Grocery Co.* (D. C., Ohio), 31 Am. B. R. 430, 206 Fed. 573. In both cases contracts were under consideration whereby store apparatus for carrying parcels and cash was leased and in which it was provided that in case of default in a monthly payment the whole amount becomes due. It appeared that such apparatus when removed was substantially lessened in value. See also *re* Merwin & Willoughby Co. (D. C., N. Y.), 30 Am. B. R. 485, 206 Fed. 116.

<sup>267.</sup> In *re* Ray, Fed. Cas. 11,589; In *re* Shepard, Fed. Cas. 12,753.

<sup>268.</sup> In *re* Kingsley, Fed. Cas. 7,819; In *re* Hardin, Fed. Cas. 6,048; In *re* Cornwall, Fed. Cas. 3,250; In *re* Reed, Fed. Cas. 11,635; In *re* Noeson, Fed. Cas. 10,268.

<sup>269.</sup> In *re* Lipman (D. C., N. Y.), 2 Am. B. R. 46, 94 Fed. 353; In *re* Resler (D. C., Minn.), 2 Am. B. R. 602, 95 Fed. 804; In *re* Watkinson (D. C., Pa.), 16 Am. B. R. 245, 143 Fed. 602; In *re* Putman (D. C., Cal.), 27 Am. B. R. 923, 193 Fed. 464.

<sup>270.</sup> In *re* Currier (D. C., N. Y.), 27 Am. B. R. 597, 192 Fed. 695, citing *Collier on Bankruptcy* (9th ed.), 722; *Pace's Trustee v. Pace*, (Ct. of App., Ky.), 33 Am. B. R. 334, 172 S. W. 925.

take the indebtedness out of the operation of the statute, and permit it to become the basis of a provable claim in bankruptcy.<sup>271</sup> It seems, too, that bankruptcy stops the running of the time and that a debt may be proven within the statutory year, provided the period of limitation expired after the bankruptcy.<sup>272</sup> However, under the present bankruptcy act an adjudication in bankruptcy does not suspend the running of the general statute of limitations as to provable claims for the reason that such adjudication does not put the creditor under a legal disability, but, on the contrary, permits him to proceed in the absence of a stay issued by the court.<sup>273</sup> The statute of limitations of the State of the bankrupt's residence, and in which he was adjudged a bankrupt, governs the rights of the creditors in the administration of the bankrupt's estate.<sup>274</sup> Any creditor of the bankrupt may interpose the statute of limitations as a defense against the allowance of a claim.<sup>275</sup> It is the duty of a trustee to plead the statute wherever an outlawed claim is presented.<sup>276</sup> The payment of dividends on a claim by a trustee in bankruptcy is not an acknowledgment of a debt by the debtor and a promise to pay it.<sup>276a</sup>

**f. Commissions of trustee.**—A claim for commissions and expenses incurred by a trustee, named in a deed of trust executed by a bankrupt, in the sale of chattels thereunder prior to bankruptcy, is not provable under this section.<sup>277</sup>

**g. Cross-references.**—The liability of an estate in bankruptcy to pay a general assignee or receiver for his services and disbursements, or his attorney, or a sheriff proceeding on an execution or attachment, as well as the priorities sometimes claimed by them, is considered under section sixty-four.

<sup>271.</sup> *Matter of Blankenship* (D. C., Cal.), 33 Am. B. R. 756, 220 Fed. 395, wherein the court said: "The claim is made by the trustee, acting for the creditors, that the renewal or rehabilitation of a debt, under such circumstances, operates in fraud of the bankruptcy act, and constitutes such a preference as would suffice to render it void and of no effect. It is true it would seem, at first blush, as if the deliberate acknowledgment of an outlawed debt, under such circumstances, for the mere purpose of making it provable in bankruptcy, would be a fraud upon the rights of other creditors, whose claims had not been outlawed by the force of the statute, and in this regard in fraud of the general object of the bankruptcy act. This, however, would be because of the assumption that in the doing of the thing inveighed against, the bankrupt had thereby rendered a claim otherwise unenforceable, enforceable against him. Such, however, could result only in the event that the bankrupt had already pleaded the statute in bar of the indebtedness, or had determined so to do. If, as it must be assumed in the case herein, the bankrupt had always intended to pay the just claim against him and had determined upon suit brought not to interpose the special defence permitted by statute, then, in the making of the acknowledgment at the time

it was made, in so far as his own personal attitude was concerned, he was not changing his position either for the worse or otherwise. In this view of the case, it seems to me that his own conduct cannot be defined as in fraud of the bankruptcy act, and that, for that reason, the trustee of his estate should not be permitted thus to characterize it. The case is much different, in my judgment, from one in which, for instance, an insolvent person, after having defeated a claim, because of his plea of the statute, should thereafter, and in contemplation of bankruptcy, attempt to rehabilitate the claim, merely that the owner thereof might participate as against other lawful creditors." See also *Matter of Salmon* (C. C. A., 2d Cir.), 41 Am. B. R. 45, 249 Fed. 300.

<sup>272.</sup> *In re Eldridge*, Fed. Cas. 4,331. *Contra*: *Nichols v. Murray*, Fed. Cas. 10,223.

<sup>273.</sup> *Simpson v. Tootle*, etc., Co. (Sup. Ct., Okla.), 32 Am. B. R. 551, 141 Pac. 448; *American Woolen Co. v. Samuelsohn* (N. Y. Ct. of App.), 43 Am. B. R. 530, 123 N. S. 154.

<sup>274.</sup> *Hargadine, etc., Dry Goods Co. v. Hudson* (C. C. A., 8th Cir.), 10 Am. B. R. 225, 122 Fed. 232, affg. 6 Am. B. R. 657.

<sup>275.</sup> *In re Lafferty* (D. C., Pa.), 10 Am. B. R. 290, 122 Fed. 558; *In re Kingsley*, Fed. Cas. 7,519.

<sup>276.</sup> *In re Wooten* (D. C., N. Car.), 9 Am. B. R. 247, 118 Fed. 670.

<sup>276a.</sup> *American Woolen Co. v. Samuelsohn* (N. Y. Ct. of App.), 43 Am. B. R. 530, 123 N. E. 154.

<sup>277.</sup> *In re Standard Dairy and Ice Co.* (Sup. Ct., Dist. Columbia), 20 Am. B. R. 321.

## SECTION SIXTY-FOUR.

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### DEBTS WHICH HAVE PRIORITY.

§ 64. Debts which have Priority.—*a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court.

*b* The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, *and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery;*\* (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, *traveling or city salesmen* † or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

*c* In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in

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\*Amendment of 1903 in italics.

†Amendment by Act of June 15, 1906.

addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

**Analogous provisions:** In U. S.: Act of 1867, § 28, R. S., § 5101; Act of 1841, § 5; Act of 1800, § 62.

In Eng.: Preferential Payments in Bankruptcy Act of 1888, § 1.

In Can.: Act of 1919, §§ 51, 52.

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**I. PRIORITIES IN GENERAL.**

**a. Comparative legislation.**—The list of debts entitled to priority has increased with each successive bankruptcy law. That of England, in substance, gives priority of payment to (1) the costs of administration, (2) taxes, (3) wages to a limited amount within a limited time, and (4) rent where the landlord has distrained the bankrupt's goods.<sup>1</sup> Our law of 1800 merely saved debts due the United States; that of 1841 added debts for labor within six months to the amount of \$25.<sup>2</sup> The law of 1867 provided five classes of priority debts: (1) Costs of suits in the proceeding and for preserving the estate; (2) debts and taxes due the United States; (3) debts and taxes due the States; (4) wages to an operative, clerk or house-servant not to exceed

1. See § 1, Preferential Payments, English Bankruptcy Act of 1888.

2. See "Analogous Provisions," *ante*.

\$50 for labor performed within six months; (5) priorities given by the laws of the United States.<sup>3</sup> The present act goes much further. The Canadian statute gives priority to (1) three months accrued rent not exceeding the amount of distrainable assets, (2) fees and expenses of trustee, (3) costs of execution creditor in certain cases, (4) wages for a limited time.<sup>3a</sup>

b. *Construction of section.*—The federal courts have construed the priority provisions of the bankrupt act with a fair degree of liberality,<sup>4</sup> but subsection a must be strictly construed when it would inure to the benefit of a particular creditor, and not to a municipality.<sup>5</sup>

c. *Priorities versus liens.*—Many cases seem to hold the broad doctrine that these priorities are superior to valid liens.<sup>6</sup> It is now settled however that priorities are not superior to valid liens,<sup>7</sup> unless given a superior right by local law.<sup>8</sup> It has also been held that subdivisions (4) and (5) of § 64-b relate exclusively to the subject of the right to priority of payment arising among those whose claims would, in the absence of such subdivisions, stand on terms of equality before the law as general unsecured claims, and

3. Act of 1867, § 28, R. S., § 5101.

3a. Can. Bankr. Act of 1919, §§ 51, 52.

4. In re Jones (D. C., Mich.), 18 Am. B. R. 206, 151 Fed. 108.

Liberal construction as to priority of claim for taxes.—The cases of *City of Chattanooga v. Hill* (C. C. A., 6th Cir.), 15 Am. B. R. 195, 139 Fed. 600, 71 C. C. A. 584, and *State of New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 63, 64, 51 L. Ed. 91, 27 Sup. Ct. 19, fairly illustrate this tendency. In the case first cited, the circuit court of appeals held that, under § 64-a, taxes assessed against land have priority, although the land on which the taxes were assessed never came into the hands of the bankrupt trustee. In the second case cited, the Supreme Court held that, under the same § 64-a, franchise fees owing by a corporation to the State of New Jersey, under whose laws it was created, have priority as taxes owing to a State, although the bankrupt corporation did no business in New Jersey, and although by such construction of the bankrupt act preference was given to the State of New Jersey over creditors who dealt with the corporation at its place of business.

5. In re Broom (D. C., N. Y.), 10 Am. B. R. 427, 123 Fed. 639. See also In re Parker, Fed. Cas. 10,719.

6. For instance: See In re Coffin (Ref., Tex.), 2 Am. B. R. 344; In re Byrne (D. C., N. Y.), 3 Am. B. R. 268, 97 Fed. 762; In re Tebo (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419.

7. *City of Richmond v. Bird* (U. S. Sup. Ct.), 43 Am. B. R. 200, 39 Sup. Ct. 186, affg. 39 Am. B. R. 1, 240 Fed. 545; In re Frick (Ref., Ohio), 1 Am. B. R. 719; In re McConnell, Fed. Cas. 8,712; In re Hambright, Fed. Cas. 5,973; *Gardner v. Cook*, Fed. Cas. 5,226; *Matter of Meis* (Ref., Ky.), 18 Am. B. R. 104; *Lott v. Salsbury* (C. C. A., 4th Cir.), 37 Am. B. R. 796; *Matter of Hosmer* (D. C., Ia.), 37 Am. B. R. 464, 233 Fed. 318; *Matter of Hermanos & Co.* (D. C., Porto Rico), 40 Am. B. R. 692, citing *Collier on Bankruptcy*

(11th Ed.) 988, 10 P. R. Fed. 183. See Am. B. R. Dig., § 860.

Liens first paid.—Judge Ray says in re Cramond (D. C., N. Y.), 17 Am. B. R. 32, 38, 145 Fed. 966: "Liens on the property of the bankrupt, not void or voidable under some provision of the law, whether obtained and created by express contract or by virtue of compliance with the lien law of a state, since the amendment to the act, are first to be paid (excepting taxes) subject to abatement for commissions expressly allowed to referees and trustees on all sums disbursed to creditors in the one case and to any one in the other."

The trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782, 26 Sup. Ct. 481, revg. 14 Am. B. R. 52, 135 Fed. 52.

Wages of workmen, clerks, etc., of bankrupt, which, in addition to the priority given by § 64-b(4) of the bankruptcy act, are given priority by the laws of the State over every other debt or claim in receivership or assignment proceedings, are not entitled to priority of payment out of the proceeds derived from a sale of the property of the estate over those having valid, fixed liens on such property at the date of the adjudication, for the reason that § 67-d of the bankruptcy act provides that such liens shall not be affected by the provisions of the act. In re Yoke Vitrified Brick Co. (D. C., Kan.), 25 Am. B. R. 18, 180 Fed. 235. See also In re Proudfoot (D. C., W. Va.), 23 Am. B. R. 106, 173 Fed. 733.

8. *Matter of Little Elk Logging Co.* (D. C., Wash.), 33 Am. B. R. 592, 218 Fed. 149; *Polk County v. Burns* (C. C. A., 8th Cir.), 40 Am. B. R. 727, 247 Fed. 399; *Matter of Woulfe & Co.* (C. C. A., 5th Cir.), 39 Am. B. R. 91, 239 Fed. 128.

that such subdivisions have no reference whatever to the subject of liens.<sup>9</sup> But the costs of administration have been construed, upon equitable grounds, to be entitled to priority of payment, even out of the proceeds of property incumbered by valid liens.<sup>10</sup> But only such costs as are necessarily incident to the preservation of the estate, its conversion into money and payment thereof to lienors are entitled to priority.<sup>11</sup> It is true that the whole estate is or may be marshaled and administered and liens paid through the trustee. But the rule that the bankrupt's assets come to his trustee charged with all *bona fide* liens,<sup>12</sup> even if within the four months' period, seems to negative the doctrine of the cases cited at the beginning of this paragraph. The question is often one of extreme difficulty. Equity may step in and charge against property affected by liens the "cost of preserving" it, or a proportionate share of the "attorney's fee"—this, however, only on a showing that his service was beneficial to the property of the lienor—but equity presumably will not declare the "filing fees" or "wages" or "State priorities" superior to valid liens. The lien creditor is prior in right, and should, therefore,

9. Effect of priorities on liens.—In the case of *In re Yoke Vitrified Brick Co.* (D. C., Kan.), 25 Am. B. R. 18, 180 Fed. 235, Judge Pollock said: "It was in contemplation of the lawmaking power that estates passing, as of the date of the adjudication, to the trustees in bankruptcy, would be covered and affected by fixed and valid liens resting thereon. Hence, for the protection of those holding such valid liens, and lest the rights of such lienholders should become confounded with the rights of those holding general unsecured demands against the estate which had been accorded priority in payment by the provisions of § 64-b of the act, it was provided in § 67-d, in effect, that nothing appearing elsewhere in the act itself, no matter how general and comprehensive the language employed might be, should affect the validity, extent, or operation of such liens. However, anything inhering in the general principles of equity or the law, such, for example, as the duty of the property to contribute its just proportion of the expense of government, or to pay its *pro rata* share of the expenses incurred in the preservation of the estate, and such like matters, remain still enforceable against the estate, although covered by fixed liens and against the consent of the holder of such liens, for such expenses are incurred for the protection of the lienholder and are enforceable for that reason and not because embodied in the act. This is the conclusion reached in *re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966, and, notwithstanding decisions apparently to the contrary, I am convinced is the true construction of the act."

10. *Matter of Hermanos & Co.* (D. C., Porto Rico), 40 Am. B. R. 692, 10 P. R. Fed. 183.

Where a mortgagee invokes the jurisdiction of the bankruptcy court to enforce his lien, a reasonable fee for the attorney of the bankrupt, as part of the costs of administration, is entitled to priority of payment out of the proceeds of a sale of the mortgaged property. *Matter of Meis* (Ref., Ky.), 18 Am. B. R. 104.

11. *Matter of Rauch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982; *Matter of Hermanos & Co.* (D. C., Porto Rico), 40 Am. B. R. 692, 10 P. R. Fed. 183.

12. *Yeatman v. Savings Inst.*, 95 U. S. 764, 24 L. Ed. 589. See also Am. B. R. Dig., § 337.

13. Compare, generally, discussion under Sections Sixty-seven and Seventy of this work.

14. See also Am. B. R. Dig., § 876.

15. *U. S. v. Fisher*, 2 Cranch 358; *Lewis v. U. S.*, 92 U. S. 618, 23 L. Ed. 513; *In re Rosey*, Fed. Cas. 12,066; *U. S. v. Griswold*, 8 Fed. 496. See also *Matter of Bologh* (D. C., N. Y.), 25 Am. B. R. 726, 729, 185 Fed. 825.

16. *U. S. v. Murphy*, 15 Fed. 589; *In re Huddell*, 47 Fed. 206; *Lewis v. U. S.*, 92 U. S. 618, 23 L. Ed. 513.

Proof of debt is not required where the debt is due the United States. Section 64-b (5) is *in pari materia* with U. S. Rev. Stats., §§ 3466 and 3467, and adds nothing to the rights given by those sections nor takes anything away. *In re Stoeber* (D. C., Pa.), 11 Am. B. R. 345, 127 Fed. 394.

Freight charges accruing during the Federal Control of Railroads are property of the United States under the Federal Control Act and are therefore debts due the United States and entitled to priority of payment over the general creditors of the bankrupt. *Matter*



unless directly benefited by the acts or disbursements for which priority is claimed, be prior in distribution.<sup>13</sup>

d. **Debts due the United States.**<sup>14</sup>—These are entitled to priority of payment. This follows from § 3466 of the Revised Statutes,<sup>15</sup> though the words are somewhat general. It even seems that the United States need not prove its debt,<sup>16</sup> and that the doctrine of *laches* does not apply, any more than to any other sovereign.<sup>17</sup> Hence, § 3467, which makes the trustee personally liable, if, with notice, he fails to pay a debt due the United States.<sup>18</sup> Being a debt, the order of payment is next after "wages due workmen, clerks or servants, which have been earned within three months before the date of the commencement of proceedings."<sup>19</sup>

e. **Order of priority.**—(1) **IN GENERAL.**—The words "order of payment" clearly indicate that, after taxes, priority debts must be paid in the order indicated in subsection b. If there is not sufficient to pay all priority debts, the last class in order abates first. If priority debts of a given class, as those specified in subdivision (3), must abate in part; the order between each of them is fixed by general equity rules.<sup>20</sup> Taxes, costs, and expenses of administration have priority over dower.<sup>21</sup>

(2) **TRUST FUNDS.**<sup>22</sup>—If property held by the bankrupt in trust passes to the trustee in bankruptcy it will be subject to the interest of the beneficiaries therein; but such beneficiaries will not be entitled to priority of payment unless they can trace the trust property, in its original or some substituted form, in the estate which comes into the hands of the trustee.<sup>23</sup> Money due

of Hebner Oil Co. (C. C. A., 7th Cir.), 45 Am. B. R. 390, 264 Fed. 667.

A surety on a contract between a bankrupt and the United States, who has paid the United States the full amount contracted by it to be paid in case of default by the bankrupt, is entitled to equal priority with a claim of the United States against the bankrupt for additional damages arising out of the violation of the same contract. *United States v. National Surety Co.* (C. C. A., 8th Cir.), 44 Am. B. R. 525, 262 Fed. 62.

17. *Cooke v. U. S.*, 91 U. S. 389, 23 L. Ed. 237; *Hart v. U. S.*, 95 U. S. 316, 24 L. Ed. 479. It is a long and firmly established rule that the sovereign is not bound by a statute of limitations in which it is not named, and the provision of the bankrupt act requiring a claim to be proved within a year is a plain limitation on the creditor's remedy. *In re Stoevers* (D. C., Pa.), 11 Am. B. R. 345, 349, 127 Fed. 394.

18. *U. S. v. Barnes*, 31 Fed. 705.

19. *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 27 Am. B. R. 873, 56 L. Ed. 706, 32 Sup. Ct. 457, revg. 23 Am. B. R. 340, 174 Fed. 385, which reversed 22 Am. B. R. 851.

20. *In re Burke* (Ref., Ohio), 6 Am. B. R. 502. For the order of priority and the apportionment of an estate insufficient to pay preferred claims, see *Matter of Grignard Lith. Co.* (D. C., N. Y.), 19 Am. B. R. 743, 155 Fed. 699.

Where the assets of a bankrupt tenant consist of the proceeds of the sale of goods,

and book-accounts, and claims for rent and for wages are sufficient to exhaust both funds, while the rent can only be paid out of the proceeds of the sale of goods the wages must first exhaust the book-accounts and take the balance only out of the other fund. *Matter of Gerrow* (D. C., Pa.), 37 Am. B. R. 14, 233 Fed. 841.

21. *In re Forbes* (Ref., Ohio), 7 Am. B. R. 42, holding that the wife of a bankrupt is entitled to her inchoate right of dower in his real estate, and if she consents to the sale of the same free from her dower, she is entitled to the value of such dower as fixed by the laws of the State of the bankrupt's residence.

22. See also Am. B. R. Dig., § 882.

23. *Deere Plow Co. v. McDavid* (C. C. A., 8th Cir.), 14 Am. B. R. 653, 137 Fed. 802; *Matter of See* (C. C. A., 2d Cir.), 31 Am. B. R. 360, 209 Fed. 172; *Matter of McIntyre & Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 487, 221 Fed. 232; *Macy v. Roedenbeck* (C. C. A., 8th Cir.), 36 Am. B. R. 31, 227 Fed. 346.

**Money paid to bankrupt for transmission to another.**—*Matter of Jarmulowsky* (C. C. A., 2d Cir.), 43 Am. B. R. 536, 258 Fed. 231.

**Beneficiary of trust fund.**—In the case of *Spokane Co. v. First Nat. Bank*, 16 C. C. A. 81, 68 Fed. 979, in disposing of a similar question, the court said: "We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business, the

from a bankrupt as trustee, and which cannot be distinguished from any other money in his possession or under his control, or which is due from him only because he has used trust funds for his own purposes, or has otherwise misapplied them, cannot be considered as property held by the bankrupt in trust.<sup>24</sup>

**f. Practice.**—Priority should be specifically claimed.<sup>25</sup> This is usually done by a sentence to that effect and giving the grounds of the claim, inserted in the proof of debt. If not claimed, it will be deemed waived; though amendment setting up the claim will usually be allowed. It is not lost even if a claim is not made until after the first dividend;<sup>26</sup> nor although the claim of priority is not made until after the expiration of a year from the date of the adjudication, and the claimant voted at the election of trustee.<sup>27</sup> It has been held that the filing of an unsecured claim, without asserting any right of priority, does not estop the claimant from thereafter setting up his right, even after receiving a dividend on the claim, in the absence of proof that the trustee was misled or the estate injured by the delay in asserting the alleged priority.<sup>28</sup> It is not sufficient to state in the proof of claim, that the debt therein mentioned is "preferred" or is "a preferred claim."<sup>29</sup> The act does not contemplate that taxes assessed upon the bankrupt's real property, and which are matters of public record, shall be proved like an ordinary debt.<sup>30</sup>

general creditors of the estate are by that amount benefited, and that, therefore, equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion. \* \* \* Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant."

24. In re Dorr (C. C. A., 9th Cir.), 28 Am. B. R. 505, 196 Fed. 292, citing In re Richard (D. C., Tenn.), 4 Am. B. R. 700, 104 Fed. 792; In re Marsh (D. C., Conn.), 8 Am. B. R. 576, 116 Fed. 896; In re Mulligan (D. C., Mass.), 9 Am. B. R. 8, 116 Fed. 715; Matter of Jacobson (C. C. A., 7th Cir.), 45 Am. B. R. 1, 263 Fed. 883.

25. Landlord's claim for rent in arrears.—Where, in Pennsylvania, a landlord makes no objection to a sale in bulk of a bankrupt tenant's liquor license, stock, fixtures and lease and accepts the purchaser as tenant, and permits him to occupy the premises as the bankrupt's successor under the lease the landlord's claim for priority of payments, from the proceeds of sale for a balance of rent which had accrued before the filing of the petition in bankruptcy against the bankrupt will be disallowed. In re McFadgen (D. C., Pa.), 19 Am. B. R. 481, 156 Fed. 715; Kayser v. Wessel (C. C. A., 3d Cir.), 12 Am. B. R. 126, 128 Fed. 221.

26. In re Scott (D. C., Tex.), 2 Am. B. R. 324, 96 Fed. 607, holding that the fact that the claim for an attorney's fee was not presented until after the declaration of the first dividend does not destroy its right to priority of payment out of any funds on hand when the claim is properly proved and allowed.

27. Time to claim priority under State laws.—Creditors who establish claims giving them a preference in the distribution of assets by virtue of a statute giving priority to those who shall furnish materials or supplies to manufacturing corporations doing business in the State, are entitled to priority of payment, though they make no special claim therefor until after the expiration of the year from the date of the adjudication in bankruptcy, though inadvertently they voted at the election for trustee, without objection. In re Ashland Steel Co. (C. C. A., 6th Cir.), 21 Am. B. R. 834, 168 Fed. 679.

28. Wuerpel v. Commercial, etc., Bank (C. C. A., 5th Cir.), 38 Am. B. R. 223, 238 Fed. 269.

29. In re Dunn (D. C., N. Y.), 25 Am. B. R. 103, 181 Fed. 701, so holding in respect to a claim which merely stated that it is for "wages due deponent as clerk and manager and is a preferred claim;" the claim should have shown that such wages were earned in the employ of the bankrupt within three months before the commencement of bankruptcy proceedings.

30. In re Cleanfast Hosiery Co. (Ref., N. Y.), 4 Am. B. R. 702; In re Prince & Walter (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546; In re Harvey (D. C., Pa.), 10 Am. B. R. 567, 122 Fed. 745, holding that the adjudication of an owner of real estate does not affect the lien of a municipality for unpaid taxes nor impose upon the city the duty of proving its claim as an ordinary creditor must do, but the amount of the taxes must be paid out of the fund realized at a trustee's sale of the property in advance of payment of dividends to creditors.

Allegations in a petition relating to an alleged priority are not to be taken as *prima facie* true, for the purpose of establishing such priority, in the absence of evidence for or against the fact,<sup>31</sup> the burden being upon creditors claiming preference to bring themselves, by the evidence, within the statute creating the preference.<sup>32</sup> A priority debt duly proved and allowed should not be ordered paid until it appears that there will be enough assets to pay in full all like debts of the same and higher classes.

## II. PAYMENT OF TAXES.

a. In general.—Subsection a requires the court to order the trustee to pay all taxes “legally due and owing by the bankrupt to the United States, State, county, district or municipality in advance of the payment of dividends to creditors.” The present law is somewhat broader than its predecessor, which required payment in full only of taxes due the United States or the State. The subsection is explicit and needs little explanation. The words “taxes legally due and owing by the bankrupt” and “in advance of the payment of dividends to creditors” should be noted.<sup>33</sup> In spite of them, the tendency has been to construe subsection a as putting taxes in a different and really higher class than the debts enumerated in subsection b; this is probably the law.

b. Construction and effect.—Construed strictly, the words of this subsection lead to the result that taxes must be paid in any event. The right of priority exists even if the property on which taxes were assessed never came into the possession of the trustee,<sup>34</sup> and the fact that the whole amount received from the sale of a bankrupt's property will be taken up in the payment of taxes, while it may be unjust to general creditors, constitutes no legal reason for the disallowance of the amount due.<sup>35</sup> The court will not favor any evasion of this law by giving a too liberal construction to its words.<sup>36</sup> It has been

31. In re Jones (D. C., Mich.), 18 Am. B. R. 206, 151 Fed. 108.

32. In re Crown Point Brush Co. (D. C., N. Y.), 29 Am. B. R. 638, 200 Fed. 882.

33. Rights of third person liable for taxes.—The fact that a person other than the bankrupt may also be liable for the payment of taxes by contract or by statute is not sufficient to entitle such other person to priority of payment. Matter of Harris Steam Engine Co. (D. C., R. I.), 34 Am. B. R. 835, 225 Fed. 600.

The word “dividend,” as used in this section does not apply to payments made to secured creditors or to those having priority. Bird v. City of Richmond (C. C. A., 4th Cir.), 39 Am. B. R. 1, 240 Fed. 545.

The term “creditor” is limited by the definition of that term by section 1 (9), which provides that “creditors shall include anyone who owns a demand provable in bankruptcy.” Matter of Jacobson (C. C. A., 7th Cir.), 45 Am. B. R. 1, 263 Fed. 883.

Where a bankrupt assigns its interest in several contracts by which it had sold orchards and agreed to cultivate them and pay the taxes, and agrees in case of failure of any of the purchasers to complete their contracts to deed such tracts to whom the assignee may select, the title remains in the bankrupt and taxes are owing by him within the meaning of section 64-a, and are payable by his trustee, although the state law provides that taxes shall be assessed against the owner in possession. Matter of Wenatchee Orchard Co. (D. C., Wash.), 32 Am. B. R. 369, 212 Fed. 787.

34. City of Waco v. Bryan (C. C. A., 5th Cir.), 11 Am. B. R. 481, 127 Fed. 79.

All taxes to be paid.—In the case of City of Chattanooga v. Hill (C. C. A., 6th Cir.), 15 Am. B. R. 195, 139 Fed. 600, Judge Lurton, in referring to § 64-a, said: “Congress evidently meant that the sovereign should neither be postponed nor delayed in the collection of taxes, and therefore provided that the trustee should pay all taxes due and owing by the bankrupt in advance of dividends. The law means that the trustee shall do what the bankrupt might have done and what good citizenship required him to do. The opinions of the courts are not agreed about this matter, and there are holdings which limit this direction to pay ‘all taxes due and owing by the bankrupt’ to such taxes as constitute a lien upon the bankrupt's estate in the hands of the trustee and remit the sovereign to the enforcement of any lien which it may have against the property which the trustee relinquished to the lien creditors.”

35. Matter of Bushnell (D. C., Conn.), 33 Am. B. R. 47, 215 Fed. 651.

36. The manifest intent of the law is that, while the estate is in the hands of the trustee, his custody shall not constitute a barrier to prevent the collection of taxes which would be collectible under the law if the property had remained in the possession and control of the bankrupt himself. In re Conhaim (D. C., Wash.), 4 Am. B. R. 58, 100 Fed. 268. See also Matter of United Five & Ten Cent Store (D. C., N. Y.), 40 Am. B. R. 146, 242 Fed. 1005.

held that State taxes are not given priority over "the actual and necessary cost of preserving the estate subsequent to the filing of the petition,"<sup>37</sup> but there is also authority for the opposite conclusion.<sup>38</sup> The costs and expenses of administering the bankrupt's estate are entitled to priority of payment over claims for taxes.<sup>39</sup> An unsecured claim for taxes, given no superior right by the State laws, is not entitled to priority in payment over a landlord's lien for rent protected by section 67d of the Bankruptcy Act.<sup>39a</sup>

c. Federal courts to determine questions.—Subsection a provides expressly that "in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court." This authorizes the court to inquire as to whether the tax is a valid claim. The question as to whether or not a charge is a tax and entitled to preference under this subsection is one to be decided by the federal court in its administration of the bankrupt act;<sup>40</sup> although the decisions of the courts of the States where

37. Taxes not prior to cost of preserving estate.—In the case of *State of New Jersey v. Lovell* (C. C. A., 3d Cir.), 24 Am. B. R. 563, 179 Fed. 321, affg. 23 Am. B. R. 401, 175 Fed. 825, Judge Buffington said: "Now, while the relative order in which subdivisions 'a' and 'b' are placed is not happy, and indeed tends to mislead, yet the general intent of the section is clear. In subdivision 'b' we find the general scheme of awarding priority in advance of dividend creditors. That subdivision makes provision for paying such costs, fees, and liens as are therein provided, and if there are no outstanding taxes the fund is then paid to creditors. But before paying creditors, subdivision 'a' intervenes and makes provision for what, if omitted, has often proved a hardship, if not indeed an abuse in the settlement of decedent and insolvent estates, viz., delay in payment of taxes. Tax collectors whose power to distrain lapsed when the estate passed into the custody of the law, or who were left to come in as general creditors, were subjected to trying delays. Obviously subdivision 'a' meant that this delay should not occur, and therefore provided that, 'in advance of payment of dividends to creditors,' 'the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality,' and, to prevent delay from questions concerning such taxes, it provided, 'in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.' And yet in case the court had to take testimony, or order a referee to determine the legality of such tax, the adjudged tax would, under the construction here contended for, absorb the whole fund and leave unpaid the agency by which its payment was effected. Now, whether the 'creditors' referred to in the phrase, 'in advance of the payment of dividends to creditors,' places the payment of taxes ahead of dividend creditors alone, or places it also ahead of those creditors who, under subdivisions 4 and 5 of clause 'b,' are paid in full, is a question not before us. It suffices to say that on the question that is before us, namely, whether the taxes of a State are under clause 'a,' given priority over 'the actual and necessary cost of preserving the estate subse-

quent to the filing of the petition,' we are clear they are not."

38. In re *Prince & Walter* (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546; In re *Weissman* (D. C., Conn.), 24 Am. B. R. 150, 178 Fed. 115.

39. *Matter of Jacobson* (C. C. A., 7th Cir.), 45 Am. B. R. 1, 263 Fed. 883; *Polk County v. Burns* (C. C. A., 8th Cir.), 40 Am. B. R. 727, 247 Fed. 399; *Matter of Hessler Foundry Mfg. Co.* (D. C., N. Y.), 45 Am. B. R. 382, — Fed. —. Compare In re *Prince & Walter* (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546; In re *Weiss* (D. C., N. Y.), 20 Am. B. R. 247, 159 Fed. 295, decided before the decision of the United States Supreme Court in the case of *Guarantee Title & Trust Co. v. Title Guarantee & Surety Co.* 224 U. S. 152, 27 Am. B. R. 873.

39a. *City of Richmond v. Bird* (U. S. Sup. Ct.), 43 Am. B. R. 260, 39 Sup. Ct. 156, affg. 39 Am. B. R. 1, 240 Fed. 545; *Polk County v. Burns* (C. C. A., 8th Cir.), 40 Am. B. R. 727, 247 Fed. 399.

40. *Matter of United Five & Ten Cent Store* (D. C., N. Y.), 40 Am. B. R. 146, 242 Fed. 1005; In re *Lange Co.* (D. C., Iowa), 20 Am. B. R. 473, 159 Fed. 586. In *New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 64, 68, 51 L. Ed. 234, 27 Sup. Ct. 137, the court said: "The Bankruptcy Act as a Federal statute, the ultimate interpretation of which is in the Federal courts. It is doubtless true . . . that, if the highest court of the State should decide that a given statute imposed no tax within the meaning of the law as interpreted by it, a Federal court, in passing upon the Bankruptcy Act, would not compel the State to accept a preference from the bankrupt's estate upon a different view of the law. Conceding that the doctrine that the meaning of a statute is a State question, except where rights, the subject of adjudication in the Federal courts, have accrued before its construction by the State court, or the question of contract within the protection of the Federal Constitution is involved, still a State court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a Federal law, providing for the payment of taxes, which is not so in fact. The section (64-a) itself declares that, in cases of disputes as to the amount or legality of any such tax, they shall be heard and determined by the court. The State court may construe a statute and define its meaning, but whether its construction creates a tax, within the meaning of a Federal statute giving a preference to taxes, is a Federal question, of ultimate decision in this court."

Determination of amount and legality of tax.—Under the provisions of § 64-a, any question as to the amount or legality of a tax shall be heard and determined by the

the tax is payable should be given well-nigh controlling force.<sup>41</sup> The court is not bound by the action of the taxing authority, but may decide the question as to amount or legality itself;<sup>42</sup> and the right is not limited by the act to such questions as the bankrupt might have raised against the tax at the date of the bankruptcy proceedings.<sup>43</sup> The priority accorded to any tax legally due and owing is qualified by leaving it open to the trustee to question or inquire into not only the legality of the tax, but also its amount, even if otherwise legal.<sup>44</sup> If the taxes are legal and binding they must be paid, although long overdue.<sup>45</sup>

**d. Taxes not debts and need not be proved.**—Taxes are not, in a strict sense, debts,<sup>46</sup> although they are within the meaning of a definition of a debt as

bankruptcy court. In *re Otto Freund Arnold Yeast Co.* (D. C., N. Y.), 24 Am. B. R. 438, 178 Fed. 306. In this case it appeared that a personal property tax, assessed against a bankrupt corporation on the tax lists of a city, became a lien at a time when the corporation was hopelessly insolvent and shortly before the petition in bankruptcy was filed and its adjudication as a bankrupt. It was held that, although the statutory legality of the tax from the standpoint of regularity could not be raised, that under § 64-a a claim for the taxes against the estate of the bankrupt corporation should be disallowed on the grounds that the property supposed to be taxed did not actually exist.

**Claim for income taxes.**—A referee has power to re-examine a claim filed by the United States for income taxes, and it is not necessary for the trustee to pay the claim and then to file a claim for refunding in order to test the validity of the claim, for it is the purpose of the Bankruptcy Act to have estates wound up promptly. *Matter of Williams Oil Corp.* (D. C., Ky.), 45 Am. B. R. 278, 265 Fed. 401.

41. *First Nat. Bank v. Aultman* (Ref., Ohio), 12 Am. B. R. 12, citing *In re Ott* (D. C., Iowa), 2 Am. B. R. 637, 647, 95 Fed. 274; *In re Camp* (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 745.

42. *State of New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 64, 51 L. Ed. 284, 27 Sup. 137; *Matter of Selwyn Importing Co.* (Ref., N. Y.), 18 Am. B. R. 190; *Matter of Heffron Co.* (D. C., N. Y.), 33 Am. B. R. 443, 216 Fed. 642; *Matter of Fisher Corporation* (D. C., N. Y.), 36 Am. B. R. 509, 229 Fed. 316; *Matter of Felipe Ramirez Quinones* (D. C., Porto Rico), 39 Am. B. R. 320, 9 P. R. Fed. 414; *Matter of Simcox* (D. C., N. Y.), 40 Am. B. R. 195, 243 Fed. 479.

The case of *New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 64, 51 L. Ed. 284, 27 Sup. Ct. 137, determines the meaning of § 64-a, and approves of the disallowance of such part of a tax as may have been assessed on non-taxable or non-existing property, even if regularly assessed and beyond dispute under the State law. The Supreme court says:

"Coming to the specific objections to the claim for the year 1902, the claim was presented upon the basis of \$40,000,000 of outstanding capital stock, when in fact there was only \$10,000,000 of such stock; the assessment by the State board being upon the former sum and made upon the failure of the corporation to report. But we do not think the finding of the State board is conclusive. The tax is to be assessed upon capital actually outstanding. It may well be doubted whether the board had power to tax any other stock. But, be that as it may, § 64-a specifically provides that, in case any question arises as to the amount of legality of taxes, the same shall be heard and determined by the court, with a view to ascertaining the amount really due. We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character, and that the claim should

have been upon the basis of the capital actually outstanding."

**Reduction of taxes.**—Although the bankruptcy court may have authority to reduce taxes assessed against the personal property of alleged bankrupts it should not be permitted where the bankrupts have not filed a claim or statement with the taxing authorities as required by the statute of the State. *Matter of Perlmutter* (D. C., N. J.), 42 Am. B. R. 725, 256 Fed. 860.

43. *Matter of Fisher Corporation* (D. C., Mass.), 36 Am. B. R. 509, 229 Fed. 316.

44. *Matter of Selwyn Importing Co.* (Ref., N. Y.), 18 Am. B. R. 190. In this case the referee said: "I do not think the trustee is confined to equitable remedies which may be provided by statutes of the State. He is clothed by § 64-a with independent equitable power to question the amount of the tax, irrespective of the State remedies."

**Estoppel of bankrupt and trustee to deny validity of assessment.**—Where there is no competent evidence from which it may be found that the assessed valuation of a bankrupt's property was unjust or illegal, both the bankrupt and his trustee are estopped by the former's own statements, as to the nature, title and value of his property. *Matter of Bushnell* (D. C., Conn.), 33 Am. B. R. 47, 215 Fed. 651.

45. *In re Weissman* (D. C., Conn.), 24 Am. B. R. 150, 178 Fed. 115, holding that taxes which were collectible from the bankrupt prior to adjudication are entitled to priority even though the tax collectors have been guilty of gross laches in allowing the taxes to remain unpaid for a period of twelve years and the payment of such taxes would take a large part, if not all, of the money which would otherwise be available for payment of dividends on the general claims.

46. A tax is not strictly a debt.—It lacks the nature of a debt in that, though for a sum certain, it is not founded upon any agreement or assent of the person or persons against whom it is assessed, but is a burden for the public purposes imposed *ex invitum*. As an obligation or duty created by statute to pay money, however, it is quasi-contractual, although there may be difficulty as to the remedy for its enforcement in a given case. *In re United Button Co.* (D. C., Del.), 15 Am. B. R. 390, 400, 140 Fed. 495; *Lane Co. v. Oregon*, 7 Wall. (U. S.), 71; *State of New Jersey v. Ander-*

contained in § 1 (9), (11).<sup>47</sup> But they are not, in any event, to be proved like other debts; this subsection makes it the duty of the trustee to pay them whether they are proved or not.<sup>48</sup>

**e. Payment out of proceeds of sale.**—But it has been held that if the tax is by law made a lien or charge on the bankrupt's property, the same equitable principle which denies to the individual whose debt is fully secured the right to share in the general fund applies to the tax claimant,<sup>49</sup> and if the property subject to the tax is sold the tax should be paid out of the proceeds before any part thereof is distributed to general creditors.<sup>50</sup> This is especially true

son, 208 U. S. 483, 17 Am. B. R. 63, 69, 51 L. Ed. 284, 27 Sup. Ct. 137; *Matter of Felipe Ramirez Quinones* (D. C., Porto Rico), 39 Am. B. R. 320, 9 P. R. Fed. 414.

The annual license fee or franchise tax, required by the statute of New Jersey to be paid by corporations upon their outstanding capital stock, for the privilege of existence and the continued right to exercise their franchises is a "tax" within the meaning of § 64-a and not a debt. *State of New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 63, 51 L. Ed. 284, 27 Sup. Ct. 137.

47. *In re Fisher & Co.* (D. C., N. J.), 17 Am. B. R. 404, 411, 148 Fed. 907.

48. *Stanard v. Dayton* (C. C. A., 8th Cir.), 33 Am. B. R. 682, 220 Fed. 441, *affd.* 241 U. S. 588, 37 Am. B. R. 259, 60 L. Ed. 1190, 36 Sup. Ct. 695; *In re Prince & Walter* (D. C., Pa.), 12 Am. B. R. 679, 131 Fed. 546; *In re Harvey* (D. C., Pa.), 10 Am. B. R. 567, 122 Fed. 745; *Hecox v. County of Teller* (C. C. A., 8th Cir.), 28 Am. B. R. 525, 198 Fed. 634; *In re Cleanfast Hosiery Co.* (Ref., N. Y.), 4 Am. B. R. 702.

**Proof of debt for taxes not required.**—*In re Fisher & Co.* (D. C., N. J.), 17 Am. B. R. 404, 412, 148 Fed. 907, the court said: "Of course, a tax is provable in bankruptcy. It thus appears that taxes legally due and owing by the bankrupt must be paid before distribution to creditors, and the injunction of § 64 is that the court 'shall order' the trustee to pay them. It seems to be the duty of the court to require such payment, even though no claim for the same shall have been presented in the manner or within the time prescribed by the bankruptcy act for the filing of claims. It is true that § 64 does not, in express words, refer to taxes assessed or becoming due after the institution of bankruptcy proceedings. But it is settled law that the bankrupt's estate is taxable while it is in the hands of the bankrupt's trustees."

*In Swarts v. Hammer* (C. C. A., 8th Cir.), 9 Am. B. R. 691, 120 Fed. 256, 56 C. C. A. 92, *affd.* 194 U. S. 441, 11 Am. B. R. 708, 48 L. Ed. 1060, 24 Sup. Ct. 695, it was held that a Federal court will always order and direct the payment of taxes duly assessed on property in the possession of its officers, and treat the same as a preferred claim against the estate or fund which is in process of administration.

The mandatory provision of section 64-a as to the payment of taxes recognizes a com-

ity that should not require the assertion by the State of its claim for taxes in all cases to warrant the order for their payment; but a suggestion that taxes are owing by one interested in the estate should be sufficient. *Matter of Wenatchee Orchard Co.* (D. C., Wash.), 32 Am. B. R. 369, 212 Fed. 787.

**Redemption of lands sold for taxes.**—Tax sales, made after adjudication of bankruptcy of property belonging to the bankrupt estate may be avoided, but purchasers will be entitled to reimbursement for the amount paid at such sales and subsequent taxes paid by them, together with interest thereon as provided by the laws of Colorado on redemption from tax sales of lands, out of the general fund, regardless of the amount which the property may bring at bankruptcy sale. *Stanard v. Dayton* (C. C. A., 8th Cir.), 33 Am. B. R. 682, 220 Fed. 441, *affd.* 241 U. S. 588, 37 Am. B. R. 259.

49. See also Am. B. R. Dig. § 608.

But see *In re Stalker* (D. C., N. Y.), 10 Am. B. R. 709, 123 Fed. 961, holding that, where land of a bankrupt, of less value than both a mortgage and unpaid taxes, is sold to third parties upon a foreclosure of the mortgage, subject to the taxes, the municipality is not entitled to priority of payment of the taxes.

50. *In re Harvey* (D. C., Pa.), 10 Am. B. R. 567, 122 Fed. 745; *In re Oxley* (D. C., Wash.), 30 Am. B. R. 406, 204 Fed. 826; *In re Clark Coal & Coke Co.* (D. C., Pa.), 22 Am. B. R. 843, 173 Fed. 658, holding that, where the real estate of a bankrupt is by order of the court, sold free and discharged of all liens, the amounts due for county taxes at the time of the sale are entitled to due priority of payment from the proceeds of sale.

**Priority of taxes over mortgage debt.**—Where a mortgagor, after neglecting to pay general and local taxes assessed against the mortgaged property and after the property had been sold under tax liens, was adjudged a bankrupt and his trustee in bankruptcy sold the property free and clear of all liens, including taxes, and held the fund instead of the property, which fund was insufficient to pay both the taxes and the mortgage debt, the payment of the taxes should be given priority under section 64 of the Bankruptcy Act. *Delahunt v. County of Oklahoma* (C. C. A., 8th Cir.), 35 Am. B. R. 157, 229 Fed. 31.

when the payment would inure solely to the benefit of a secured creditor.<sup>51</sup> The weight of authority seems, however, to sustain the view that the taxes, whether a lien or not, are to be paid before any distribution is to be made to creditors.<sup>52</sup> The taxes and assessments against lands are not merely charges upon the tracts sold, but also against the general estate as well.<sup>53</sup> If the greater part of the bankrupt's property upon which the tax was assessed is covered by a mortgage, the sale of which did not satisfy the lien of the mortgage, the tax must nevertheless be paid from the proceeds of the remaining estate of the bankrupt.<sup>54</sup> Where real property which is subject to a tax lien is sold divested of that lien, under an order of the court, the purchaser acquires a clear title and the claim for taxes has priority over the claims of general creditors against the other assets in the hands of the trustee.<sup>55</sup> The right to priority of payment out of the bankrupt's estate exists although the property is sold at a tax sale prior to the bankrupt's adjudication and bid in by the county treasurer because no other bid was received, owing to existing incumbrances against the property.<sup>56</sup> Where real property subject to an unpaid tax is in custody of the court of bankruptcy it may not be sold for such tax without leave of the court.<sup>57</sup>

f. Taxes entitled to priority.—(1) IN GENERAL.<sup>58</sup>—The word "tax" is not used in a restricted or narrow sense, but is intended to include all obligations imposed by the State and general governments under their restrictive taxation or police powers for governmental or public purposes. That a tax so imposed may not be a general property tax does not deprive it of the character of a tax. Many taxes are imposed under the name of license fees, franchise taxes or taxes for special purposes under some other name, and are, therefore,

51. *In re Veitch* (D. C., Conn.), 4 Am. B. R. 112, 101 Fed. 251.

52. *In re Hollenfeltz* (D. C., Iowa), 2 Am. B. R. 499, 94 Fed. 629; *In re Hillberg* (Ref., Pa.), 6 Am. B. R. 714.

Payment by trustee where property is sold.—When goods have been sold by the trustee and the vendees resist payment of the taxes thereon, under a State revenue law, on the ground that the taxes accrued before the sale to them, the trustee will not be ordered to pay such taxes upon their petition, but will be ordered to have the goods assessed at a fair valuation in his name as trustee and pay the amount which can be legally assessed thereon. *In re Conhaim* (D. C., Wash.), 4 Am. B. R. 58, 100 Fed. 268.

Taxes on exempt property.—The trustee must, at the request of the bankrupt, pay the taxes legally owing by such bankrupt even though assessed against property which is set off as exempt and though the said taxes are a lien upon and enforceable against the exempt property, and their payment would exhaust the fund otherwise going to the general creditors. *In re Tilden* (D. C., Iowa), 1 Am. B. R. 300, 91 Fed. 500; *In re Baker* (Ref., Tex.), 1 Am. B. R. 526.

53. *Dayton v. Stanard*, 241 U. S. 588, 37 Am. B. R. 259, 60 L. Ed. 1190, 36 Sup. Ct. 695; *Matter of Clark Realty Co.* (C. C. A., 7th Cir.), 43 Am. B. R. 408, 263 Fed. 933.

54. *Chattanooga, City of, v. Hill* (C. C.

A., 6th Cir.), 16 Am. B. R. 195, 139 Fed. 600.

55. *In re Prince & Walter* (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546. But see *In re Oxley* (D. C., Wash.), 30 Am. B. R. 406, 204 Fed. 826, holding that where after taxes had been lawfully assessed against the property of a bankrupt, eight-ninths of such property was taken under mortgage foreclosure, leaving only enough to pay the costs and expenses of administration, the payment of such taxes will not be decreed to the exclusion of the costs of administration, but an effort should be made to secure the payment of the taxes from the mortgaged property, the lien of the county not having been lost by the foreclosure.

The relinquishment of the property upon which the taxes were levied, to the holder of an incumbrance thereon, with the consent of the bankruptcy court in a proceeding to which the county was not a party, does not destroy the county's right to a preferential payment. *Hecox v. County of Teller* (C. C. A., 8th Cir.), 28 Am. B. R. 525, 198 Fed. 634.

56. *Hecox v. County of Teller* (C. C. A., 8th Cir.), 28 Am. B. R. 525, 198 Fed. 634.

57. *Dayton v. Stanard*, 241 U. S. 588, 37 Am. B. R. 259, 60 L. Ed. 1190, 36 Sup. Ct. 695.

58. See also Am. B. R. Dig., § 860.

special taxes, but they are nevertheless taxes imposed for a public purpose no matter what the name under which they are levied or imposed and are clearly within the meaning of the term "tax" as used in this section.<sup>59</sup> Generally speaking a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting government.<sup>60</sup> And in this sense it includes duties imposed by federal law upon goods imported by the bankrupt.<sup>61</sup> A tax imposed upon retail dealers in cigarettes in addition to the other taxes is within this section.<sup>62</sup> A claim against a defaulting tax collector is not a debt for "taxes."<sup>63</sup> The liability of an employer of labor to pay assessments to a State under a Workmen's Compensation Act is not a tax within the meaning of this section,<sup>63a</sup> nor is an award under such a statute against a bankrupt for personal injuries to an employee a "tax" entitled to priority.<sup>64</sup>

(2) **LOCAL ASSESSMENT; WATER RENTS.**<sup>65</sup>—An assessment levied for a local improvement is a tax entitled to priority of payment.<sup>66</sup> In some jurisdictions it has been held that the word "taxes" includes water rents due to a municipality,<sup>67</sup> and in other jurisdictions the courts have reached the opposite conclusion.<sup>68</sup>

(3) **LICENSE FEES, FRANCHISE AND CORPORATION TAXES.**<sup>69</sup>—An annual license fee or franchise tax, required to be paid by a corporation as a condition of its continued existence and based upon the amount of its capital stock issued and outstanding, is a tax within the meaning of this section,<sup>70</sup> and is

59. *In re Lange Co.* (D. C., Iowa), 20 Am. B. R. 478, 159 Fed. 586. See *In re Wyoming Valley Ice Co.* (D. C., Pa.), 21 Am. B. R. 1, 165 Fed. 799.

Character of tax.—The bankruptcy act does not make any distinction as to the character of the tax which is imposed. A license fee or franchise tax imposed by the State is recognized by the Federal courts as a tax. *First Nat. Bank v. Aultman* (Ref., Ohio), 12 Am. B. R. 12, 14.

60. *New Jersey v. Anderson*, 203 U. S. 483, 492, 17 Am. B. R. 63, 51 L. Ed. 284, 27 Sup. Ct. 137.

Tax defined.—The term "taxes," within the meaning of this section, includes only such taxes as are required to be paid into a common fund for the support of the government, national, state, or municipal, and such a fund as will relieve the general taxpayer from a payment of an unfair proportion of the expenses in the operation of the government, or a tax which would be by operation of law a lien upon the bankrupt estate. *Matter of Farrell* (D. C., Wash.), 32 Am. B. R. 212, 211 Fed. 212.

61. *Matter of Rosenthal Bros.* (D. C., N. Y.), 38 Am. B. R. 1, 235 Fed. 315. But see *contra*, *Matter of Pedlow & Co.* (Ref., N. Y.), 32 Am. B. R. 808, holding that duties due to the United States on importations are not entitled to priority as they are not taxes within the meaning of the bankruptcy act.

62. *In re Lange Co.* (D. C., Iowa), 20 Am. B. R. 478, 159 Fed. 586. See also Am. B. R. Dig. § 863.

63. *In re Waller* (D. C., Md.), 15 Am. B. R. 753, 142 Fed. 883. As to taxes payable by tax collector on his own property, see *In re Porterfield* (D. C., W. Va.), 15 Am. B. R. 11, 138 Fed. 192.

63a. *Matter of Farrell* (D. C., Wash.), 32 Am. B. R. 212, 211 Fed. 212.

64. *Matter of Rockaway Soda Water Manufacturing Co.* (D. C., N. Y.), 36 Am. B. R. 640.

65. See also Am. B. R. Dig. § 863.

66. *In re Stalker* (D. C., N. Y.), 10 Am. B. R. 709, 123 Fed. 961.

67. *In re Industrial Coal Storage & Ice Co.* (D. C., Pa.), 20 Am. B. R. 904, 163 Fed. 390. See also dictum in *Matter of Hills* (C. C. A., 2d Cir.), 34 Am. B. R. 43, 221 Fed. 260.

68. *Matter of Park Brew. Co.* (Ref., R. I.), 35 Am. B. R. 652.

Covenant of lessee.—The failure of a lessee to comply with a covenant in his lease to pay water rents or charges has been held not to give the lessor or the municipality a claim to priority of payment out of the funds of the estate of the bankrupt lessee. *In re Broom* (D. C., N. Y.), 10 Am. B. R. 427, 123 Fed. 639. See *In re Parker*, Fed. Cas. No. 10,719.

Meter charge.—Where the charge for water is for the amount used as indicated by meter, and not an assessment against the premises, it is not a tax but merely a debt to the municipality, and is not entitled to the priority given to taxes. *Matter of Hills* (C. C. A., 2d Cir.), 34 Am. B. R. 43, 221 Fed. 260.

69. See also Am. B. R. Dig. § 863.

70. *State of New Jersey v. Lovell* (C. C. A., 3d Cir.), 24 Am. B. R. 562, 179 Fed. 321; *New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 64, 51 L. Ed. 284, 27 Sup. Ct. 137, revg. 14 Am. B. R. 604, 137 Fed. 858, and superseding *In re Danville Rolling Mill Co.* (D. C., Pa.), 10 Am. B. R. 327, 121 Fed. 432; *Matter of Mutual Mercantile Agency* (Ref., N. Y.), 8 Am. B. R. 435.



payable as of the date of the entry of the tax lien in the proper office, where such entry is required;<sup>71</sup> but a sum exacted by a State for the privilege of increasing the capital stock of a corporation is not a debt entitled to priority upon the corporation subsequently becoming bankrupt, but is a provable debt entitled to a *pro rata* distribution with other general creditors.<sup>72</sup> Taxes assessed against a partnership must be paid from the estate of an individual partner where he is individually liable under the State law.<sup>73</sup> The fact that a claim is called a tax does not make it so;<sup>74</sup> as where by a State statute a corporation is required to collect of its bondholders a State tax on a mortgage securing its bonds, the corporation is merely a collecting agency, and the tax is not that of the corporation entitled to priority of payment upon its being adjudicated a bankrupt.<sup>75</sup> So, when a State statute speaks of a license to sell liquors as a "tax," that does not make it a tax. It is merely a charge in the nature of a license and not entitled to priority.<sup>76</sup>

**g. Right to subrogation upon payment of taxes.**—Where a purchaser of land upon which taxes were unpaid paid a judgment for such taxes, he is not subrogated to the rights of the municipality and cannot claim priority of payment upon the grantor of the lands being adjudged a bankrupt. Such judgment becomes in the hands of the person paying it an unsecured claim and is entitled to no priority.<sup>77</sup> The benefit of priority is available only to the municipality, State or United States and may not be extended to any other creditor.<sup>78</sup> So, where an owner of premises has leased them under a lease which requires the lessee to pay the taxes, he may not claim priority on account of city taxes paid by him after the bankrupt's failure to pay such taxes because of his bankruptcy.<sup>79</sup> A purchaser at a tax sale is entitled to subrogation to a municipality's right to priority of payment of taxes from the assets of the bankrupt.<sup>80</sup>

Franchise tax may be re-assessed by the court. *Matter of Simcox, Inc.* (D. C., N. Y.), 40 Am. B. R. 195, 243 Fed. 479.

71. *In re Clark Coal & Coke Co.* (D. C., Pa.), 22 Am. B. R. 843, 173 Fed. 658.

72. *Matter of York Silk Mfg. Co.* (D. C., Pa.), 26 Am. B. R. 650, 188 Fed. 735; *affd.* 27 Am. B. R. 525, 192 Fed. 81.

73. *In re Green* (D. C., Ia.), 8 Am. B. R. 553, 116 Fed. 118. But a claim for personal taxes due the city of New York from a member of a firm cannot be enforced out of firm assets until all firm creditors have been paid in full. See *Matter of Flatau* (Ref., N. Y.), 21 Am. B. R. 352.

74. *In re Cosmopolitan Power Co.* (C. C. A., 7th Cir.), 14 Am. B. R. 604, 137 Fed. 858. *revd.* on other grounds, 203 U. S. 483, 17 Am. B. R. 63, 51 L. Ed. 284, 27 Sup. Ct. 137.

75. *In re Wyoming Valley Ice Co.* (D. C., Pa.), 16 Am. B. R. 594, 145 Fed. 267; *Commonwealth of Pennsylvania v. York Silk Mfg. Co.* (C. C. A., 3d Cir.), 27 Am. B. R. 525, 192 Fed. 81.

76. *In re Ott* (D. C., Ia.), 2 Am. B. R. 637, 95 Fed. 274.

77. *Cooper Grocery Co. v. Bryan* (C. C. A., 5th Cir.), 11 Am. B. R. 734, 127 Fed. 815, *citing City of Waco v. Bryan* (C. C. A., 5th Cir.), 11 Am. B. R. 481, 127 Fed. 9. See also

*Matter of Gracey* (D. C., Pa.), 39 Am. B. R. 463, 241 Fed. 981.

**Payment of taxes by mortgagee.**—In the case of *In re Barr Pumping Engine Co.* (Ref., Pa.), 11 Am. B. R. 312, the referee, after referring to several English cases, said: "If, as the English cases lay down, the unsecured creditors of the bankrupt, standing in his shoes, have no equity to be protected, and if the question, therefore, practically arises between the bankrupt and a mortgagee, who, having been compelled to pay taxes, would have the right to claim a priority as against the bankrupt estate, the conclusion is irresistible that these taxes should be paid from the fund applicable to the payment of the general creditors."

78. *Matter of Harris Steam Engine Co.* (D. C., R. I.), 34 Am. B. R. 835, 225 Fed. 609; and see *In re Broom* (D. C., N. Y.), 10 Am. B. R. 427, 123 Fed. 639; *In re Veitch* (D. C., Conn.), 4 Am. B. R. 112, 101 Fed. 251; *In re Hollenfeltz* (D. C., Ia.), 2 Am. B. R. 499, 94 Fed. 629.

79. *Matter of Harris Steam Engine Co.* (D. C., R. I.), 34 Am. B. R. 835, 225 Fed. 609.

80. *Matter of Clark Realty Co.* (C. C. A., 7th Cir.), 42 Am. B. R. 403, 253 Fed. 938. Compare *In re Brinker* (D. C., N. Y.), 13 Am. B. R. 122, 128 Fed. 634.

**h. Taxes accrued since proceedings were instituted.**—Taxes upon property in the hands of the trustee, accrued since the proceedings were instituted, do not fall within the strict letter of the law, but the bankruptcy act does not withdraw the estates of bankrupts from the reach of the taxing power and they are subject, in consequence, to the payment of taxes imposed while in the hands of trustees.<sup>81</sup> The tax assessed prior to adjudication is "legally due and owing" on the day of assessment, although not payable until after adjudication.<sup>82</sup> An income tax is not payable by receivers or trustees who merely marshal and distribute the assets of the bankrupt among his creditors,<sup>82a</sup> but, it seems, that if the business of the bankrupt is continued by his trustee or receiver it is subject to the payment of an income tax, if the profit received brings it within the Income Tax Act.<sup>82b</sup>

**i. Interest on taxes and penalties.**—It should be noted that this section does not provide for the payment of interest on taxes,<sup>83</sup> but it has been held that taxes which the trustee is required to pay carry interest until payment is actually made or tendered, and that the reasons why ordinary claims of creditors are not permitted to draw interest subsequent to adjudication have no application in the case of public taxes.<sup>84</sup> A penalty imposed for a failure to pay a State franchise tax has been held not to be a part of the original tax, and is not, therefore, entitled to priority,<sup>85</sup> but the courts are not in accord as to this proposition.<sup>86</sup>

**j. Illustrative cases.**—Other cases in point on the payment of taxes under the present and the former law will be found in the foot-note.<sup>87</sup>

81. In re Prince (D. C., Pa.), 12 Am. B. R. 676, 131 Fed. 546; Swarts v. Hammer (C. C. A., 8th Cir.), 9 Am. B. R. 691, 120 Fed. 256, affd. 194 U. S. 411, 11 Am. B. R. 708, 48 L. Ed. 1060, 24 Sup. Ct. 695; City of Waco v. Bryan (C. C. A., 5th Cir.), 11 Am. B. R. 481, 127 Fed. 79; In re Sims (D. C., Ga.), 9 Am. B. R. 162, 118 Fed. 356; In re Keller (D. C., Iowa), 6 Am. B. R. 324, 357, 109 Fed. 131; In re Conbalm (D. C., Wash.), 4 Am. B. R. 59, 100 Fed. 268; Stanard v. Dayton (C. C. A., 8th Cir.), 33 Am. B. R. 682, 220 Fed. 441, affd. 241 U. S. 588, 37 Am. B. R. 259; In re Fisher & Co. (D. C., N. J.), 17 Am. B. R. 404, 412, 148 Fed. 907. See also Am. B. R. Dig. § 555.

The trustee should pay "all taxes owing by the bankrupt." This includes the original tax and all other sums accrued thereon under the revenue laws of the State up to the time the payment is actually made or tendered. Matter of Kallak (D. C., N. Dak.), 17 Am. B. R. 414, 147 Fed. 276. It is settled law that the bankrupt's estate is taxable while it is in the hands of the bankrupt's trustee. As to sale of property upon which taxes have been assessed since the bankruptcy, see In re Crowell (D. C., Mass.), 29 Am. B. R. 308, 199 Fed. 659.

82. In re Flynn (D. C., Mass.), 13 Am. B. R. 720, 134 Fed. 145; New Jersey v. Anderson, 208 U. S. 483, 17 Am. B. R. 64, 51 L. Ed. 284, 27 Sup. Ct. 137, revg. 14 Am. B. R. 604, 137 Fed. 858, holding that a franchise tax assessed after adjudication upon a return made by the corporation before adjudication was "legally due and owing" and collectible. See Matter of Sherwood, Inc. (C. C. A., 2d Cir.), 31 Am. B. R. 769, 210 Fed. 754.

The fact that property may change hands after the date of the assessment does not make any difference. Matter of Felipe Ramirez Quinones (D. C., Porto Rico), 39 Am. B. R. 320, 9 P. R. Fed. 414.

82a. Matter of Heller, Hirsh & Co. (C. C. A., 2d Cir.), 43 Am. B. R. 525, 258 Fed. 208.

82b. Matter of Heller, Hirsh & Co. (C. C. A., 2d Cir.), 43 Am. B. R. 525, 258 Fed. 208.

83. In re Fisher & Co. (D. C., N. J.), 17 Am. B. R. 404, 413, 148 Fed. 907.

84. Matter of Kallak (D. C., N. Dak.), 17 Am. B. R. 414, 147 Fed. 276; Matter of Schuyler & Co. (Ref., N. Y.), 21 Am. B. R. 428; Stanard v. Dayton (C. C. A., 8th Cir.), 33 Am. B. R. 682, 220 Fed. 441, affd. 241 U. S. 588, 37 Am. B. R. 259; Matter of Ashland Emery & Corundum Co. (D. C., Mass.), 36 Am. B. R. 194, 229 Fed. 829; Matter of Felipe Ramirez Quinones (D. C., Porto Rico), 39 Am. B. R. 320, 9 P. R. Fed. 414; Matter of Clark Realty Co. (C. C. A., 7th Cir.), 42 Am. B. R. 408, 253 Fed. 938.

"There are two reasons why ordinary claims of creditors are not permitted to draw interest subsequent to the adjudication; first, it is important that the proportionate interest of the several creditors in the estate be ascertained and fixed. If interest were to accrue, however, after the adjudication the amount of the several claims would vary from time to time, according to their respective rates of interest and the proportionate share of the several creditors would be subject to constant readjustment. The second reason is the convenience of administration. . . . In the case of public taxes, neither of these reasons has any application because they do not share the estate with the claims of private creditors. On the contrary, § 64-a expressly provides that before anything shall be paid to the creditors by way of dividends, all taxes owing by the bankrupt shall be fully discharged." Matter of Kallak (D. C., N. Dak.), 17 Am. B. R. 414, 147 Fed. 276.

85. Matter of Ashland Co. (D. C., Mass.), 36 Am. B. R. 194, 229 Fed. 829.

86. Penalties entitled to priority.—Stanard v. Dayton (C. C. A., 8th Cir.), 33 Am. B. R. 682, 220 Fed. 441; Matter of Kallak (D. C., N. Dak.), 17 Am. B. R. 414, 147 Fed. 276; Matter of Schuyler (Ref., N. Y.), 21 Am. B. R. 428; Matter of Scheidt Bros. (D. C., Ohio), 23 Am. B. R. 778, 177 Fed. 599.

87. In re Force (Ref., Mass.), 4 Am. B. R. 114; In re Cleanfast Hosiery Co. (Ref., N. Y.), 4 Am. B. R. 702; In re Keller (D. C., Iowa), 6 Am. B. R. 351, 100 Fed. 131;

### III. PRESERVING ESTATE; FILING FEES.

a. **Cost of preserving estate.**—(1) **IN GENERAL.**<sup>88</sup>—Subdivision 1 of subsection *b* provides as the first statutory priority that there shall be paid "the actual and necessary cost of preserving the estate subsequent to filing the petition." The words of this subdivision are broad and have a corresponding elasticity of application. They give priority to the (1) actual and (2) necessary cost (3) of preserving the estate (4) subsequent to filing the petition. This has been thought to include the costs and disbursements of receivers in bankruptcy and other officers pending the adjudication and appointment of trustees.<sup>89</sup> But these are sufficiently within § 62. Hence, the reference here seems rather to the expenses of parties, not officers, in preserving the estate.<sup>90</sup> The impossibility of phrasing any rule whereby to determine when priority will be decreed is apparent. Nor, it seems, is it material what has been paid, as long as the court finds that the disbursement was not necessary.<sup>91</sup> Where property is sold in admiralty to enforce maritime liens, with the consent of the bankruptcy court, the costs incurred in bankruptcy in the preservation of the property, together with the costs of administration, are entitled to priority of payment from the proceeds of the sale.<sup>92</sup> But if the general fund of a bankrupt transportation company is sufficient to pay all expenses of administration, the cost of the operation of the vessels owned by the corporation should not be charged against the proceeds of the sale of a single vessel, sold to satisfy liens against it.<sup>93</sup> Claims for rent due for the occupation of the premises during the settlement of the bankrupt estate should be paid as part of the expense of maintaining the estate.<sup>94</sup> Likewise, claims of watchmen employed by express authority of the court to care for the bankrupt's stock are entitled to priority.<sup>95</sup> But costs in an attachment suit which was dissolved under § 67-f and was of no benefit to the bankrupt estate should not be allowed under this subdivision.<sup>96</sup> Nor should an allowance be made for services of counsel rendered without authority of the court, in advising the bankrupt regarding his business during the period between the filing of the petition and the adjudication of bankruptcy.<sup>96a</sup> Debts created in conserving the estate, which was wrongfully concealed by the bankrupt, are entitled to priority.<sup>96b</sup>

(2) **EXPENSES OF CREDITORS IN RECOVERING PROPERTY.**<sup>97</sup>—The doctrine

*Matter of Wenatchee Orchard Co.* (D. C., Wash.), 32 Am. B. R. 369, 212 Fed. 737; *U. S. v. Herron*, 20 Wall. 251; *In re Moller*, Fed. Cas. 9,700; *In re Brand*, Fed. Cas. 1,809; *In re Ambler*, Fed. Cas. 271.

<sup>88</sup> See also Am. B. R. Dig. 896.

<sup>89</sup> *Paine v. Archer* (C. C. A., 9th Cir.), 37 Am. B. R. 454, 233 Fed. 259.

Certificates issued by a receiver with the consent of the court to raise money necessary to care for and preserve the bankrupt estate are entitled to priority of payment from the proceeds of the sale of such property. *In re Alaska Fishing & Developing Co.* (D. C., Wash.), 21 Am. B. R. 636, 167 Fed. 375; *Matter of Veler* (C. C. A., 6th Cir.), 41 Am. B. R. 736, 249 Fed. 633.

Claim of assignee for benefit of creditors.—*Galbraith v. Vallyley* (C. C. A., 8th Cir.), 44 Am. B. R. 523, 261 Fed. 670.

<sup>90</sup> *In re Burke* (Ref., Ohio), 6 Am. B. R. 502. Compare also, generally, cases cited sub-titles "Cost of Administration," "Fees of General Assignees," and "Sheriff's Fees," *post*, under this section.

The expense of opposing an offer of composition is not "an actual and necessary cost of preserving the estate" within this section. *Matter*

*of Estate of Kinnane Co.* (C. C. A., 6th Cir.), 39 Am. B. R. 593, 242 Fed. 760.

<sup>91</sup> *In re Allen* (D. C., Cal.), 3 Am. B. R. 38, 96 Fed. 51.

<sup>92</sup> *In re Hughes* (D. C., N. J.), 22 Am. B. R. 303, 170 Fed. 809.

<sup>93</sup> *Matter of New England Transp. Co.* (D. C., Ct.), 34 Am. B. R. 323, 220 Fed. 203.

<sup>94</sup> *In re Youdelman-Walsh Foundry Co.* (D. C., N. Y.), 21 Am. B. R. 509, 166 Fed. 331; *In re Hersey* (D. C., Iowa), 22 Am. B. R. 860, 171 Fed. 1,001.

**Premises used by receiver or trustee.**—Where a receiver or trustee in bankruptcy actually occupies the leased premises, rent for such occupancy and use is payable by the receiver or trustee and will be considered a preferred claim in favor of the landlord, not because of any reservation of rent mentioned in the lease, but because the use of the premises was considered necessary to the preservation of the estate, and the amount paid by the receiver or trustee will be allowed as part of the cost of administration. *Matter of Mullings Clothing Co.* (D. C., Conn.), 37 Am. B. R. 166, 230 Fed. 631.

**Amount of rent.**—See *Gardner v. Gleason* (C. C. A., 1st Cir.), 43 Am. B. R. 644, 259 Fed. 755;

that the expense of preserving the estate is entitled to priority was, prior to the amendatory act of 1903, carried to the extent of decreasing costs out of the estate to creditors who before the bankruptcy had obtained a lien, by means of which all the creditors were equally benefited.<sup>98</sup> There was doubt, however, whether this was the law. The amendatory act of 1903 has removed the doubt by the words added to subdivision (2). This subdivision impliedly recognizes the right of a creditor to institute proceedings to recover, for the benefit of the estate of the bankrupt, property transferred by him, either before or after filing of the petition.<sup>99a</sup> It will be observed that the act makes no distinction as to the character of the transfer, whether it be one involving actual fraud, an intent to hinder, delay, or defraud the creditors of the bankrupt, which the law declares to be null and void, or a constructive fraud. So, then, it makes no difference whether the transfer be one of actual or of constructive and technical fraud, so far as the interest and rights of creditors are concerned.<sup>99</sup> Now, to entitle a creditor to an allowance for expenses and priority of payment, the applicant must show that he has (1) at his expense (2) recovered for the benefit of the bankruptcy estate (3) property which the (4) bankrupt had transferred or concealed.<sup>100</sup> If the creditor shows this, he is entitled to his "reasonable expenses" in so doing. It is immaterial whether the transfer or concealment was before or after the petition. Nor is it thought that the word "recovered" will be construed strictly; it should be enough if any active agency, which was either the moving cause or without which recovery would have been unlikely or impossible, is shown.<sup>101</sup>

**b. Filing fees in involuntary cases.**—Subdivision 2 of subsection *b* requires the payment of filing fees paid by creditors in involuntary cases. This subdivision should be read in connection with § 3-e and General Order XXXIV. The three together fix the rights of the respective parties to costs and disbursements on creditors' petitions for involuntary bankruptcy. Such a creditor is entitled, not only to a return of his filing fee, but also his other disbursements, as for service of process;<sup>102</sup> the latter, however, as cost of administration, rather than under this subdivision. A priority of this kind may be claimed by a verified account filed with the trustee; but the same should not be paid until allowed by the referee. This priority is akin to, but not the

Matter of Crawford Plummer Co. (D. C., Mass.), 42 Am. B. R. 92, 253 Fed. 76.

98. Matter of Mitchell (C. C. A., 2d Cir.), 32 Am. B. R. 391, 212 Fed. 932, holding that such claims are entitled to priority over attorney's fees, and that a trustee is personally liable for their payment when he uses all the assets to pay subordinate claims.

99. Matter of Rood (Ref., Minn.), 34 Am. B. R. 273.

99a. Matter of Kinnane Co. (C. C. A., 6th Cir.), 39 Am. B. R. 593, 242 Fed. 769.

99b. Matter of Offright & Lacher (D. C., Tex.), 43 Am. B. R. 345, 260 Fed. 682.

97. See also Am. B. R. Dig. § 867.

99. In re Lesser (C. C. A., 2d Cir.), 5 Am. B. R. 320, 100 Fed. 433, rev'd. on another point in Metcalf v. Barker, 157 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67. Compare also In re Little River Lumber Co. (D. C., Ark.), 3 Am. B. R. 682, 101 Fed. 553; In re Groves, 2 N. B. N. Rep. 466.

99a. Matter of Vadner (D. C., Nev.), 42 Am. B. R. 465, 259 Fed. 614, citing Collier on Bankruptcy (11th ed.), 1001.

99. Frost v. Latham & Co. (C. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866.

100. For definitions of these words see Bankr. Act, § 1.

Rights in distribution of money recovered.—See Matter of Butcher & Marshall (D. C., Mass.), 45 Am. B. R. 300, 266 Fed. 239.

An allowance by a state court to a receiver for services rendered in the preservation of the estate during the four months preceding bankruptcy is entitled to priority in payment after the property has been transferred to the trustee in bankruptcy. *Paine v. Archer* (C. C. A., 9th Cir.), 37 Am. B. R. 454, 233 Fed. 259.

101. Where attorneys for unsecured creditors of a bankrupt performed valuable services prior to the appointment of a trustee by conducting an examination of the officers of the bankrupt which insured to the benefit of all the general creditors and tended to recover property which had been fraudulently transferred, they are entitled to compensation from the estate under section 64-b(2) of the bankruptcy act, as amended in 1903, by which it is provided that where property of the bankrupt has been recovered for the benefit of the estate, the reasonable expenses for such recovery shall be entitled to priority of payment, but after the employment of counsel by the trustee, no al-

same as, that for indemnity deposits required by General Order X.<sup>108</sup> On the analogy of these provisions, money advanced by the attorney or friend of a voluntary bankrupt to pay the filing fee is often ordered paid in full out of the estate when collected in;<sup>104</sup> but such an advancement is strictly a "cost of administration."

#### IV. COST OF ADMINISTRATION.

a. In general.<sup>105</sup>—Subdivision 3 makes next in order of priority the payment of the "cost of administration." This phrase includes the priorities mentioned in the preceding subdivision. A similar idea is expressed in "the actual and necessary expenses incurred by officers in the administration of estates" in § 62. It may include the referees' fees for allowing claims, fixed by § 40, as amended by the act of 1903, and disbursements of the bankrupt in notifying creditors of an application for his discharge.<sup>106</sup> The expenses of a referee, including a reasonable allowance for clerk hire, fall within this subdivision.<sup>107</sup> And so also does the reasonable value of the use by a trustee of leased premises formerly occupied by the bankrupt.<sup>108</sup> It may also include a great variety of disbursements made necessary in the administration of the estate,<sup>108a</sup> but not costs awarded in proceedings not a part of the bankruptcy proceeding.<sup>109</sup> It is impossible to phrase any fixed rule. Compensation for services of accountants, acting without authority of the court, will not be allowed.<sup>110</sup>

b. Witness fees and mileage.—These are expressly given priority. They would have it were the law silent. Their amount is fixed by the Revised Statutes.<sup>111</sup>

c. Attorney's fees.<sup>112</sup>—Costs of administration under subdivision (3) include "one reasonable attorney's fee." This subject is considered in detail under § 62. The allowance must be (1) in one item, (2) reasonable, and (3) for professional services actually rendered. It seems that the basis of compensation is not payment for all services which the bankrupt may request of his attorney, but for the services to the bankrupt in involuntary cases, while performing the duties devolved upon the bankrupt by the bankruptcy law,<sup>113</sup> and will not include services rendered prior to the institution of bankruptcy proceedings.<sup>113a</sup> The services rendered must be such as aid in the settlement of the estate, and will not include services rendered in securing an exemption for the

allowance can be made out of the estate for services performed by such attorneys in aid of such counsel. In re Medina Quarry Co. (D. C., N. Y.), 25 Am. B. R. 405, 182 Fed. 508, revd. on other grounds, 27 Am. B. R. 466, 191 Fed. 815.

102. In re Silverman (D. C., N. Y.), 3 Am. B. R. 227, 97 Fed. 325.

103. Compare In re Matthews (D. C., Iowa), 3 Am. B. R. 265, 97 Fed. 772; also In re Burke (Ref., Ohio), 6 Am. B. R. 502.

104. See Whiston v. Smith, Fed. Cas. 17,523.

105. See also Am. B. R. Dig. § 869.

106. In re Hatcher (D. C., Tex.), 16 Am. B. R. 722, 145 Fed. 658. See General Order X.

107. In re Tebo (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419.

108. In re Abrams (D. C., Iowa), 29 Am. B. R. 590, 200 Fed. 1005. See also Matter of Cort & Gold (D. C., Ohio), 39 Am. B. R. 607.

108a. Matter of Offricht & Lacher (D. C., Tex.), 43 Am. B. R. 345, 260 Fed. 682.

109. For exceptions to this rule, see In re Lesser (C. C. A., 2d Cir.), 5 Am. B. R. 320, 100 Fed. 433, revd. on other grounds in 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct.

67; In re Neely (D. C., N. Y.), 5 Am. B. R. 836, 108 Fed. 371.

110. Matter of Marks (Ref., Ga.), 22 Am. B. R. 54, holding that items of expense incurred by accountants for "entertainment" and unusual hotel bills and Pullman fares are not properly chargeable against the estate of a bankrupt, and will be disallowed.

111. U. S. R. S., § 848. See also under Section Twenty-one of this work, ante.

112. See also Am. B. R. Dig. § 870 and cross-references thereunder.

113. The "one reasonable attorney's fee" must be allowed for services actually rendered to the bankrupt in performing the duties required by the act. In re Payne (D. C., N. Y.), 18 Am. B. R. 192, 153 Fed. 1,018; In re Lewin (D. C., Vt.), 4 Am. B. R. 632, 103 Fed. 850; In re Anderson (D. C., S. Car.), 4 Am. B. R. 640, 103 Fed. 854; In re Terrill (D. C., Vt.), 4 Am. B. R. 625, 103 Fed. 781.

The "duties" referred to in the last sentence of the above text are those imposed by section 7 of the Bankruptcy Act. Whitla & Nelson v.

bankrupt,<sup>114</sup> nor services rendered in State and city courts at the instance of the bankrupt,<sup>115</sup> nor services rendered in resisting the claim of a receiver appointed by the State court prior to adjudication,<sup>116</sup> nor services rendered as the result of claims made by the bankrupt and his wife in the proceedings.<sup>116a</sup> And the bankruptcy act does not contemplate that estates shall be burdened with the expense of furnishing an attorney for the bankrupt every time he appears before the referee.<sup>117</sup> Where partnership bankrupts have different attorneys but one allowance can be made.<sup>118</sup> An attorney who uselessly files a second involuntary petition, and subsequently demurs to the petition previously filed by another attorney, and such petition is amended, and an adjudication had thereon, is not entitled to an allowance of a fee for services.<sup>119</sup> The attorney's fee should be kept down to what it was intended by the act to represent, and that is simply the necessary professional assistance required by the bankrupt to meet the demands of the act upon him. Thus, clerical work performed by an attorney in posting the bankrupt's books and in making extra copies of schedules cannot be charged for as professional services.<sup>120</sup> It should affirmatively appear that the services were reasonably necessary and rendered in good faith,<sup>121</sup> although the prevailing opinion seems to be that the attorney for petitioning creditors in an involuntary proceeding is entitled as a matter of right to a reasonable fee, the amount to be determined upon evidence of the services performed and their value.<sup>122</sup> An application to confirm a composition made by an involuntary bankrupt is no part of the administration of the estate, and the fees and disbursements of the bankrupt's attorney cannot be allowed as costs of administration.<sup>123</sup> Compensation may be allowed to the bankrupts' attorneys for

Boyd (C. C. A., 9th Cir.), 32 Am. B. R. 469, 213 Fed. 587.

113a. Matter of Luber (D. C., Pa.), 44 Am. B. R. 292, 261 Fed. 221; Matter of Munford (D. C., N. Car.), 43 Am. B. R. 218, 255 Fed. 108.

114. In re O'Hara (D. C., Pa.), 21 Am. B. R. 508, 166 Fed. 884; Matter of Bohrmann (D. C., Ga.), 34 Am. B. R. 801, 224 Fed. 287.

115. Musica v. Prentice (C. C. A., 5th Cir.), 31 Am. B. R. 687, 211 Fed. 326, affg. 30 Am. B. R. 555, 205 Fed. 413.

116. Whitla & Nelson v. Boyd (C. C. A., 9th Cir.), 32 Am. B. R. 469, 213 Fed. 587.

116a. Matter of Munford (D. C., N. Car.), 43 Am. B. R. 218, 255 Fed. 108.

117. Whitla & Nelson v. Boyd (C. C. A., 9th Cir.), 32 Am. B. R. 469, 213 Fed. 587.

118. See In re Eschwege (Ref., N. Y.), 8 Am. B. R. 282.

119. Frank v. Dickey (C. C. A., 8th Cir.), 15 Am. B. R. 155, 139 Fed. 744.

120. In re Connell & Sons (D. C., Pa.), 9 Am. B. R. 474, 120 Fed. 846.

121. In re Carr (D. C., N. Car.), 9 Am. B. R. 88, 117 Fed. 572, holding that the allowance to an attorney under section 64-b being discretionary, the attorney must disclose his dealings with his client that the court may act intelligently.

Test is whether services are necessarily rendered.—In re Rosenthal & Lehman (D. C., Mo.), 9 Am. B. R. 626, 628, 120 Fed. 848, the court said: "It goes without saying that, if the services of counsel are secured, or, when secured, are employed for the purpose of securing the bankrupt from the consequences of his own wrongful conduct, or for the purpose of suppressing the truth or otherwise thwarting the operation of the act, no compensation can reasonably be allowed by the court to be paid out of the assets of the estate. The test, in my opinion, is whether the employment is necessarily made, and the services necessarily rendered in good faith for the real purpose of so administering the act in a given case as to ac-

complish the purpose of its enactment."

Services to secure preferential payments.—

Where an attorney for the petitioning creditors, who were in sympathy with the bankrupt and assisted in the wrongful transfer of its property, subsequently represented creditors who had received preferential payments and who sought to establish invalid claims against the estate, he is not entitled to an allowance for fees out of the estate. In re Medina Quarry Co. (D. C., N. Y.), 25 Am. B. R. 405, 182 Fed. 508, revd. on other grounds 27 Am. B. R. 466, 191 Fed. 815.

122. Smith v. Cooper (C. C. A., 5th Cir.), 9 Am. B. R. 755, 120 Fed. 230; In re Curtis (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784; In re Goldville Mfg. Co. (D. C., S. Car.), 10 Am. B. R. 552, 118 Fed. 892; In re Lang (D. C., Tex.), 11 Am. B. R. 794, 127 Fed. 755.

123. Compensation of attorney for bankrupt in contest over confirmation of composition.—In re Fogarty (C. C. A., 8th Cir.), 26 Am. B. R. 568, 187 Fed. 773, the court said: "If, because the professional services in this case were rendered in the bankruptcy court—in the administration of the bankruptcy law—the attorney's fees are therefore costs of administration within the meaning of section 64, nevertheless such fees are not payable from the estate unless the services were rendered to the bankrupt while he was in the performance of some duty prescribed by the act. No duty was laid upon him to try to settle the case and get back his property. That was a privilege,

services rendered at a trial in which, although adjudication finally resulted, a successful resistance was made to important and serious charges alleged in the petition of the petitioning creditors.<sup>124</sup> No attorney's fee will be allowed, under this section, except upon notice to parties interested, and upon petition by, or recommendation of, parties mentioned in the statute.<sup>125</sup> Where the attorney for a bankrupt advanced the filing fee for a voluntary petition and made other disbursements for printing notices to creditors, etc., on behalf of the bankrupt, the same should be allowed out of the estate as a "cost of administration."<sup>126</sup> Claims of attorneys for the receiver of a corporation appointed by a State court are not entitled to priority, where the corporation subsequently becomes bankrupt.<sup>127</sup> Though but three kinds of legal services in bankruptcy cases are enumerated in this subsection, services not coming within the words must still be paid for and are entitled to priority, if within the meaning of "cost of administration." But an attorney's priority is not superior to that of a *bona fide* lienor.<sup>128</sup> Claims of attorneys for services

not a duty. If it be said that an application for a discharge is likewise merely a privilege, that the bankrupt's costs in connection with the hearing upon his application for a discharge are payable from the estate, that the confirmation of a composition is equivalent to a discharge, and that therefore his costs in connection with the prosecution of his composition offer should also be payable from the estate, we think the following considerations are a sufficient answer. Attendance in the one case is made by the letter of the statute the bankrupt's duty; in the other, not. Though a confirmed composition has the effect of a discharge, and though confirmation may be opposed on grounds that would prevent a discharge, the first question for the judge is whether the composition is for the best interests of the creditors, and this question has nothing to do with the right to a discharge. This question might be clearly determinable without the attendance of the bankrupt. Upon the judge is laid the duty of becoming 'satisfied' that the composition offer is fair. If questions should arise which the judge thought might not be rightly solved without the attendance of the bankrupt and his attorney to aid in determining what was for the best interests of the creditors, it is possible that under section 7-a(2) he might make a 'lawful order' requiring the attendance of the bankrupt and his attorney at the expense of the estate. But the issue here is whether the bankrupt can recover from the estate the fees and disbursements of his attorney in endeavoring to force a dismissal of the case and a restoration of the seized property, when neither the letter of the statute nor an order of the court imposed upon the bankrupt the obligation to make such a contest. Our interpretation of the sections herein referred to, in connection with the spirit of the act as an entirety, is against the bankrupt's contention." See also Matter

of Estate of Kinnane Co. (C. C. A., 6th Cir.), 39 Am. B. R. 593, 242 Fed. 769; Matter of Mumford (D. C., N. Car.), 43 Am. B. R. 218, 255 Fed. 108.

124. Successful defense to charges.—In the case of Matter of Perlbeffer (Ref., N. Y.), 25 Am. B. R. 586, the referee said: "It seems to me essentially equitable that a bankrupt should be allowed to defend himself against charges made under section 3 of the Bankruptcy Act, denying acts in bankruptcy, and that the expense of successful defense be allowed out of his estate under section 64-b(3) of the Act, especially if such charges, if established, could be pleaded as objections to his discharge within section 14-b of the Bankruptcy Act (I refer particularly to subdivision 4), or should be germane to any such objections, although at the same time the trial should result in an adjudication on other charges established at the trial."

125. In re Young (D. C., N. Car.), 16 Am. B. R. 106, 142 Fed. 891.

126. Matter of Carpenter (Ref., N. Y.), 25 Am. B. R. 161, citing Collier on Bankruptcy (8th ed.), p. 736.

127. Compensation of attorneys for receiver of corporation appointed by State court.—Where a fee has been allowed attorneys by a State court for services rendered the receiver of a corporation in that court and ordered to be paid by such receiver out of any funds available for that purpose, and prior to the making of such order, the corporation has become bankrupt and its assets have passed under the jurisdiction of the bankruptcy court, such fee is not a priority claim constituting a lien on the assets of the bankrupt corporation. Such claim is allowable only upon equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial in fact. In re Standard Fuller's Earth Co. (D. C., Ala.), 26 Am. B. R. 562, 186 Fed. 578.

Fed. 379.

128. In re Frick (Ref., Ohio), 1 Am. B. R. 719; Liddon v. Smith (C. C. A., 5th Cir.),

Priority over receiver's certificates.—An attorney's fee for services rendered the bankrupt under the Bankruptcy Act must be deducted from the proceeds of the sale of unencumbered property before applying them to the certificates of a receiver, appointed by the State court, prior to bankruptcy, upon the ground of insolvency. Smith v. Shenandoah Valley Nat. Bank (C. C. A., 4th Cir.), 40 Am. B. R. 314, 246

essential to the proper administration of the bankrupt's estate rank second only to labor claims.<sup>129</sup>

#### V. PAYMENT OF WAGES.<sup>130</sup>

a. In general.—Subdivision 4 specifies the wages which are to have priority in payment. The amendment of 1906 added "traveling or city salesmen" to workmen, clerks and servants, who alone were preferred under the original act. Under this subdivision the rule as to a conflict between the bankruptcy law and a State statute concerning wage priorities should be noted.<sup>131</sup> An analogous but different priority to the wage-earner is probably given by every State law. Still, such statutes apply in certain circumstances, as where they give priority for labor over even an existing mortgage,<sup>132</sup> or where, in case of insolvency, a lien is given.<sup>133</sup> But such claims are not usually prior to valid vested liens.<sup>134</sup> Since the claim of a clerk for his wages earned within three months of his bankruptcy with his employer is a priority fixed by the bankruptcy act and not a lien under the laws of the State,<sup>135</sup> it is immaterial whether under the laws of the State the claim is or is not superior to a homestead right.<sup>136</sup> A laborer may be entitled to priority of payment hereunder although he has not perfected his lien under a State statute.<sup>137</sup> Proof of claim for wages must state facts which show the claim to be entitled to preference or priority of payment. It is not sufficient to say in the claim that the debt therein mentioned is "preferred" or a "preferred claim."<sup>138</sup>

b. Construction and effect.—The term "wages" should be construed in a broad and general sense, as meaning compensation for services rendered. Any

14 Am. B. R. 204, 135 Fed. 43. *Contra*: In re Duncan (Ref., Tex.), 2 Am. B. R. 321. Compare also In re Tebo (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419.

129. In re Erie Lumber Co. (D. C., Ga.), 17 Am. B. R. 689, 700, 150 Fed. 817.

130. See also Am. B. R. Dig. §§ 871-873.

131. See under this section, *post*, subtitle "Conflicting and Overlapping State Priorities."

132. In re Matthews (D. C., Ark.) 6 Am. B. R. 96, 109 Fed. 603.

In Kentucky wage-earners have no lien upon and are not entitled to priority of payment out of the proceeds of mortgaged property sold by the trustee in bankruptcy of the mortgagor. In re Mulhauser (C. C. A., Ky.), 10 Am. B. R. 231, 121 Fed. 629, followed in Matter of Meis (Ref., Ky.), 18 Am. B. R. 104.

133. In Ohio it has been held to be the purpose of the statute in regard to labor claims, when the property of the employer shall be placed by assignment or receivership beyond the reach of those who may have assisted in its creation by their labor to the extent of claims which have accrued three months prior thereto, to fasten upon it a charge which shall yield in priority of payment only to taxes and costs of administering the trust, and that this charge is tantamount to a specific lien in favor of this class of creditors. The mere fact that a petition in bankruptcy has been filed within four months of the appointment of a

receiver of the insolvent debtor does not affect such a lien, which is not in any proper sense a lien created by a suit or proceeding at law or in equity. In re Coe, Powers & Co. (C. C. A., 6th Cir.), 6 Am. B. R. 1, 109 Fed. 550.

134. In re Cramond (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966; In re Proudfoot (D. C., W. Va.), 23 Am. B. R. 106, 173 Fed. 733; In re Tebo (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419, is thus not a reliable authority. See discussion under this section, *ante*, subtitle "Priorities versus Liens."

135. In re Erie Lumber Co. (D. C., Ga.), 17 Am. B. R. 689, 699, 150 Fed. 817, quoting Collier on Bankruptcy (5th Ed.), p. 504.

136. Matter of Strickland (Ref., Ga.), 20 Am. B. R. 923.

137. In re Cramond (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966; In re Burton Mfg. Co. (D. C., Ia.), 14 Am. B. R. 218, 134 Fed. 157.

138. Sufficiency of proof of claim entitled to priority as a wage claim.—Where a proof of claim states merely that it is for "wages due deponent as clerk and manager and is a preferred claim," and it does not appear in such claim or by proof of any kind that such wages were earned in the employ of bankrupt within three months before the commencement of bankruptcy proceedings, it is not sufficient. In re Dunn (D. C., N. Y.), 25 Am. B. R. 106, 181 Fed. 701.



other construction would lead to glaring inconsistencies and manifest injustice.<sup>139</sup> The services referred to are those rendered by one occupying the relation of servant to his employer as master; including only persons who work, labor or serve in a more or less subordinate position.<sup>140</sup> The statute indicates that such a construction should be made, for it specifies "wages due to workmen, clerks or servants," excluding the notion that one who renders professional services as an attorney or physician is entitled to priority under such provision.<sup>141</sup> Under such construction a person who renders services as an incident of a contract providing for payment in some other way than on a time basis would not be entitled to the privilege of priority.<sup>142</sup> Commissions on sales of traveling salesmen constitute wages within the meaning of this provision,<sup>143</sup> but a partnership, composed of several members, selling the product of a corporation on a commission, is not a workman or laborer, and its commissions may not be considered as "wages."<sup>144</sup> The fact that a claimant's compensation was more than \$1,500 per year does not of itself disentitle him to priority.<sup>145</sup> The intent and purpose of the clause is to protect laborers to the fullest possible extent, giving them priority over all other creditors.<sup>146</sup> The priority given to claims for wages is not lost by the entry of judgment on the claim before the institution of bankruptcy proceedings.<sup>147</sup> One claiming priority under this section has the burden of showing that he is within one of the designated classes.<sup>147a</sup>

**c. Assignee of claim for wages.**<sup>148</sup>—An assignee of a claim for wages is entitled to priority of payment although the assignment was made prior to the commencement of the bankruptcy proceedings.<sup>149</sup> But such priority is lost by the assignee's acceptance of the debtor's note and due bill, the transaction

139. *In re New England Thread Co.* (C. C. A., 1st Cir.), 20 Am. B. R. 47, 158 Fed. 788.

**Wages loaned to employer.**—Where stockholders in a bankrupt partnership association consented that a portion of their wages be withheld by and loaned to the company, they are not entitled to priority for such sums upon the ground that they are labor claims. *Matter of Caledonia Coal Co.* (D. C., Mich.), 43 Am. B. R. 93, 254 Fed. 742.

140. *Matter of Gay & Sturgis* (D. C., Mass.), 86 Am. B. R. 350; *Matter of Quackenbush* (D. C., N. J.), 43 Am. B. R. 699, 259 Fed. 599.

141. *Matter of Gay & Sturgis* (D. C., Mass.), 86 Am. B. R. 350.

142. *Matter of Footville Condensed Milk Co.* (D. C., Wis.), 38 Am. B. R. 472, 237 Fed. 136.

143. *In re New England Thread Co.* (C. C. A., 1st Cir.), 20 Am. B. R. 47, 158 Fed. 788; *In re Fink* (D. C., Pa.), 20 Am. B. R. 897, 163 Fed. 135.

144. *Matter of Crawford Woolen Co.* (D. C., W. Va.), 34 Am. B. R. 223, 218 Fed. 951.

145. *Matter of Schultz & Guthrie* (D. C., Mass.), 37 Am. B. R. 604, 235 Fed. 907; *Matter of American Finance & Securities Co.* (Ref., N. J.), 38 Am. B. R. 479. *Contra*; *In re Becker* (Ref., N. Y.), 31 Am. B. R. 596.

146. Judgment founded upon claims for labor are entitled to priority over the claims of all other creditors and to payment in full. *In re Blackstaff Engineering Co.* (D. C., Ga.), 29 Am. B. R. 663, 200 Fed. 1,019, citing *In re Erie Lumber Co.* (D. C., Ga.), 17 Am. B. R. 689, 150 Fed. 817, and *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 27 Am. B. R. 873, 56 L. Ed. 708, 32 Sup. Ct. 457.

**Purpose of section.**—Priority of payment of wages under section 64b(4) of the Bankruptcy Act was intended for the benefit only of those

who are dependent upon their wages, and who, having lost their employment by the bankruptcy, would be in need of such protection. *Blessing v. Blanchard* (C. C. A., 9th Cir.), 36 Am. B. R. 135, 213 Fed. 35.

147. *Matter of Haskell* (D. C., N. Y.), 36 Am. B. R. 423, 228 Fed. 819.

147a. *Matter of Quackenbush* (D. C., N. J.), 43 Am. B. R. 699, 259 Fed. 599.

148. See also Am. B. R. Dig. § 885.

149. *Matter of Dutcher* (D. C., Wash.), 32 Am. B. R. 545, 213 Fed. 908.

**Priority of assignee.**—*Shropshire v. Bush*, 204 U. S. 186, 17 Am. B. R. 77, 51 L. Ed. 436, 27 Sup. Ct. 178, holding that "The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant;" *In re Fuller & Bennett* (D. C., W. Va.), 18 Am. B. R. 443, 152 Fed. 538. The act of 1898, providing for priority in payment of wages earned within three months of the filing of the petition by workmen, clerks, or servants, not to exceed \$300 to each claimant, causes such priority to attach to the character of claim earned by the designated class and within the period fixed, and not to the character of the claimant who offers to prove such claim, and such priority claims do not lose their status as such, by assignment before the filing of the petition to another than the workman, clerk, or servant who earned them. *Matter of Harmon* (D. C., W. Va.), 11 Am. B. R. 64, 128 Fed. 170.

**Borrowing money to pay wages.**—In the case of *United Surety Co. v. Iowa Mfg. Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 726, 179 Fed. 55, the court said: "In this case there was no assignment of the claims and none

operating as a novation.<sup>150</sup> Orders drawn upon a company by a bankrupt, and given to his employees, payable in trade, do not, upon payment, constitute an assignment of wages so as to entitle the drawee to priority.<sup>151</sup> Where checks are given to laborers for wages earned prior to the employer's bankruptcy, the person who cashes such checks becomes an assignee of the claims represented by such checks and is entitled to priority.<sup>152</sup> If the claim be assigned after being proved, the assignee is subrogated to the priority of the assignor.<sup>153</sup> A surety may be entitled, through the doctrine of subrogation, to preference in payment of claims which it has discharged.<sup>154</sup> But the mere fact that one pays off a debt at the instance of the debtor or lends money to

was intended by the parties. The transaction consisted simply in the Abadie Company [insolvent] borrowing money from the surety company to pay a debt which, as between the borrower and the lender, was alone owned by the former, and instead of buying the claims from the laborers, and thereby securing some equitable right as against the principal debtor, the surety company took what it conceived to be ample security for the loan, turned over the money to the borrower, and with it the latter paid and extinguished its own debt to the laborers. Their claims, therefore, were not at the time bankruptcy proceedings were instituted against the borrower 'wages due the workmen' within the meaning of the section 64-b(4) of the Bankruptcy Act. Neither were they assigned claims of that kind entitling the assignee to stand in the shoes of the laborers."

**Priority personal under prior decisions.**—This priority has been held to be personal and where an assignment of the wages took place prior to the filing of the petition no priority was allowed. In *re Westlund* (D. C., Minn.), 3 Am. B. R. 646, 99 Fed. 399. Thus, where, prior to the bankruptcy of a corporation, its employees assign their claims for wages to secure one who advanced the money for their wages, the assignee is not entitled to priority of payment. In *re St. Louis Ice, etc., Co.* (D. C., Mo.), 17 Am. B. R. 194, 147 Fed. 792. But where the assignment took place after the bankruptcy proceedings were commenced it was held that the claims for wages are entitled to priority in the hands of the assignee. In *re Campbell* (D. C., Wis.), 4 Am. B. R. 535, 102 Fed. 686.

150. In *re Fuller & Bennett* (D. C., W. Va.), 18 Am. B. R. 443, 152 Fed. 536.

151. *Stewart & Co. v. McLeod* (C. C. A., 5th Cir.), 34 Am. B. R. 414, 222 Fed. 253.

**Goods purchased by orders of bankrupt.**—Where a merchant supplied goods to workmen in the employ of the bankrupt, upon orders; of the bankrupt, received as a portion of their wages, and for the amount of such orders remaining unpaid, filed a claim in their own name and asserted a laborers' lien upon the bankrupt's property under a Tennessee statute, and where there had been no assignment of the labor claims to the merchant *pro tanto* by consent or

knowledge of the laborers themselves, but simply a supposition between the bankrupt and claimant that claimant should stand precisely in the shoes of the laborers, in the absence of evidence that the laborers intended to sell and agreed that the lien should be kept alive for the benefit of the purchaser, payment and not an assignment will be presumed. *Browder & Co. v. Hill* (C. C. A., 6th Cir.), 14 Am. B. R. 619, 136 Fed. 821. See also *Bell v. Arledge* (C. C. A., 5th Cir.), 27 Am. B. R. 773, 192 Fed. 837.

152. *Matter of Stultz Brothers* (D. C., N. Y.), 34 Am. B. R. 783, 226 Fed. 969.

**Time checks.**—Where bankrupts were loggers and failed to pay their men and the owners of the logs paid off the liens to prevent threatened foreclosure and sale, and the time checks representing each man's claim being turned over to the owners of the logs upon such payment, the transaction amounted to an assignment in fact of such claim and not to a payment and extinguishment, and such claims were entitled to the same right to priority of payment in the hands of such owners as in the hands of the workmen. *Matter of Langley & Alderson* (Ref., Wis.), 24 Am. B. R. 69. Where a bankrupt corporation issued daily time checks to its laborers which were neither dated nor negotiable and a mercantile firm gave merchandise for the checks under an agreement by the bankrupt to pay the same, less 10 per cent., and the checks were not assigned to the mercantile firm and the laborers had no agreement with it, such firm is not entitled to priority in payment of such checks under section 64-b (4) of the Bankruptcy Act, especially where the evidence is insufficient to establish that the checks were for labor performed within three months prior to bankruptcy. *Matter of McGowin Lumber Co.* (D. C., Ala.), 35 Am. B. R. 57, 223 Fed. 553, quoting text with approval.

153. **Subrogation.**—In *re North Carolina Car Co.* (D. C., N. Car.), 11 Am. B. R. 488, 127 Fed. 178; *Matter of Langley & Alderson* (Ref., Wis.), 24 Am. B. R. 69.

154. **Right to be subrogated to priority claims.**—A surety on the bond of a municipal contractor, one of the conditions of which was that the wages of workmen should be paid, who, after the bankruptcy obtains an assignment of claims for wages and pays them, is entitled to subrogation to the rights

pay off such debt does not entitle him to subrogation to the liens of the creditors so paid off.<sup>155</sup>

d. **When services performed.**—The labor must have been performed within three months of the filing of the petition, although a different and longer period be prescribed by a State statute.<sup>156</sup> The claim of an infant for wages, earned more than three months before the commencement of bankruptcy proceedings, is not entitled to priority.<sup>157</sup> The holding that, if performed thereafter without actual notice of the bankruptcy, the right to priority exists, seems erroneous;<sup>158</sup> though perhaps such a disbursement could be allowed as an expense of administration. If a labor claim is reduced to judgment within the four months' period, priority may still be asserted if the claimant waives his judgment, but all such rights are lost where the judgment was without the four months' period.<sup>159</sup> The claim must be for wages actually earned within the prescribed time, and a judgment for a breach of a contract of employment based upon an unlawful discharge of the employee is not entitled to priority.<sup>160</sup> The claim of a teamster should be limited to his personal services.<sup>161</sup> The words "wages due" include wages owing at the date of bank-

of its assignor and to their right of priority in payment. *Matter of Dutcher* (D. C., Wash.), 32 Am. B. R. 645, 213 Fed. 908.

155. *Brower & Co. v. Hill* (C. C. A., 6th Cir.), 14 Am. B. R. 619, 136 Fed. 821.

156. Priority confined to wages earned within three months of bankruptcy.—In *re Rouse* (C. C. A., 7th Cir.), 1 Am. B. R. 234, 91 Fed. 96, revg. a. c., 1 Am. B. R. 231, 91 Fed. 514, and holding that, where a company suspended business on August 31, 1898, owing wages to many workmen, and said company was involuntarily adjudged bankrupt on November 1, 1898, that the workmen, etc., were limited as to their priorities, to the wages earned within three months prior to the filing of the petition in bankruptcy, and they could not under section 67-b(5), which allows the same priorities in bankruptcy as are allowed by State laws, be allowed, as prior claims, wages earned more than three months prior to the filing of the bankruptcy petition, notwithstanding there were two statutes of the State of their residence, one allowing priority in the payment of wages for three months prior to the suspension of business by the employer, and another allowing priority in the payment of any sum earned as wages, no matter at what period.

Where a State statute provides that in all distributions of assets under general assignments for the benefit of creditors, the wages or salaries actually owing to the employees of the assignor for services rendered within one year prior to the execution of the assignment shall be preferred before any other debts, and such an assignment is made within four months prior to the filing of the petition in bankruptcy against the assignor, the priority of a wage claim against the bankrupt estate is confined to wages earned within three months before the commencement of the bankruptcy proceedings. *Matter of Slomka*

(C. C. A., 2d Cir.), 9 Am. B. R. 635, 122 Fed. 630, revg. 9 Am. B. R. 124.

157. In *re Huntenberg* (D. C., N. Y.), 18 Am. B. R. 697, 153 Fed. 768.

158. In *re Gerson* (Ref., Pa.), 1 Am. B. R. 251.

159. In *re Anson* (D. C., Cal.), 4 Am. B. R. 231, 101 Fed. 698; *Matter of Pedlow & Co.* (Ref., N. Y.), 32 Am. B. R. 808.

160. Damages for breach of contract.—*Matter of Lewis County* (Ref., R. I.), 12 Am. B. R. 279, holding that, where a salesman employed under a yearly contract is wrongfully discharged after seven weeks of work, sues at once and recovers judgment for breach of such contract, the amount recovered is not wages; hence upon the bankruptcy of the employer within a year, the salesman is not entitled to payment in full for the proportionate part of his judgment, which three months bears to the unexpired period of his term of service.

Where a contract of employment at a fixed salary for a definite time expressly provides that in case the employer, a corporation, should be dissolved before the expiration of the contract, it might at the option of the corporation be declared null and void, and before the expiration of the contract the employer makes a written admission of its inability to pay its debts and its willingness to be adjudged bankrupt upon that ground, the employee is not entitled to prove a claim for damages for an alleged breach of the contract of employment. In *re Sweetser* (C. C. A., 2d Cir.), 15 Am. B. R. 650, 142 Fed. 131.

161. If the claim is for services of teamster with wagon and team, he may have priority only for his personal services. *Matter of Winton Lumber & Mfg. Co.* (Ref., Ky.), 17 Am. B. R. 117.

In Pennsylvania, the earnings of horses and teams, not being preferred under the

ruptcy, even though, by contract between the wage-earner and the bankrupt, payment is to be deferred to a date later than the date of bankruptcy.<sup>162</sup> Payments on account of wages due, made by a bankrupt to certain of his employees within three months of the filing of a petition in bankruptcy, will not be held to reduce the amount of wages earned by them during that period, where the bankrupt was indebted to such employees for services rendered prior thereto to a greater extent than the payments made, and in making such payments gave no direction for their application.<sup>163</sup>

**e. Persons entitled to priority.**<sup>164</sup>—(1) **WORKMEN, CLERKS OR SERVANTS.**—The question as to who is entitled to priority for wages is not, it seems, controlled by the statutory definition of "wage-earner."<sup>165</sup> The words are used in their popular sense, and should be construed to mean just what they are popularly understood to mean;<sup>166</sup> that is, only those who work, labor or serve in a more or less subordinate capacity.<sup>167</sup> Dictionaries should be consulted, as well as cases. The phrase "operative, clerk, or house-servant," in the law of 1867, is thought to be practically equivalent. Cases construing these words will be found in the foot-note.<sup>168</sup> Priority, being given to persons performing services of a certain character, depends upon the character of the services rather than upon the particular mode of employment.<sup>169</sup> A bookkeeper, employed by a bankrupt at a regular salary payable monthly, is a clerk within the meaning of this subdivision.<sup>170</sup> Under the present law, the following have been held not entitled to priority under this subsection: a contractor,<sup>171</sup> a

State law, are not preferred under section 64-b(5) of the bankruptcy act, and it being impossible to individuate claimant's earnings and the earnings of his team, no portion of the claim will be allowed. *Spruks v. Lackawanna Dairy Co.* (D. C., Pa.), 26 Am. B. R. 554, 189 Fed. 287.

**162. Wages due; deferred payment.**—In re Gladding (D. C., R. I.), 9 Am. B. R. 700, 120 Fed. 709, holding that, where a clerk of the bankrupt took two weeks' vacation in accordance with a notice posted in the store and which provided that "it is understood and agreed that employees taking vacations agree that if for any reason employment is severed voluntarily or otherwise before January 1, 1903, the vacation pay will be forfeited," and the employer becomes a bankrupt in October, 1902, such provision must not be converted into an agreement which would deprive the clerk of his ordinary legal status as a creditor.

**163.** In re Van Wert Machine Co. (D. C., Mass.), 26 Am. B. R. 597, 186 Fed. 607.

**164.** See also Am. B. R. Dig. §§ 872, 873.

**165. Wages, definition.**—In re Scanlon (D. C., Ky.), 3 Am. B. R. 202, 97 Fed. 26; In re Gurewitz (C. C. A., 2d Cir.), 10 Am. B. R. 350, 121 Fed. 982; *Blessing v. Blanchard* (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35. The term "wages," as used in this section, has received a very liberal construction. It includes commissions or other methods of payment. In re Roebuck Weather Strip & Wire Screen Co. (D. C., N. Y.), 24 Am. B. R. 532, 180 Fed. 497.

The term "wage-earner," as defined in § 1 (27) of the act does not appear in this sub-

section, and the definition does not in any way tend to assist in construing the language here used. *American Finance & Securities Co.* (Ref., N. J.), 38 Am. B. R. 479.

**166.** In re Rose (Ref., Ohio), 1 Am. B. R. 68.

**167.** *Matter of Gay and Sturgis* (D. C., Mass.), 36 Am. B. R. 350.

The word "servant," as used in section 64b(4) of the bankruptcy act, giving priority to wages due, should be held to mean a restricted class of subordinate helpers who work for wages, but who are not salesmen, workmen, or clerks. It does not include the manager of a business, although he may also have rendered services as a salesman. *Blessing v. Blanchard* (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35.

**168.** In re Pevear, Fed. Cas. 11,053; In re Erie Rolling Mill Co., 1 Fed. 585; In re Waites & Co., 39 Fed. 284.

**169.** In re New England Thread Co. (D. C., R. I.), 18 Am. B. R. 840, 154 Fed. 742; *Matter of Snow Wire Works* (Ref., N. Y.), 34 Am. B. R. 152.

**170. Bookkeeper.**—In re Baumblatt (D. C., Pa.), 19 Am. B. R. 500, 153 Fed. 485; *Bell v. Arledge* (C. C. A., 5th Cir.), 27 Am. B. R. 773, 192 Fed. 837.

Under the act of 1867, Judge Lowell decided that the word included "a person employed for temporary service in adjusting the books and accounts of a bankrupt." *Ex parte Rockett*, Fed. Cas. 11,977.

**171. Contractor distinguished from workman.**—Where one rendered services to another under an express contract, and the relation established between the parties was

general buyer from jobbers,<sup>172</sup> a manager of a branch broker's office,<sup>173</sup> an actress,<sup>174</sup> a teamster,<sup>175</sup> a blacksmith shoeing horses and repairing tools in his own shop,<sup>176</sup> a firm, selling the product of a corporation on a commission,<sup>177</sup> a person engaged merely in an incidental agency,<sup>178</sup> a vendor of a business under an agreement by which he is to receive a certain yearly salary as consideration for the transfer and his services for three years,<sup>178a</sup> and a corporation manager<sup>179</sup> or officer.<sup>180</sup> But if an officer of a corporation performs services which are not connected with his office, he is entitled to priority of payment for such services.<sup>181</sup> It has been held that the superintendent of a factory, employed

one of contract involving the employment of capital of the alleged laborer, and the use of his machinery, factory, and the services of his own employees, it was held that the party furnishing such capital, factory, and services of his employees was not a workman, clerk, or servant, within the meaning of subdivision 4, even though he also in connection with the performance of his contract, rendered some manual service. In re Rose (Ref., Ohio), 1 Am. B. R. 68. See also Matter of Moore (D. C., Ohio), 45 Am. B. R. 388, — Fed. —.

172. A general buyer from jobbers, receiving his pay wholly from the persons for whom he purchases, is not a "workman, clerk or servant" within the meaning of subdivision 4. Matter of Smith (Ref., R. I.), 11 Am. B. R. 646.

173. A manager of a branch broker's office is neither a workman, servant, or clerk. In re Brown (D. C., N. Y.), 22 Am. B. R. 496, 171 Fed. 281. Nor is a manager of a branch store who incidentally sells goods and performs clerical work. In re Greenberger (D. C., N. Y.), 30 Am. B. R. 117, 203 Fed. 583; Blessing v. Blanchard (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35.

174. An actress, under contract to receive \$5,000 for a four weeks' engagement, is not a "workman" or "servant" within the meaning of this section. Matter of All Star Feature Corporation (D. C., N. Y.), 36 Am. B. R. 655, 231 Fed. 251.

175. A teamster is neither a workman, clerk, or servant, within the meaning of subdivision 4 of the act. Spruks v. Lackawanna Dairy Co. (D. C., Pa.), 26 Am. B. R. 554, 189 Fed. 287; Spruks v. Lackawanna Dairy Co. (D. C., Pa.), 26 Am. B. R. 554, 189 Fed. 287.

One employed to deliver milk at bankrupt's premises with his team, at a fixed price per month, is neither a workman, clerk, or servant within the meaning of subdivision 4 so as to give his claim priority. Spruks v. Lackawanna Dairy Co. (D. C., Pa.), 26 Am. B. R. 554, 189 Fed. 287.

176. The claim of a blacksmith, proprietor of a shop, for the services of himself and men in shoeing horses belonging to a bankrupt corporation and in doing other work, is not entitled to priority. Weaver v. Hugill Shoe & Supply Co. (Ref., Ohio), 16 Am. B. R. 516.

177. Matter of Crawford Woolen Co. (D. C., W. Va.), 34 Am. B. R. 223, 213 Fed. 951.

178. An incidental agency, with no obligation to serve, does not create a claim entitled to priority under subdivision 4. In re Mayer (D. C., Wis.), 4 Am. B. R. 119, 101 Fed. 227.

178a. Matter of Quackenbush, Jr. (D. C., N. J.), 43 Am. B. R. 699, 259 Fed. 599.

179. General manager.—A general manager of a bankrupt corporation, having authority to hire and discharge men, and to superintend the salesmen who himself worked as a salesman, is not entitled to priority under section 64-b(4) nor under a statute of California, giving priority to "miners, mechanics, salesmen, clerks, servants, laborers or other persons for work done or service rendered." Blessing v. Blanchard (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35.

A general manager and president of a corporation, who, with his wife, owned all but one share of the stock, and who managed the corporation, hired and discharged all employees, and attended to all financial arrangements, and whose salary was fixed by the board of directors, consisting of himself, his wife and his attorney, is not a servant of the corporation entitled to priority under this section. Keyes v. Davis (C. C. A., 9th Cir.), 36 Am. B. R. 884, 231 Fed. 686.

A claimant, who entered the employ of the bankrupt as an accountant, but after a short time actually acted as manager, is not a workman, clerk or servant. Matter of Snow Wire Works (Ref., N. Y.), 34 Am. B. R. 152.

A shop foreman, who was also the treasurer and a director of his employer, and spent an appreciable part of his time in the latter position, is not entitled to priority therefor. Matter of Boston French Range Co. (D. C., Mass.), 37 Am. B. R. 508, 235 Fed. 916.

180. In re Grubbs-Wiley Co. (D. C., Mo.), 2 Am. B. R. 442, 96 Fed. 183; In re Carolina Cooperage Co. (D. C., N. Car.), 3 Am. B. R. 154, 96 Fed. 950; Matter of Metropolitan Jewelry Co. (D. C., N. Y.), 31 Am. B. R. 752, 216 Fed. 385; Arnold v. Knapp (W. Va., Sup. Ct.), 34 Am. B. R. 432, 84 S. E. 895; Matter of Eagle Ice, etc., Co. (D. C., Pa.), 39 Am. B. R. 184, 241 Fed. 393.

Director.—A shop foreman, who was also the treasurer and a director of his employer, and who spent an appreciable part of his time in the latter position, is not entitled to priority therefor. Matter of Boston French Range Co. (D. C., Mass.), 37 Am. B. R. 508, 235 Fed. 916.

181. In re Swain Co. (D. C., Cal.), 28 Am. B. R. 66, 194 Fed. 749, in which it was held that the claim made by one who acted as director and secretary of the bankrupt restaurant corporation for wages for services rendered as steward of bankrupt's restaurant, and in no other capacity, is entitled to priority of payment; Matter of Capital Paint Co. (D. C., Cal.), 38 Am. B. R. 188; In re Crown Point Brush Co. (D. C., N. Y.), 39 Am. B. R. 638, 200 Fed. 882; Blessing v.

to have charge of the factory and superintend the making of paints, is not a workman or servant, although he performs more or less manual labor.<sup>182</sup> On the other hand, it has been held that the superintendent of an automobile shop, who does the same kind of work as the men under him and is subject to the control and direction of the general manager, is a workman, even though he has authority to hire and discharge the men in his department.<sup>183</sup> The earnings of a professional man, employed primarily because of his ability to advise helpfully, do not constitute "wages" and the man himself is not a "workman, clerk or servant."<sup>184</sup> But a clerk selling goods in a store<sup>185</sup> is entitled to priority, and so is a laborer "working by the piece."<sup>186</sup> So also as to musicians employed by the bankrupt to play in a roof garden;<sup>187</sup> and it has been held that a manager of a store may apply a payment of wages made to him within the three months' period upon wages due before such period, and that he is entitled to priority in the payment of the balance of his claim.<sup>188</sup>

Blanchard (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35; *Keyes v. Davis* (C. C. A., 9th Cir.), 36 Am. B. R. 884, 231 Fed. 688; *Matter of American Finance & Securities Co.* (Ref., N. J.), 38 Am. B. R. 479; *Matter of Capital Paint Co.* (D. C., Cal.), 38 Am. B. R. 188.

182. *Matter of Continental Paint Co.* (D. C., N. Y.), 34 Am. B. R. 282, 220 Fed. 189.

183. *Blessing v. Blanchard* (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35.

184. *Mining engineer.*—A claim by a mining engineer, employed by the bankrupt at a salary of \$4,000 per annum, payable monthly, to advise and assist the superintendent, is not entitled to priority. *Matter of Gay and Sturgis* (D. C., Mass.), 36 Am. B. R. 350.

185. A person selling goods in a store is a clerk within the meaning of subdivision 4 and is entitled to priority, but where a person so entitled to priority allows his debtor to retain a portion of his wages under an arrangement to create a fund with which to pay the expenses of a college education, his lien as a wage-earner does not extend to the balance of his wages thus retained. *In re Flick* (D. C., Ohio), 5 Am. B. R. 465, 105 Fed. 503. See also *In re King Co.* (D. C., Mass.), 7 Am. B. R. 619, 113 Fed. 120.

186. "Piece worker."—In the case of *In re Guarewitz* (C. C. A., 2d Cir.), 10 Am. B. R. 350, 121 Fed. 982, the court holding that the claim of a "piece worker" is entitled to priority, said: "It surely could not have been the purpose of Congress to make the method of computation a criterion of priority.

... In order to secure priority under this subdivision [subd. 4], the creditor must establish the following facts: First, that he was a workman, clerk, or servant of the bankrupt. Second, that he earned wages within three months prior to the commencement of the proceedings. There is nothing ambiguous about the use of the word 'wages' in this connection. It means the agreed compensation for services rendered by the workmen, clerks or servants of the bankrupt, those who have served him in a subordinate or

menial capacity and who are supposed to be dependent upon their earnings for their present support. Whether their employer has agreed to pay them by the hour, the day, the week, the month, or by the 'job' or piece, is wholly immaterial."

In Pennsylvania a workman has been held to be one who works for others at manual labor, skilled or unskilled, and the reward of his labor is wages, and it is none the less such because it is paid for by the piece. But it is not wages where payment is by the job nor where it is profits on the labor of others, even though the person himself takes part in the work. *In re Deutsche & Co.* (D. C., Pa.), 25 Am. B. R. 343, 182 Fed. 430. In this case the establishment of the bankrupts was a sash, door and blind factory, and the claimants, under contract with the bankrupts, had charge of two of the factory departments. The men under them were their own, hired and discharged by them, and claimants were paid for the work which their men turned out at so much a piece, and were answerable for it. This work was done at the factory of the bankrupts with the aid of materials and machinery which the bankrupts furnished, the claimants furnishing the required labor. The hours of the men were regulated by the shop whistle and, for the sake of convenience, their wages were taken care of by the bankrupts for the claimants on pay day. It was held that claimants were not "workmen," nor were their earnings "wages" within the meaning of section 64-b (4) of the bankruptcy act.

187. Musicians hired at regular wages by a bankrupt to play on his roof garden are "servants" within the meaning of subdivision 4. *In re Calwell* (D. C., Ark.), 21 Am. B. R. 236, 164 Fed. 515.

188. *In re Andrews* (Ref., N. Car.), 19 Am. B. R. 441; *Matter of McIntyre Bros.* (Ref., Miss.), 21 Am. B. R. 586. But in the absence of specific application to other debts, such payments are to be applied to wages earned during the three months' period. *In re Flick* (D. C., Ohio), 5 Am. B. R. 465, 105 Fed. 503.

The priority does not exist in favor of an officer of a corporation, who occupies the position of a manager or assistant manager of the corporation's business, although incidentally he keeps the books and performs other services ordinarily performed by a clerk or laborer.<sup>189</sup> Every laborer who actually labors under the authority of the court for the preservation or enhancement of the fund or property in *custodia legis* is entitled to an equitable lien equivalent in effect to that of a *bona fide* purchaser without notice.<sup>190</sup>

(2) TRAVELING OR CITY SALESMAN.—The amendment of 1906 has included within the preference the wages earned by a traveling or city salesman, thus nullifying contrary authorities under the former law.<sup>191</sup> This amendment is not retroactive, and a claim for such wages filed in a bankruptcy proceeding instituted before said amendment is not entitled to priority.<sup>192</sup> A traveling salesman, as commonly understood, may be defined as a man who travels about the country soliciting orders for goods, which orders are sent to his employer for approval. This is the primary service for which he is employed, and it measures the full extent of his responsibility.<sup>193</sup> The fact that a claimant, in addition to procuring orders for the bankrupt's goods, supervised their being placed in position, does not take him from the classification of a salesman, his principal business being to procure orders.<sup>194</sup> Likewise, the fact that a

189. In re Crown Point Brush Co. (D. C., N. Y.), 29 Am. B. R. 638, 200 Fed. 882.

190. Labor under authority of court.—“Thus, to express it otherwise, a laborer, who by order of the court is employed on property in the hands of the court, as to the existent values in hand, will be paid by the court for the value of his services rendered to that property to which the liens of the creditors attach, and for the benefit of which his services were rendered.” In re Erie Lumber Co. (D. C., Ga.), 17 Am. B. R. 689, 700, 150 Fed. 817.

191. In re Scanlon (D. C., Ky.), 3 Am. B. R. 202, 97 Fed. 26; In re Greenwald (D. C., Pa.), 3 Am. B. R. 696, 90 Fed. 705.

192. In re Photo Engraving Co. (D. C., N. Y.), 19 Am. B. R. 94, 155 Fed. 684.

193. Traveling salesman, definition.—In re New England Thread Co. (C. C. A., 1st Cir.), 20 Am. B. R. 47, 158 Fed. 788. In this case the court said: “He is not employed or authorized to fix prices. He cannot pass upon the credit or standing of customers. He does not collect accounts. He is not responsible for the quality, condition, or delivery of the goods. He makes no personal contracts, and he has no other interest in the sales than his compensation for those which are approved his employer. But, while the field of service and responsibility of traveling salesmen is limited, the agreements which they make with their employers vary greatly in such details as the form of compensation, the extent of territory, and in many other particulars. A traveling salesman may be paid a fixed sum per day, week or month, or a yearly salary, or a commission on the amount of goods sold, or both a fixed sum in the form of wages or salary, and, in addition thereto, a commission on the amount of goods sold when the sales exceed a certain

amount. The territory assigned to him may be confined to a single city or State, or it may cover many cities or States. Commonly, the employer pays the salesman's expenses, but sometimes, especially if he works for a commission, he pays his own expenses. Sometimes the employer has a list of customers, and the salesman receives a commission upon all orders sent in by those customers. Sometimes he is allotted a certain territory, and he receives a commission upon all sales which are sent in from that territory. In some cases the employer may direct the routes he is to travel, and in other cases the salesman chooses his own routes. Sometimes the salesman sends the orders directly to his employer, and sometimes the customers themselves send in the orders to the employer. We do not think any of these details takes a man out of the category of traveling salesman.” See also In re Fink (D. C., Pa.), 20 Am. B. R. 897, 163 Fed. 135.

194. In re Roebuck Weather Strip & Wire Screen Co. (D. C., N. Y.), 24 Am. B. R. 532, 180 Fed. 497. In this case a claim was filed against the estate of a bankrupt under a contract between the bankrupt and the claimant by which it was agreed that the claimant should solicit orders for weather strips, superintend the placing of the same by workmen whom the claimant should select, subject to the approval of the bankrupt, and that bankrupt should pay the wages of the workmen, furnish the material, and out of the price should retain the cost of labor and material and an additional amount of 15 per cent. of the price, turning the balance over to the claimant as his compensation. Claimant claimed priority for compensation due pursuant to said contract under subdivision 4. It was held that the claimant was a wage-earner and not a principal with

traveling salesman had charge of a local office, does not deprive him of priority, where his office management was merely incidental to his work as salesman.<sup>195</sup> A corporation or partnership engaged in selling merchandise for manufacturers, is not a traveling or city salesman within the meaning of this section.<sup>196</sup>

#### VI. DEBTS ENTITLED TO PRIORITY UNDER STATE LAWS.<sup>197</sup>

a. **In general.**—Subdivision 5 requires the payment of "debts owing to any person who by the laws of the States or the United States is entitled to priority." Here the practitioner should again bear in mind the rule as to liens, previously stated.<sup>198</sup>

b. **Liens under State laws and bankrupt act.**—Where a priority is sought under a State statute it must be determined under the laws of that State.<sup>199</sup> If the State law gives a lien and it continues after bankruptcy, the priority exists in effect though not in name; the property becomes charged with the lien, and § 64, strictly speaking, does not apply.<sup>200</sup> In this connection, too, § 67 on liens avoided by the adjudication should be consulted. It must be remembered, too, that this subdivision has no application where the State statute gives priority to a class already given priority by the bankruptcy law; the bankrupt act not only controls the State law in case of absolute conflict, but by its express regulation of these priorities excludes the State law altogether.<sup>201</sup> Subject to these exceptions, if the State law gives the priority, the same must be recognized in the bankruptcy proceedings.<sup>202</sup> A state statute which gives a lien to employees and materialmen of manufacturing establishments is not unconstitutional as discriminating against those furnishing money or machinery to the same establishments, but is a reasonable classification.<sup>203</sup> The bankruptcy act expressly recognizes the existence of State

the bankrupt in its business and that the claim should be allowed priority to the extent of \$300.

**Salesman for another concern selling on commissions.**—Where a traveling man for another concern, having an agreement with a bankrupt company whereby he was to receive 15 per cent. on monuments sold by him to be paid him when the monument was set up and paid for, makes an agreement for the sale of a monument about ten months before the bankruptcy proceeding, but the monument is not delivered and paid for until the month prior to the bankruptcy proceedings, he is a traveling salesman. *In re National Marble & Granite Co.* (D. C., Ga.), 31 Am. B. R. 80, 206 Fed. 185.

<sup>195.</sup> *Matter of Gay* (D. C., Mass.), 33 Am. B. R. 898, 188 Fed. 392.

<sup>196.</sup> *Matter of Herzenstein Bros.* (Ref., N. Y.), 35 Am. B. R. 656; *Matter of Kominers* (D. C., N. Y.), 40 Am. B. R. 431, 252 Fed. 183.

<sup>197.</sup> See also Am. B. R. Dig. § § 874-881.

<sup>198.</sup> See discussion under this section, ante, subtitle "Priorities versus Liens."

<sup>199.</sup> *In re Byrne* (D. C., Iowa), 3 Am. B. R. 268, 97 Fed. 762. Text cited in *In re United States Lumber Co.* (D. C., Wash.), 30 Am. B. R. 682, 206 Fed. 236.

<sup>200a.</sup> *Matter of North Star Ice & Coal Co.* (D. C., Tenn.), 42 Am. B. R. 76, 252 Fed. 301.

<sup>200.</sup> *In re Lewis* (D. C., Iowa), 4 Am. B. R. 51, 99 Fed. 935; *Matter of Slomka* (C. C. A., 2d Cir.), 9 Am. B. R. 635, 122 Fed. 630; *In re Crown Point Brush Co.* (D. C., N. Y.), 29 Am. B. R. 638, 200 Fed. 882, quoting text.

A state statute cannot override the act of

Congress, even if a lien exists under the former at the time when the proceedings in bankruptcy are begun. *In re Consumers' Coffee Co.* (D. C., Pa.), 18 Am. B. R. 500, 151 Fed. 933.

<sup>201.</sup> Compare *In re Fall City, etc., Co.* (D. C., Ky.), 3 Am. B. R. 437, 98 Fed. 592; *In re Worcester Co.* (C. C. A., 1st Cir.), 4 Am. B. R. 497, 102 Fed. 808; *In re Crow* (D. C., Ky.), 7 Am. B. R. 545, 116 Fed. 110; *In re Potter* (D. C., Ky.), 16 Am. B. R. 26, 143 Fed. 401; *Moore v. Greene* (C. C. A., 4th Cir.), 16 Am. B. R. 648, 145 Fed. 480; *Matter of Spies-Alper Co.* (D. C., N. J.), 36 Am. B. R. 470, 281 Fed. 535; *Matter of Woulfe & Co.* (C. C. A., 5th Cir.), 39 Am. B. R. 91, 239 Fed. 128. If the state statute gives no lien to a county on the property of a tax collector for moneys collected by him, the county is not entitled to priority of payment out of his bankrupt estate. *In re Waller* (D. C., Md.), 15 Am. B. R. 753, 142 Fed. 883; *In re Iroquois Machine Co.* (D. C., R. I.), 22 Am. B. R. 183, 106 Fed. 629, holding that where an attachment upon a debtor's property is dissolved by his adjudication as a bankrupt, the attaching creditor's claim for costs of the attachment is a debt entitled to priority. As to a lien of garnishment, see *Matter of Culpepper* (Ref., Tex.) 31 Am. B. R. 762.

**Priority among liens.**—Where a statute gives to materialmen and mechanics a lien on moneys due to a principal contractor on a public building, the fact that some of the lienors commenced actions to enforce said liens prior to others does not give them a priority of payment out of the principal fund. *Lowe & Co. v. Leary* (Utah Sup. Ct.), 39 Am. B. R. 774, 164 Pac. 1062.

<sup>202.</sup> *Central Trust Co. v. Lueders & Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 61, 221 Fed. 829. See Kentucky Statutes, § 2.487.



statutes, and makes them the basis for allowing priority of payment to certain classes of claims.<sup>303</sup> The priority should be clearly evidenced by some statutory provision, or by a judicial rule so definitely established as to have the force of a statute.<sup>304</sup> It seems that a creditor will be allowed the same priority under the bankruptcy act which he would have had, had not the latter act superseded the State laws governing the distribution of estates of insolvent

<sup>303.</sup> *In re Crow* (D. C., Ky.), 7 Am. B. R. 545, 116 Fed. 110, 112, approved in *In re Bennett* (C. C. A., 6th Cir.), 18 Am. B. R. 320, 153 Fed. 673.

<sup>304.</sup> *In re Potter* (D. C., Ky.), 16 Am. B. R. 226, 143 Fed. 407. See also *Vidal, Petitioner* (C. C. A., 1st Cir.), 36 Am. B. R. 783; *Gandia & Slubbe v. Cadierno* (C. C. A., 1st Cir.), 36 Am. B. R. 780.

Money due from a guardian to his ward, on a settlement of his accounts in a probate court of Kentucky, is entitled to priority from the estate of the guardian in bankruptcy, the statutes of Kentucky providing that in a distribution of insolvent estates, whether on a voluntary or involuntary assignment, or the death of the insolvent, debts due as a guardian shall be paid in full before any payment shall be made to general creditors. (Ky. St., 1903, § 74.) *In re Crow* (D. C., Ky.), 7 Am. B. R. 545, 116 Fed. 110. But see under the Michigan statute, *In re Jones* (D. C., Mich.), 18 Am. B. R. 206, 151 Fed. 108.

Costs incurred in an action against the bankrupt prior to bankruptcy, which would constitute a preferred claim under the insolvency laws of Rhode Island, are entitled to priority against the estate in bankruptcy. *In re Daniels* (D. C., R. I.), 6 Am. B. R. 699, 110 Fed. 745.

A claim for materials supplied to a corporation, being entitled to priority under the laws of Kentucky, has been held to be entitled to priority under the bankruptcy act, although a technical lien had not ripened at the date of the corporation's adjudication in bankruptcy. *In re Bennett, Trustee, etc.* (C. C. A., 6th Cir.), 18 Am. B. R. 320, 153 Fed. 673, affg. 18 Am. B. R. 847. Such lien does not exist for manufactured goods sold to a manufacturer and jobber, engaged in manufacturing the same goods, and also in selling such goods manufactured by others. *In re Starks-Ullman Saddlery Co.* (C. C. A., 6th Cir.), 22 Am. B. R. 596, 171 Fed. 834. See also *In re Floyd & Behr Co.* (D. C., Ky.), 29 Am. B. R. 149, 200 Fed.

1,016. Such lien is superior to the lien of a pledge of running accounts receivable. *Fels v. Luaders & Co.* (C. C. A., 6th Cir.), 40 Am. B. R. 851, 246 Fed. 436.

**Priority of unrecorded mortgage.**—In Kentucky under a statute providing that no mortgage shall be valid as against creditors until acknowledged or proved according to law and lodged for record, a mortgage acknowledged in 1906, but not recorded until within four months of the mortgagor's adjudication in 1906, is not a valid lien as against creditors whose claims were created while the mortgage was withheld from record, and the mortgagee is not

entitled to priority of payment over such creditors, but in the distribution of the assets should share pro rata with the general creditors. *Matter of Doran* (D. C., Ky.), 17 Am. B. R. 799, 148 Fed. 327. See also *In re Clark Coal & Coke Co.* (D. C., Pa.), 23 Am. B. R. 273, 173 Fed. 658. The recording act of Kentucky is ineffective unless an attachment has been sued out by a creditor claiming its benefits; hence an unrecorded mortgage on real estate has priority over the general creditors of a bankrupt where no creditor has attached the land prior to bankruptcy. *Matter of Brown* (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

**Community property.**—In New Mexico, a husband has only a community interest in property acquired by himself or wife during the marriage, and upon the bankruptcy of the husband, community creditors are entitled to priority of payment as to community property. *In re Chaves* (C. C. A., 8th Cir.), 17 Am. B. R. 641, 149 Fed. 73.

**Priority of debts owing by foreign corporation to residents of State out of property in the State, sustained and applied.** See *In re Standard Oak Veneer Co.* (D. C., Tenn.), 22 Am. B. R. 883, 173 Fed. 103.

**Priority of mortgage executed prior to four months' period.**—Where a real estate mortgage was executed by a bankrupt more than four months prior to the filing of a petition against him for adjudication, it constitutes a valid mortgage against all creditors except such as may have acquired a lien prior to its proper record and is entitled to priority under subdivision 5, unless void under the State law as made with intent to hinder, delay and defraud creditors. *Bean v. Orr* (C. C. A. 5th Cir.), 25 Am. B. R. 400, 182 Fed. 599, revg. *In re Tysor-Cheatham Mercantile Co.* (D. C., Ga.), 24 Am. B. R. 434, 178 Fed. 733; *Rouse v. Ottenweas & Huxtell* (C. C. A., 6th Cir.), 31 Am. B. R. 115, 208 Fed. 861.

**Claim by wife for wages.**—Under the statutes and law of Alabama, a wife on the bankruptcy of her husband is entitled to a prior claim for wages due under a contract for services in her husband's store. *Matter of Davidson* (D. C., Ala.), 37 Am. B. R. 480, 233 Fed. 462.

**Wages or salary under Washington statute.**—The secretary, general manager, and superintendent of a lumber company, whose duties include employing workers, directing sales, overseeing the work, and repairing and adjusting machinery, is not a laborer, within the meaning of Remington & Ballinger's Code of Washington, §§ 1149, 1150,

debtors.<sup>205</sup> Thus, a landlord's claim for rent in arrears, being entitled to priority under the State law, is within this subsection.<sup>206</sup> And a mechanic's

and 1153, and his claim for salary is not entitled to priority. (See Am. B. R. Digest, § 881.) *Wintermote v. MacLafferty* (C. C. A., 9th Cir.), 37 Am. B. R. 425, 233 Fed. 95.

**Priority of labor claims under Ohio code.**—Claims for services rendered the bankrupt allowed as preferred claims under section 8339 of the Ohio General Code and section 64-b(5) of the bankruptcy act. *Emerson v. Castor* (C. C. A., 6th Cir.), 37 Am. B. R. 719.

**Fraudulent mortgage.**—A mortgage, withheld from record until shortly before the date of bankruptcy of the mortgagor for the purpose of bolstering the credit of the mortgagor, and defrauding his creditors, should not be allowed priority. *Fourth Nat'l Bank v. Willingham* (C. C. A., 5th Cir.), 32 Am. B. R. 159, 213 Fed. 219.

**Caption of mortgage wrong.**—A mortgage executed by a bankrupt in good faith, attested in compliance with the law of Georgia, and, through a mistake, bearing a caption for the wrong county, but recorded in the proper county, is valid and entitles the mortgagee to priority of payment. *Matter of Williams* (D. C., Ga.), 35 Am. B. R. 459, 224 Fed. 984.

**Customers of bankrupt stockbrokers** who have traced their stock specifically and hold the same free and clear, are in a preferred class, and if the equity of a loan to the bankrupt for which the stock had been pledged is insufficient, the deficiency must be borne by the other customers provided they held their stocks on a margin. *Matter of Pierson, Jr. & Co.* (D. C., N. Y.), 35 Am. B. R. 213, 225 Fed. 889.

<sup>205</sup> *In re Jones* (D. C., Mich.), 18 Am. B. R. 206, 151 Fed. 108; *In re Chandron & Peyton* (D. C., Md.), 24 Am. B. R. 811, 815, 180 Fed. 841, citing *Collier on Bankruptcy* (7th Ed.), p. 742.

<sup>206</sup> **Lien for rent.**—*Matter of Pittsburg Drug Co.* (D. C., Pa.), 20 Am. B. R. 227, 164 Fed. 482; *In re Sapinsky & Sons* (D. C., Ky.), 30 Am. B. R. 416, 206 Fed. 523; *Matter of Mt. Winans Lumber Co.* (D. C., Md.), 36 Am. B. R. 263, 228 Fed. 831.

Upon the adjudication of a tenant in a jurisdiction where the landlord has by statute a preferred lien upon the tenant's chattels on the leased premises, the landlord's claim for the rent due at the adjudication is entitled to priority of payment from the proceeds of a sale of said chattels. *In re Bishop* (D. C., S. Car.), 18 Am. B. R. 635, 153 Fed. 304.

A claim for future accruing rent will not be given effect under sections 67-d and 64-b of the bankruptcy act, by virtue of article 3261 of the Revised Statutes of Texas which provides that the lessor should have a lien for rent due or to become due on the property of the tenant in the building for the

period of the current contract year, "it being intended by the term 'current contract year' to embrace a period of twelve months, reckoning from the beginning of the lease or rental contract," the "current contract year" mentioned in the statute having expired on the date the petition was filed. *Matter of Sterne & Levi* (Ref., Tex.), 26 Am. B. R. 585. Where a landlord on refusing to accept the surrender of a lease has a provable claim against the estate for the unexpired term, he comes in as a general creditor and is not entitled to priority for subsequent rent. *Rosenblum v. Uber* (C. C. A., 3d Cir.), 43 Am. B. R. 480, 250 Fed. 584.

Under the Iowa statute (Code, § 2992), enacting that a landlord shall have a lien for his rent upon any personal property of the tenant used or kept on the leased premises, for one year after a year's rent, or the rent for a shorter period, falls due the lien of a landlord, as between him and a tenant, is given priority in all cases. *In re Hersey* (D. C., Ia.), 22 Am. B. R. 860, 171 Fed. 998.

Under the Pennsylvania statute, a landlord is entitled to priority of payment not exceeding the rent for one year, and this preference will be recognized by a court of bankruptcy. *In re West Side Paper Co.* (D. C., Pa.), 20 Am. B. R. 289, 293, 159 Fed. 241; *Ludlow v. Pugh* (C. C. A., 3d Cir.), 32 Am. B. R. 435, 213 Fed. 450, affg. *Matter of Keith-Gara Co.* (D. C., Pa.), 29 Am. B. R. 466, 203 Fed. 535; *Longstreth v. Pennock*, 87 U. S. 575, 22 L. Ed. 451; *Rosenblum v. Uber* (C. C. A., 3d Cir.), 43 Am. B. R. 480, 250 Fed. 584; *Matter of Delaney* (D. C., Pa.), 41 Am. B. R. 601, 251 Fed. 425. *Contra*, *Matter of Stern* (D. C., Pa.), 41 Am. B. R. 712. But where a landlord makes no objection to a sale in a bulk of bankrupt tenant's stock and lease, and accepts the purchaser as a tenant, the landlord's claim for priority of payment, from the proceeds of the sale, for a balance of rent which had accrued before the filing of the petition in bankruptcy is properly disallowed. *Vollmer v. McFadden* (C. C. A., 3d Cir.), 20 Am. B. R. 540, 161 Fed. 914, affg. 19 Am. B. R. 481; *Matter of Quality Shoe Shop* (D. C., Pa.), 34 Am. B. R. 196, 212 Fed. 321. See also *Matter of West* (D. C., Pa.), 42 Am. B. R. 341, 253 Fed. 963.

The landlord's lien is prior to the claim of execution creditors to the proceeds of the sale of goods of the tenant, although they were under levy by the sheriff at the time of the filing of the petition in bankruptcy. *Matter of Gerrow* (D. C., Pa.), 37 Am. B. R. 14, 233 Fed. 841.

**Georgia code.**—The general lien of a landlord under the Georgia Code is not created by the levy of a distress warrant but arises out of the relation of landlord and tenant, and hence, his claim for rent is entitled to priority upon the bankruptcy of the tenant over the levy of a distress warrant. *Matter of City Drug Store* (D. C., Ga.), 35 Am. B. R. 335, 224 Fed. 152. Under the Georgia Code mortgage lien holders with duly recorded mortgages are entitled to priority over the landlord's general lien for rent, with long-after-issued distress warrant. *Pretorius v. Anderson* (C. C. A., 5th Cir.), 38 Am. B. R. 93.

**Priority over wage earners.**—Where, just prior to adjudication of bankruptcy, the landlord distrained for rent in arrears, priority will be given over wage earners, where the

lien is valid as against the trustee although notice of the lien was filed after the adjudication in bankruptcy; the State statute must be recognized which gives the creditor a specified time after the materials were furnished within which the lien may be perfected.<sup>207</sup> The repeal of a statute giving a lien for materials furnished does not affect the right of priority as to materials furnished before the repeal, even though the statute was repealed before adjudication.<sup>208</sup> A collusive assignment of mechanics' liens for the benefit of the bankrupt will not be allowed.<sup>209</sup> While the priority of a landlord's lien, given under the State statute, is undoubtedly preserved by clause b (5) of § 64, this priority is not over all other claims whatever, but only over those that are not specified in the section as being even higher in right.<sup>210</sup> Where a conditional vendor has no priority over judgment creditors without notice, the order of payment provided for in subdivision 5 is not interfered with by not allowing such conditional vendor priority of payment.<sup>211</sup> If a State

funds are insufficient to pay both classes of creditors. *Matter of Mock* (D. C., Miss.), 35 Am. B. R. 9, 228 Fed. 94.

**New Jersey Landlord and Tenant Act.**—Under this section and the New Jersey Landlord and Tenant Act, which provides that no chattels lying upon leased premises shall be liable to be taken by any process unless before the renewal the accrued rent shall be paid, and giving the landlord the right to distrain the goods of the tenant on the demised premises for rent, a landlord, although he has not distrained for rent, has a prior claim for rent subject to the costs against the bankrupt tenant. *Matter of Braus* (D. C., N. Y.), 37 Am. B. R. 594, 233 Fed. 835.

The landlord is merely entitled to a preference in payment out of the tenant's goods and chattels on the demised premises over other creditors, including those holding executions who are not lien holders. *Matter of Spies-Alper Co.* (D. C., N. J.), 36 Am. B. R. 470, 231 Fed. 535.

<sup>207.</sup> *Hildreth Granite Co. v. Watervliet* (N. Y. App. Div.), 31 Am. B. R. 703, 161 N. Y. App. Div. 420, 146 N. Y. Supp. 449.

<sup>208.</sup> *Louisville Woolen Mills v. Johnson* (C. C. A., 6th Cir.), 37 Am. B. R. 67, 228 Fed. 606.

<sup>209.</sup> Collusive assignment of mechanics' liens to sons of bankrupt for benefit of bankrupt.—Two sons of a bankrupt father, who clerked for him, and knew of his financial extremity, a day or two before he executed an assignment for the benefit of creditors bought up mechanics' liens against the bankrupt's store building to the amount of \$2,000, all but one of which were subject to set-offs on book accounts for material sold by the bankrupt out of the store to the original claimants, amounting to nearly \$1,800, and with the money the original claimants paid the bankrupt the book accounts. It was not pretended that the liens were bought up by the sons to relieve their father from financial pressure, nor to protect their individual interests. They did not buy at a discount, so as to make it an in-

ducement, nor did they satisfactorily show that they purchased with their own money, the property of one son being heavily mortgaged and the other son being only a few years out of college. It was held that instead of the account being used by set-off to reduce the claims to about \$200, leaving that much more derivable from the real estate by the creditors, the real estate was allowed to continue burdened with liens amounting to \$2,000; that it was a collusive scheme between the father and sons to enable the father to realize on the book accounts, which were thus withdrawn from the reach of creditors; and that the liens were not valid in the hands of the sons as against the creditors except the one claim against which there was no book account to set-off. *In re Kyte* (D. C., Pa.), 25 Am. B. R. 337, 182 Fed. 166.

<sup>210.</sup> *In re Consumers' Coffee Co.* (D. C., Pa.), 18 Am. B. R. 500, 151 Fed. 933.

**Cost of administration.**—Since the words "of estates" and "bankruptcy estates" as used in sections 62 and 64-b respectively relating to the payment of costs of administration, refer to the unincumbered assets generally as distinguished from property upon which there is a specific lien, only such costs as are necessarily incident to the preservation of the particular estate, its conversion into money, and payment thereof to the lienor, are entitled to payment in preference to the landlord's lien for rent. *Matter of Rauch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982.

<sup>211.</sup> **Priority of conditional vendor.**—Where under the State law a conditional vendor has no priority over judgment creditors without notice, and since section 47-a (2), as amended in 1910, places the trustee in bankruptcy in this class, the conditional vendor has no priority and the order of payment provided by section 64 is not interfered with by not allowing the conditional vendor priority of payment. *In re Bazemore* (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236; *In re Calhoun Supply Co.* (C. C., Ala.), 26 Am. B. R. 528, 189 Fed. 537. Before the amendment to the bankruptcy act, the trustee's title

statute gives a lien for wages or services, and the persons entitled to the lien fall within the clause as to priority of claims therefor, the extent of the lien is limited by the provisions of the bankruptcy act.<sup>212</sup>

c. **Priority of debts due the State.**—A State is a "person" within the meaning of this clause, and a debt due to a State which is entitled to priority under its insolvency laws is entitled to priority against the debtor's estate in bankruptcy.<sup>213</sup> But in the case of a debt due the State, the priority must be created by a State law of the same general character as the bankruptcy act.<sup>214</sup> A debt due the State on a judgment for a fine is not entitled to priority.<sup>215</sup>

d. **Conflicting or overlapping State priorities.**—An interesting question which thus far has received little attention is, the effect of § 64-b (5) where the State statute gives priority to a class or for a purpose specified in the other subdivisions of § 64-b. On principle, it would seem that where the Federal statute prescribes a class as entitled to priority, as "workmen, clerks or servants," no overlapping State statute having the same purpose but defining the class in different words should apply.<sup>216</sup> Thus, it has been well said by Judge Lowell: "Where both a State law and the bankrupt act give priority to the same class of debts, the bankrupt act not only controls the State law in case of absolute conflict between the two, but, by its express regulation of these

as against a claim under an unrecorded conditional sale, though the State law required record, did not prevail. *Crucible Steel Co. v. Holt* (C. C. A., 6th Cir.), 23 Am. B. R. 302, 174 Fed. 127. It was to obviate this, among other things, that section 47, clause 2, subdivision a, of the act was amended by inserting the words "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."

Under the law of Kentucky, the sale of a computing scale to a bankrupt upon a contract, which was never recorded, providing that title should remain in the vendor until the agreed price was fully paid, constitutes a sale and mortgage back to the vendor to secure the price, and the vendor has a preferred claim as against the scale or its proceeds under subdivision 5 of this section of the bankruptcy act. *In re Lausman* (D. C., Ky.), 25 Am. B. R. 186, 183 Fed. 647.

212. *Matter of Crawford Woolen Co.* (D. C., W. Va.), 34 Am. B. R. 223, 218 Fed. 951.

213. *In re Western Implement Co.* (D. C., Minn.), 22 Am. B. R. 167, 166 Fed. 576, *affd.* 171 Fed. 81, 96 C. C. A. 185.

214. **State statutes requiring debts of insolvents to be paid to State.**—In the case of *In re Devlin* (D. C., Kan.), 24 Am. B. R. 863, 180 Fed. 170, the judge said: "It is not thought that provision of the statutes of the State which requires all debts due the State to be paid as a claim of the third class out of the estate of a deceased person is a law of such general nature or so related to the sub-

ject in hand that it can be given weight here in determining the right of the State to priority of payment of its demands arising under the provisions of clause 5, § 64-b, of the Bankruptcy Act." This question was expressly ruled upon by the circuit court of appeals for the first circuit in *Derby v. Worcester County* (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808, 42 C. C. A. 637, where Judge Putnam, delivering the opinion of the court, said: "We are unable to conceive of any priority to which any one may be entitled by the laws of a State, under section 64 of the Bankruptcy Act, unless it be a priority created by insolvent laws of that character. It is true that priorities are often created by State statutes relating to the administration of estates of deceased persons, and also to proceedings for winding up corporations; but such laws are not of that general character which can be supposed to be within the purview of the provision of the Bankruptcy Act which is concerned here. Of course statutes touching assignments for the benefit of creditors must be classed with insolvency laws, strictly so called. It is settled that State insolvency laws are not annulled by the enactment of a bankruptcy Act, and that the only effect of such enactment is to suspend their operation, so that they become operative again, without re-enactment when the Bankruptcy Act is repealed." *Butler v. Gorley*, 146 U. S. 303, 36 L. Ed. 981, 13 Sup. Ct. 84. See also *State of Alabama v. Morton* (C. C. A., 5th Cir.), 43 Am. B. R. 450, 256 Fed. 313; *Matter of Eureka Paper Co.* (D. C., N. Y.), 44 Am. B. R. 179, citing *Collier on Bankruptcy* (10th ed.), § 11.

215. *In re Alderson* (D. C., W. Va.), 3 Am. B. R. 544, 98 Fed. 588.

216. Thus, see *In re Rouse* (D. C., Ill.), 1 Am. B. R. 231, 91 Fed. 514; *In re Union Planing Mill*, 2 N. B. N. Rep. 384; *In re Shaw* (D. C., Pa.), 6 Am. B. R. 501, 109 Fed. 782; *Matter of Caledonia Coal Co.* (D. C., Mich.), 43 Am. B. R. 93, 254 Fed. 742.

priorities, excludes the State law altogether."<sup>217</sup> This distinction seems sometimes to have been overlooked.<sup>218</sup>

**e. Liens.**—As previously stated, mere liens are not priorities. They stand or fall as liens, as where under a statute a distress for rent creates a lien upon the property distrained, the lessor has no lien upon the property if the proceeding was instituted after the lessee was adjudicated a bankrupt, but is entitled to his rent as a preferred claim out of the proceeds of the sale of property.<sup>219</sup> Other cases illustrating this distinction will be found in the foot-note.<sup>220</sup>

**f. Attorney's liens.**—Liens of attorneys on the proceeds of litigations instituted prior to bankruptcy, have been recognized, as where an attorney foreclosed a mechanic's lien for a debtor prior to his bankruptcy, and the amount recovered was turned over to his trustee, it was held that the attorney was entitled to reasonable compensation out of the proceeds of the recovery.<sup>221</sup>

<sup>217.</sup> In re Lewis (D. C., Mass.), 4 Am. B. R. 51, 99 Fed. 935. See also Matter of Western Condensed Milk Co. (C. C. A., 9th Cir.), 44 Am. B. R. 558, 261 Fed. 62.

<sup>218.</sup> See In re Byrne (D. C., Iowa), 3 Am. B. R. 268, 97 Fed. 762; In re Lawler (D. C., Wash.), 6 Am. B. R. 184, 110 Fed. 135.

<sup>219.</sup> In re Cramond (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966; Mott v. Wissler Mining Co. (C. C. A., 4th Cir.), 14 Am. B. R. 321, 135 Fed. 697; In re Austin (D. C., Hawaii), 13 Am. B. R. 136, 2 U. S. (D. C., Hawaii), 210; In re Thackara Mfg. Co. (D. C., Pa.), 15 Am. B. R. 258, 140 Fed. 126; Matter of Federal Biscuit Co. (C. C. A., 2d Cir.), 33 Am. B. R. 273, 218 Fed. 753.

**Priority between purchase money lien and mechanic's lien.**—See Matter of Atkinson-Kerce Grocery Co. (D. C., Ga.), 40 Am. B. R. 411, 245 Fed. 481.

Where property was converted by a bankrupt prior to adjudication and mingled with the other assets, the trustee takes such assets subject to the claim of the owner of the property converted, and such owner is entitled to priority of payment from the proceeds of the sale thereof. Erie Railroad Co. v. Dial (C. C. A., 6th Cir.), 15 Am. B. R. 559, 140 Fed. 689.

**Equitable assignment.**—A legatee assigned his interests in the estates of his father and grandfather as security for the payment of certain notes and thereafter certain other creditors having attached his interest in said estates, the assignee wrote a letter approved by such legatee, to the attorney for the attaching creditors agreeing that after payment of his debts, costs and expenses, the assignee would pay the claims of such attaching creditors "from the money coming into (their) hands on account of" said assignor, whereupon the attachment was withdrawn. Subsequently such legatee went into bankruptcy. It was held that said assignment was a mortgage only, and that the promise of the assignee was merely to pay over any excess which might come into its hands, and did not operate as an equitable assignment of the fund, nor give said attaching creditors any preference in payment out of such fund in the hands of the trustee in bankruptcy. In re Ballantine (C. C. A., 3d Cir.), 26 Am. B. R. 275, 186 Fed. 91.

**Lien on distrainable assets.**—In re Duble (D. C., Pa.), 9 Am. B. R. 121, 117 Fed. 794; In re

Bourlier Cornice & Roofing Co. (D. C., Ky.), 23 Am. B. R. 585, 133 Fed. 968.

In Pennsylvania when the intention to so consider them is made clear in the contract between lessor and lessee, sums by way of taxes, etc., will be considered as rent and may be distrained for by the landlord and are entitled to preference over liens by execution or otherwise. In such a case the lessor upon filing a claim against the bankrupt lessee is entitled to priority over general creditors for the whole amount of rent due, including taxes, McCann v. Evans (C. C. A., 3d Cir.), 26 Am. B. R. 47, 185 Fed. 93.

In determining whether a landlord is entitled to priority of payment for rent in arrears, the sole question is whether, under the State law of the State in which the property is situated, the rent is under such circumstances a preferred claim. Thus, where at the time of adjudication, the bankrupt owed rent which was then due and in arrears, and there were at the time of such adjudication distrainable goods on the premises, the landlord, not having distrained for rent before the filing of the bankruptcy petition, was not entitled to a landlord's lien under the Maryland law, and so could not have a preferred claim in bankruptcy out of the proceeds of sale of the goods by the trustee, by filing a petition with the bankruptcy court asking for preferential payment or in the alternative for permission to distrain on the said goods. In re Chandron & Peyton (D. C., Md.), 24 Am. B. R. 811, 180 Fed. 841.

<sup>220.</sup> In re Kerby-Dennis Co., 95 U. S. 116, 2 Am. B. R. 402; In re Lowensohn (D. C., N. Y.), 4 Am. B. R. 79, 101 Fed. 776; In re Esmale (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed. 291; In re Mitchell (D. C., Del.), 8 Am. B. R. 324, 116 Fed. 87; Matter of Cole Jewelry Co. (D. C., Ga.), 40 Am. B. R. 234, 243 Fed. 790; Matter of Jackson Light & Traction Co. (D. C., Miss.), 44 Am. B. R. 222.

<sup>221.</sup> Matter of Coney Island Lumber Co. (D. C., N. Y.), 34 Am. B. R. 563, 199 Fed. 808.

<sup>222.</sup> Summers v. Abbott (C. C. A., 8th Cir.), 10 Am. B. R. 254, 122 Fed. 36; In re Pattee (D. C., Conn.), 16 Am. B. R. 430, 143 Fed. 904; In re Hersey (D. C., Iowa), 22 Am. B. R. 856, 171 Fed. 908; Hume v. Myers (C. C. A., 4th Cir.), 39 Am. B. R. 401, 242 Fed. 827; Matter of Morris & Rice (D. C., Mass.), 44 Am. B. R. 146, 258 Fed. 712.

Costs in an attachment, which was dissolved under § 67-f and was of no benefit to the bankrupt estate should not be allowed as a preferred claim under § 64-b, subd. 1 or subd. 5. Matter of Rood (Ref., Minn.), 34 Am. B. R. 273.

<sup>223.</sup> In re Zier & Co. (D. C., Ind.), 11 Am. B. R. 527, 127 Fed. 399; In re Allison Lumber Co.

**g. Fees and expenses of general assignees and receivers and their attorneys.—**

A general assignment for the benefit of creditors is not in itself a fraudulent act although it is an act of bankruptcy, and if such an assignment be honestly made for the purpose of applying all the assignor's property to the payment of his debts, the assignee who accepts the trust in good faith and executes it intelligently, successfully and honestly, is entitled to be paid a fair and reasonable compensation for his services and those of his attorneys, out of the assets turned over by him to the trustee in bankruptcy of his assignor.<sup>223</sup> But it must appear that the services rendered were an actual benefit to the estate,<sup>223</sup> and that the assignment was not made for the purpose of avoiding inevitable bankruptcy.<sup>224</sup> If the assignment be actually fraudulent, and the assignee be a party to the fraud, he has no right to priority in bankruptcy proceedings,<sup>225</sup> nor, indeed, to prove a claim as a general creditor. There are rulings to the effect that if an assignee has been permitted by the court to retain possession of the property assigned from the filing of the petition in bankruptcy until the adjudication, he is entitled to compensation as a *quasi* receiver.<sup>226</sup> The United States Supreme Court has disapproved the doctrine, that a general assignment for creditors, valid under a State statute, is constructively fraudulent, and has held that a claim for services rendered by or for an assignee, which were beneficial to the estate, is entitled to priority of payment, and that a charge for preparing the necessary papers for the assignment is a provable debt, but that a charge for services in resisting an adjudication in bankruptcy against the assignor is not provable.<sup>227</sup> There is, perhaps, a distinction between a corporation which cannot file a voluntary petition and one which can; but the distinction may be overcome by recalcitrancy, evidencing an intent to deprive creditors of rights given them by the Federal laws.<sup>228</sup> The same test would doubtless determine the right of a receiver of an insolvent corporation<sup>229</sup>—he being technically named by the State court—to the fees allowed by the State law; though since such a receivership is now an act of bankruptcy,<sup>230</sup> the strict rule applicable to

(D. C., Ga.), 14 Am. B. R. 78, 137 Fed. 643; *Matter of Morris & Rice* (D. C., Mass.), 44 Am. B. R. 146, 258 Fed. 712.

<sup>224</sup> *Matter of Congdon* (D. C., Minn.), 11 Am. B. R. 219, 129 Fed. 478, *affd.* 15 Am. B. R. 46, 142 Fed. 102, citing *Collier on Bankruptcy* (4th ed.), p. 404.

<sup>225</sup> *In re McCauley*, 2 N. B. N. Rep. 1069; *Stearnes v. Flick* (D. C., Ohio), 4 Am. B. R. 723, 108 Fed. 919; *Wilbur v. Watson* (D. C., R. I.), 7 Am. B. R. 54, 111 Fed. 493; *In re Chase* (C. C. A., 1st Cir.), 10 Am. B. R. 677, 124 Fed. 753; *Matter of Harson* (Ref., R. I.), 11 Am. B. R. 514. For case of doubtful authority where fees paid were not disturbed, see *In re Scholts* (D. C., Iowa), 5 Am. B. R. 782, 106 Fed. 834.

<sup>226</sup> *Matter of Harson* (Ref., R. I.), 11 Am. B. R. 514; *Matter of Gladding Co.* (Ref., R. I.), 9 Am. B. R. 171.

<sup>227</sup> *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. Ed. 1165, 23 Sup. Ct. 710; *Summers v. Abbott* (C. C. A., 8th Cir.), 10 Am. B. R. 254, 122 Fed. 36.

A claim by an appraiser for services rendered prior assignee for benefit of creditors should be allowed as a preferred claim. *Matter of Cooper* (D. C., Mass.), 40 Am. B. R. 17, 243 Fed. 797.

<sup>228</sup> See *In re Lock-Stub Check Co.* (Ref., N. Y.), 5 Am. B. R. 106-n; *In re Peter Paul Book Co.* (D. C., N. Y.), 5 Am. B. R. 105, 104 Fed. 736.

<sup>229</sup> Compare *Mauran v. Crown, etc., Co.* (Sup. Ct., R. I.), 6 Am. B. R. 734, 50 Atl. 331, 23 R. I. 824; *Cudahy Packing Co. v. N. J. Dairy Co.* (N. Y. Ct. of Ch.), 43 Am. B. R. 674, 107 Atl. 147.

**Claim for debts incurred by receiver of private corporation.**—Debts incurred by the receiver of a private corporation, not in preserving its property but in operating and adding to it, will not be allowed priority over the claims of bondholders of the corporation having liens on its property. *In re Benwood Brewing Co.* (D. C., W. Va.), 29 Am. B. R. 759, 202 Fed. 326.

**Change of order fixing compensation.**—Orders for the allowance of compensation of receivers appointed by a court of equity are purely administrative and subject to entire disallowance or change by either increase or decrease with the development of the administration. *Hume v. Myers* (C. C. A., 4th Cir.), 39 Am. B. R. 401, 242 Fed. 827.

The ultimate determination of the allowances to be made to a receiver in the State court for his services rendered prior to the institution of bankruptcy proceedings is for the court of bankruptcy to determine, though in making such determination it will take into consideration the action of the State court. *Matter of Diamond's Estate* (C. C. A., 6th Cir.), 44 Am. B. R. 268, 259 Fed. 70.

<sup>230</sup> See *Bankr. Act*, § 3-a(4), as amended in 1908.

general assignees may apply instead. But if the fees have been actually paid to the assignee, before notice of bankruptcy or in pursuance of an order of a court, the trustee in bankruptcy cannot proceed to collect summarily; he must collect by suit.<sup>231</sup> So, the right of a trustee to retain a part of the assets of an estate as compensation for services rendered and expenses incurred prior to the bankruptcy in attempting to effect a composition with the creditors, may not be determined by a summary order, but the trustee must bring a plenary suit to determine the rights of the parties.<sup>232</sup> What goes before does not, of course, apply where the assignment or receivership is more than four months before the bankruptcy; in such a case, the administration continues in the State court.

**h. Sheriff's fees.**—One of the most difficult questions which has arisen under the present law is whether a sheriff has priority for his fees and disbursements after the property seized by him vests, clear of the lien of the execution or attachment, in the bankrupt's trustee. As a rule, a sheriff must proceed under an execution or warrant of attachment delivered to him; in case he seizes, he must insure and safely keep the property; he may be liable in damages if he fails so to do. Yet, if the lien of his attachment or execution is avoided by a bankruptcy within four months, he is obliged to surrender to the trustee, and, it has been claimed, without right even to reclaim his disbursements.<sup>233</sup> On the other hand, the creditor represented by the sheriff was probably seeking to obtain an advantage,<sup>234</sup> and the general creditors should not be compelled to pay his bill. Thus, if the lien creditor or his attorney is not financially responsible, the sheriff may fall between two stools. The equities—of the sheriff on the one hand and of the general creditors on the other—are equally strong, though the rules discussed in the two previous paragraphs do not apply, the sheriff not being a willing party to a fraud on the law as are usually a general assignee and his attorney. The question is not yet authoritatively settled. Cases under the former law quite uniformly went against the sheriff.<sup>235</sup> Those under the present law quite evenly balance.<sup>236</sup> It is impossible, however, to distinguish them; it is only possible to suggest therefrom the following tests which, when applied to a given case, may aid in determining the sheriff's right to payment in full: (1) has the sheriff a lien for his fees at the time the petition is filed; (2) if so, is it a lien that survives the bankruptcy? In either event, the property comes to the trustee charged with such lien and the sheriff's fees, must be

<sup>231</sup> *Cominger v. Louisville Trust Co.*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413, 22 Sup. Ct. 293. Compare *In re Klein & Co.* (D. C., N. Y.), 8 Am. B. R. 559, 116 Fed. 523.

<sup>232</sup> *In re Hersey* (D. C., Iowa), 22 Am. B. R. 856, 171 Fed. 998.

<sup>233</sup> *In re Young* (D. C., N. Y.), 2 Am. B. R. 673, 96 Fed. 606.

<sup>234</sup> Fees of a sheriff, accruing on a writ of attachment founded on a provable debt and issued before the commencement of proceedings in bankruptcy, are entitled to priority of payment, where such priority is given under the Massachusetts insolvency laws. *In re Lewis* (D. C., Mass.), 4 Am. B. R. 51, 99 Fed. 935.

<sup>235</sup> See, generally, under Sections Sixty and Sixty-seven of this work.

<sup>236</sup> *In re Davis*, Fed. Cas. 3,616; *Zelber*

*v. Hill*, Fed. Cas. 18,206; *In re Fortune*, Fed. Cas. 4,955; *In re Preston*, Fed. Cas. 11,394; *In re Jenks*, Fed. Cas. 7,276; *In re Ward*, Fed. Cas. 17,145; *In re Hatje*, Fed. Cas. 6,215. Apparently *contra*: *In re Housberger*, Fed. Cas. 6,734; *Platt v. Stewart*, Fed. Cas. 11, 220; *In re Foster*, Fed. Cas. 4,960.

<sup>236</sup> *In re Lewis* (D. C., Mass.), 4 Am. B. R. 51, 99 Fed. 935; *In re Beaver Coal Co.* (C. C. A., 9th Cir.), 7 Am. B. R. 542, 113 Fed. 889, *aff. s. c.*, 6 Am. B. R. 404, 107 Fed. 98; *In re Young* (D. C., N. Y.), 2 Am. B. R. 673, 96 Fed. 606; *In re Allen* (D. C., Cal.), 3 Am. B. R. 38, 96 Fed. 512; *Matter of Moncrief Mfg. Co.* (Ref., R. I.), 31 Am. B. R. 674; *Matter of Hessler Foundry & Mfg. Co.* (D. C., N. Y.) 43 Am. B. R. 246. For a review of the cases, see *In re Jennings* (Ref., N. Y.), 8 Am. B. R. 358.

paid. Or, if the sheriff has no lien or it is avoided by the bankruptcy, (3) is there any State statute that gives the sheriff a priority? If not, his claim to priority for his fees will be disallowed. It is important to note that a sheriff's lien or priority may exist and yet the creditor's fail. In the ultimate analysis, the question turns solely on what the State law is.

i. *Sheriff's disbursements.*—These may sometimes be paid when his fees are not. This, however, is also on the theory that he is a custodian or that his service has been beneficial to the estate, *i. e.*, under § 64-b (1).<sup>237</sup> The cases under the law of 1867 are quite numerous and are still authorities.<sup>238</sup>

j. *Other illustrative cases.*—As will be noticed from the cases cited there is some confusion in the cases and they cannot always be reconciled.<sup>239</sup> Special deposits in banks and trust funds in the hands of bankrupts are, under some circumstances, entitled to priority of payment; but a treasurer of a municipal corporation who, under authority of law, deposits public moneys in a bank which becomes bankrupt, is not a special depositor entitled to be first paid out of the funds of the estate.<sup>240</sup> State statutes frequently accord to creditors maintaining actions, in behalf of all creditors, to set aside trust deeds and transfers of insolvent debtor's property, preferences by lien or otherwise upon the property affected; in such cases the liens or priorities are to be preserved, and the creditors are entitled to priority of payment.<sup>241</sup> An award by a State industrial commission against a bankrupt, for personal injuries to an employee, is not entitled to priority under this subdivision, taken in connection with a State law providing that the right of compensation given shall have the same preference or lien against the assets of the employer as allowed by law for a claim for unpaid wages.<sup>242</sup> Claims of composition creditors should be paid before the claim of a person who advanced the consideration for the composition, where default was made in carrying out the agreement.<sup>242a</sup>

<sup>237</sup>. Compare *In re Lengert Wagon Co.* (D. C., N. Y.), 6 Am. B. R. 535, 110 Fed. 927; *In re Francis-Valentine Co.* (C. C. A., 9th Cir.), 2 Am. B. R. 522, 94 Fed. 793; *Matter of Hessler Foundry & Mfg. Co.* (D. C., N. Y.), 43 Am. B. R. 246.

<sup>238</sup>. *In re Fortune*, Fed. Cas. 4,955; *In re Ward*, Fed. Cas. 17,145; *In re Jenks*, Fed. Cas. 7,276; *Zeiber v. Hill*, Fed. Cas. 18,206; *In re Holmes*, Fed. Cas. 6,631.

<sup>239</sup>. *In re Wright* (D. C., Mass.), 2 Am. B. R. 592, 95 Fed. 807; *In re Goldstein* (Ref., Pa.), 2 Am. B. R. 603; *In re Daniels* (D. C., R. I.), 6 Am. B. R. 699, 110 Fed. 745; *In re Matthews* (D. C., Ark.), 6 Am. B. R. 96, 109 Fed. 603; *In re Meyers* (D. C., Pa.), 4 Am. B. R. 536, 102 Fed. 869; *Central Trust Co. v. Lueders & Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 61, 221 Fed. 829.

<sup>240</sup>. *Priority of bank deposits.*—*In re Smart* (D. C., Ohio), 14 Am. B. R. 672, 136 Fed. 974. See also *Deere Plow Co. v. McDavid* (C. C. A., 8th Cir.), 14 Am. B. R. 653, 137 Fed. 802; *In re Brunsing, Tolle & Postal* (D. C., Cal.), 22 Am. B. R. 129, 169 Fed. 668, holding that the special deposit or trust property must be traced into the hands of the trustee as part of the bankrupt's estate.

<sup>241</sup>. *In re Goldberg* (D. C., Me.), 16 Am. B. R. 521, 144 Fed. 566; *Moore v. Green* (C. C. A., 4th Cir.), 16 Am. B. R. 648, 145 Fed. 480.

<sup>242</sup>. *Matter of Rockaway Soda Water Manufacturing Co.* (D. C., N. Y.), 36 Am. B. R. 640.

<sup>242a</sup>. *Matter of Bruns* (C. C. A., 7th Cir.), 43 Am. B. R. 282, 256 Fed. 840.



## SECTION SIXTY-FIVE.

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### DECLARATION AND PAYMENT OF DIVIDENDS.

§ 65. Declaration and Payment of Dividends.— *a* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

*b* The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed, equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.\**

*c* The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

*d* Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts.

*e* A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act.

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\* Amendments of 1903 in italics.

**Analogous provisions:** In U. S.: As to first and subsequent dividends, Act of 1867, §§ 27, 28, R. S., §§ 5092, 5093; Act of 1841, § 10; Act of 1800, §§ 29, 30; As to filing accounts preparatory to final dividend, Act of 1867, § 27, R. S., § 5096; As to rights of creditors whose claims are allowed after first dividend, Act of 1867, § 28, R. S., § 5097; Act of 1841, § 10.

In Eng.: Act of 1883, §§ 58-63; General Rules 232-234, 273 (11) (12).

In Can.: Act of 1919, § 37.

**Cross-references:** To the law: Referees to declare dividends and to prepare and deliver dividend sheets to trustees, § 39-a(1).

Payment of dividends by trustees by check or draft, § 47-a(4); payment within ten days after declaration, § 47-a(9).

Final meeting of creditors when estate is closed, § 55.

Proof and allowance of claims, § 57.

Notice to creditors of declaration and time of payment of dividends, § 58-a(5).

Unclaimed dividends to be paid into court, § 66.

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Notice of dividend; creditor's letter to trustee, No. 41.

See also Supplementary Forms; Hagar and Alexander's Bankruptcy Forms.

## SYNOPSIS OF SECTION.

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### I. DIVIDENDS GENERALLY.

a. *Comparative legislation.*—The English law is and our law of 1867 was far more elaborate in their provisions on this subject. The same is true of the Canadian act. Some useful suggestions will be found in them.<sup>1</sup> The present section differs from those of the former law chiefly in being more elastic. Dividends may now be declared at irregular intervals. The amount on hand, not the time elapsed since the bankruptcy, is the real test; though this rule has been somewhat modified by the proviso clauses added by the amendatory act of 1903.

1. See "Analogous Provisions," *ante*,

**b. Cross-references.**—Some of the subjects treated in this connection in the law of 1867 are found elsewhere in the present law. Thus, of the method of declaring dividends,<sup>2</sup> and of paying of dividends;<sup>3</sup> also of the notice to creditors of the declaration and payment of dividends.<sup>4</sup> The meaning of "dividend" is also discussed in section one of this work; the disposition of unclaimed dividends is fixed by § 66.

**c. Declaration of dividends.**—Subsection *a* provides for the declaration and payment of dividends on all allowed claims, except such as have priority or are secured. The meaning of this clause has been much discussed. It has been held a definition of "dividends."<sup>5</sup> It is rather the declaration, found in all bankruptcy laws, that each creditor of the same class shall receive his *pro rata* of the bankrupt's assets.<sup>6</sup> The subsection was of considerable importance prior to the amendatory act of 1903; the cases, which are by no means uniform, are collected in the foot-note.<sup>7</sup> The status of creditors entitled to priority and the order of payment has already been considered;<sup>8</sup> so also of secured creditors.<sup>9</sup> The former are never entitled to "dividends" in the restricted sense here employed; the latter only after they have realized on their securities or had their value otherwise determined.<sup>10</sup> Both classes are "creditors" as defined in § 1 (9), and for the purpose of computing commissions under §§ 40 and 48, as amended.

## II. FIRST AND SUBSEQUENT DIVIDENDS.

**a. Time and amount.**—Subsection *b* provides for the time of declaring the first dividend, and the amount thereof, and regulates all subsequent dividends. The statute seems full and clear and is thought to be mandatory. The first dividend must be declared within thirty days after the adjudication, if a dividend of five per cent. can (after deducting sufficient to pay priorities) be paid on all claims whether allowed or not. In doing so, claims scheduled but not yet allowed must be included.<sup>11</sup> The second dividend must, subject to the proviso clauses of the amendatory act of 1903, be declared as soon as there is enough to pay 10 per cent. more; and so on until the funds of the estate are entirely distributed. This accords with the policy of

2. Bankr. Act, § 39-a (1).

3. Bankr. Act, § 47-a (4) (9).

4. Bankr. Act, § 58-a (5).

5. See *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 322.

Definition.—A dividend in bankruptcy has been defined as a parcel of funds arising from the assets of the estate rightfully allotted to the creditor entitled to share in the fund, whether in the same proportion with the other creditors or in a different proportion. *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547.

6. *In re Gerson* (Ref., Pa.), 2 Am. B. R. 362; *In re Barber* (D. C., Minn.), 3 Am. B. R. 307, 97 Fed. 547.

Oral promise by one creditor that claim of another should be paid.—The fact that one creditor promised orally that the indebtedness of another creditor should be paid, there being no evidence of facts creating an estoppel on the part of the one creditor from receiving his dividends on an equality with the other creditor, does not entitle the other creditor to a preference. *Moise vs. Scheibel* (C. C. A., 8th Cir.), 40 Am. B. R. 311, 245 Fed. 546.

7. *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 322; *In re Ft. Wayne Elec. Corp.* (D. C., Ind.), 1 Am. B. R. 706, 94 Fed. 109; *In re Coffin* (Ref., Tex.), 2 Am. B. R. 344; *In re Gerson* (Ref., Pa.), 2 Am. B. R. 362; *In re Fielding* (D. C., Mo.),

3 Am. B. R. 135, 96 Fed. 800; *In re Utt* (C. C. A., 7th Cir.), 5 Am. B. R. 383, 105 Fed. 754, holding that sums to be paid upon secured claims or other claims entitled to priority are not "dividends" upon which the trustee or referee may receive a commission, disapproving *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547.

8. See discussion under Section Sixty-four of this work.

9. See discussion under Section Fifty-seven of this work.

10. Compare *In re Little* (D. C., Ia.), 6 Am. B. R. 681, 110 Fed. 621.

11. *In re Scott* (D. C., Tex.), 2 Am. B. R. 324, 96 Fed. 607, holding that in declaring the first dividend the referee should withhold from distribution sufficient funds to cover all expenses of administration and priorities. He is required to hold back only sufficient funds to cover claims that will probably be allowed. This includes only those claims as to which he has information such as justifies him in the conclusion that they will be allowed when presented.

the law in hastening distribution. This policy is further emphasized by the provision that the judge, but not the referee, may declare dividends oftener and in smaller proportions. In all other cases, the referee declares the dividend<sup>12</sup> and orders it paid. The assignee (trustee) formerly did this; in England, the trustee does yet. But dividends can be declared only at meetings of creditors.

b. Amendment of 1903.—Since the amendatory act, the practice of declaring first and final dividend in small estates at one time is no longer possible.<sup>13</sup> Since this amendment, if any dividends are declared, there must be two, the second at least three months after the first. The first proviso, added by the amendatory act, is a further limitation. Not more than 50 per cent. of the cash on hand, in excess of money to be reserved or paid on priority debts and that held out for claimants who have not yet proven, can be disbursed in a first dividend. The meaning is not exactly clear. The purpose, however, is patent enough: to give creditors a longer time to prove and additional notice of their right to dividends.<sup>14</sup> The change is a mild reversal of the policy of the original law toward rapidity in administration.

c. Creditors entitled only to what the bankruptcy law gives them.—Subsection *c* is the corollary of subsection *a*. It prevents a creditor from collecting from the bankrupt estate any greater amount than accrues under the provisions of the bankruptcy law. General creditors are entitled each to his *pro rata*, but no more; secured creditors to their security and a *pro rata* of the balance, but no more. An apparent exception is that interest is sometimes paid on allowed claims; but this is only in case such claims have been paid in full, and there are assets still undistributed.<sup>15</sup> If anything then remains it is returned to the bankrupt. The estate of a debtor of a bankrupt is not precluded, by reason of the debtor's fraudulent conduct in taking and concealing conveyances of real estate from the bankrupt, which were subsequently set aside as fraudulent in a suit by bankrupt's trustee, from participating in the distribution of the proceeds arising from the sale of such real estate, as to a debt in no way involved in the fraudulent conveyances, incurred before they were made, and admitted to be just and unpaid.<sup>16</sup> Where bankrupt stockbrokers dispose of securities belonging to several of their customers, deposit the proceeds in one of their general bank accounts, draw out such moneys and convert the same to their own use, and subsequently make other deposits, such deposits must be considered as a general restoration in which all the defrauded customers should share ratably.<sup>17</sup> Where a State law provides for the deposit of bonds with a State officer for the protection of creditors from whom moneys are received by the depositor of such bonds, they may be held by the trustee of the bankrupt for the benefit of those creditors who live within the State.<sup>18</sup>

d. Garnishment of dividends in hands of trustee.—Although dividends in the hands of a trustee in bankruptcy are not, as a matter of right, subject to

12. Bankr. Act, § 39-a (1).

13. See *In re Smith* (Ref., N. Y.), 2 Am. B. R. 646.

14. It perhaps minimizes certain evils, which grew out of a liberal construction of Bankr. Act, § 57-n.

15. *In re Hagan*, Fed. Cas. 5,898; *In re Town*, Fed. Cas. 14,112; *In re Bank, etc.*, Fed. Cas. 895. As to arrangement for distribution of dividends between two creditors

having special relations to each other, see *In re Paris Modes Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 470, 196 Fed. 357.

16. *In re Hurst* (D. C., W. Va.), 26 Am. B. R. 781, 188 Fed. 707.

17. *In re McIntyre & Co.* (C. C. A., 2d Cir.), 25 Am. B. R. 93, 181 Fed. 960. See *a. c.*, 24 Am. B. R. 1, 4, 626.

18. *In re Rosset* (D. C., N. Y.), 29 Am. B. R. 341, 203 Fed. 67.

attachment or garnishment,<sup>19</sup> it seems, that the bankruptcy court may, out of respect to the State court, direct the trustee to pay a judgment obtained in a garnishment proceedings against a creditor of the bankrupt.<sup>20</sup> The rule of a State court permitting the garnishment of dividends after they have been declared by an officer of a State court, such as a receiver, administrator, or a trustee, cannot affect the administration by a Federal court of an estate in bankruptcy. The right to garnishee funds in *custodia legis* must depend upon express statutory authority. No such authority is to be found in the bankruptcy law. The distribution of the assets of the bankrupt, therefore, cannot be stayed or prevented by the process of a State court, the object of which is to withhold a dividend from a creditor entitled thereto for the security of a plaintiff pending litigation.<sup>21</sup> If a State court could garnishee a trustee in bankruptcy, to catch funds in his hands which had been ordered paid by the court to which he was directly amenable, but which he had not actually paid out, and could compel him to withhold the payment, regardless of the order of the court of bankruptcy, it will be readily perceived that confusion and conflict of jurisdiction would at once arise, and that a State

19. Garnishment of dividends in hands of trustee.—Although the State law permits an attachment to be laid in the hands of a trustee appointed by a court of chancery to bind the funds in his hands, after the amount to be paid out by him has been definitely ascertained by the court, and nothing remains for him to do but to pay the sum over to the person whose credits are attached, the dividends in the hands of a trustee in bankruptcy are not subject to attachment. Where petitioner, who had obtained a judgment against a person entitled to a dividend out of a bankrupt's estate, had no claim of title to nor specific lien upon the fund in the hands of the trustee and had not procured the appointment of a receiver who had succeeded to the title of the creditor entitled to such dividend, the bankruptcy court is without power to order the trustee to pay over the dividend to the petitioner. In *re Hollander* (D. C., Md.), 25 Am. B. R. 48, 181 Fed. 1019.

In *Gilbert v. Quimby*, 1 Fed. 111, the court said: "That the dividend was not attachable on process from the State courts would seem to be quite clear. While in the hands of the assignee, it would be part of the estate of the bankrupt in the custody of the court. It would not be held the property of the debtor, but would only be property that would become his when he should get it. He could not maintain any suit against the assignee for it, nor obtain it by any legal process other than by application to the District Court having control of the fund as a party to the proceedings in that court. Money in the hands of a disbursing officer of the United States, due to a private person, cannot be attached on process against such person out of a State court, because the money will not be his, but will remain the property of the United States until it is paid to him. *Buchanan v. Alexander*, 4 How. 20,

11 L. Ed. 857." In *re Cunningham*, Fed. Cas. 3,478, it was said: "The reason of this doctrine seems to be that the court having the money or property in its custody under the law holds it for some purpose, of which that court is exclusive judge. To permit property or money thus held to be seized on execution, attached, or garnished, would therefore defeat the very purpose for which it is held, and in many cases enable some other court to dispose of property or money, and wholly divert it from the end or purpose for which possession has been taken. A conflict of jurisdiction and decision would in many cases thus ensue." There is nothing in the present bankruptcy law to change the rule thus established under the provisions of the act of 1867. In *re Argonaut Shoe Co.* (C. C. A., 9th Cir.), 26 Am. B. R. 584, 187 Fed. 784; In *re Thompson-Breese Co.* (Ref., Ohio), 80 Am. B. R. 105; *Matter of Port Tampa Phosphate Co.* (D. C., Mass.), 41 Am. B. R. 154.

20. Trustee to pay judgment.—In the case of *In re Kranich* (D. C., Pa.), 25 Am. B. R. 50, 182 Fed. 849, the judge said: "The following situation is therefore presented: A creditor has obtained judgment against the garnishee in an execution attachment. The garnishee is an officer of this court and has more than enough money in his hands to satisfy the judgment; and while the State tribunal could not compel him to pay over the money, he himself has made no objection either to the judgment or to the order that is not asked for by the creditor. Under such circumstances, I see no reason why this court should not pay due respect to a tribunal of the State, and recognize a claim that has thus been conclusively proved—although I repeat that the allowance must be accepted as purely *ex gratia*."

21. In *re Argonaut Shoe Co.* (C. C. A., 9th Cir.), 26 Am. B. R. 584, 187 Fed. 784; *Clark v. Shaw*, 28 Fed. 356.

court, by means of a garnishment, could indefinitely delay the final winding up of the matter in bankruptcy and the final discharge of the trustee.<sup>22</sup>

**e. Practice.**—The practice usually involves an order, reciting the giving of the statutory notice, the action of the creditors at the meeting, if any, and declaring a dividend at a specified per cent. on all claims allowed as shown on a dividend sheet annexed; it also should direct the trustee to pay the same.<sup>23</sup> It is the practice in some districts to require exceptions to a proposed distribution to be filed before the final decree of confirmation is entered.<sup>24</sup> If a dividend has been declared, the court has power in a proper case to restrain the payment of it by the trustee in order to give to parties in interest an opportunity to move to have the order of dividend vacated,<sup>25</sup> or to allow for an adjustment of the liability of the claimant to the bankrupt.<sup>25a</sup> But a dividend so declared cannot be distributed except for some error or other cause. It cannot be opened for the purpose of paying an expense which would have been allowed, had it been brought to the attention of the court before the declaration of the dividend.<sup>26</sup> Whether a dividend order, which was right when made should be revoked and the case reopened so that a claim may be proved, is a matter within the discretion of the referee, to the exercise of which no appeal lies except so far as it may have proceeded on erroneous principles of law.<sup>27</sup> A State court cannot in any way interfere with the bankruptcy court in its distribution of the assets of the bankrupt.<sup>28</sup>

**f. Illustrative cases.**—There are but few cases even under the former law. Some of them will be found in the foot-note.<sup>29</sup>

### III. RIGHTS OF CREDITORS WHOSE CLAIMS ARE ALLOWED SUBSEQUENT TO PAYMENT OF DIVIDENDS.

**a. In general.**—There was a corresponding clause in the former law. Claims cannot be allowed after one year after the adjudication;<sup>30</sup> thus, the list of creditors entitled to share is fixed at that time. Prior to the amendments of 1903, it was held that if a dividend had been paid within the year, such dividend and payment should not be distributed or a creditor compelled to return what he has received, even that an expense of administration which was overlooked may be paid.<sup>31</sup> Such a contingency can rarely arise. As the law now is, a like dividend on such subsequent claims and such expenses must be paid before a further dividend is declared.

**b. Final dividends.**—As the prior provisions of the act have made it necessary to declare a first dividend within thirty days after adjudication, if there are funds sufficient to do so, and as the statute has provided that

<sup>22</sup> *Cowart v. Caldwell Co.* (Sup. Ct., Ga.), 24 Am. B. R. 546, 551, 134 Ga. 544, holding that "garnishment will not lie from a state court to a trustee or assignee in bankruptcy to catch dividends which have been declared in favor of certain creditors or the amount which will be going to them under a composition."

<sup>23</sup> See discussion under Section Forty-seven of this work.

<sup>24</sup> *In re Heebner* (D. C., Pa.), 13 Am. B. R. 256, 132 Fed. 1003, holding that, in this district, exceptions with a petition for review filed after a decree of confirmation, and distribution of the final dividend, will be dismissed with costs.

<sup>25</sup> *In re N. Y. Mail S. S. Co.*, Fed. Cas. 10,212, 3 N. B. R. 280.

<sup>25a</sup> *Matter of La Jolla L. & M. Co.* (D.

C., Cal.), 40 Am. B. R. 273, 243 Fed. 1004.

<sup>26</sup> *In re B. K. Smith*, Fed. Cas. 12,989, 15 N. B. R. 97.

<sup>27</sup> *Matter of Siegel Co.* (D. C., Mass.), 32 Am. B. R. 645, 216 Fed. 943.

<sup>28</sup> *In re Bridgman*, Fed. Cas. 1,867, 2 N. B. R. 252.

<sup>29</sup> *In re Walker* (D. C., N. Dak.), 3 Am. B. R. 35, 96 Fed. 550; *In re James*, Fed. Cas. 7,175; *Bristol v. Sanford*, Fed. Cas. 1,893; *Atkinson v. Kellogg*, Fed. Cas. 613; *In re Sheehan*, Fed. Cas. 12,737; *In re Haynes*, Fed. Cas. 6,260.

<sup>30</sup> Bankr. Act, § 57-n.

<sup>31</sup> *Clafin v. Eason* (Ref., Tex.), 2 Am. B. R. 263; *In re Hegerty*, 2 N. B. N. Rep. 1088; *In re Smith*, Fed. Cas. 12,989; *In re N. Y. Mail, etc.*, Co., Fed. Cas. 10,212.

creditors who are not diligent are permitted only to share in the estate that remains, and not to interfere with the funds already divided, it would appear that the court has the power to make a final dividend and to approve of a final report at any time after four months have elapsed subsequent to adjudication, if the other conditions are present showing the estate to be apparently ready for the final accounting.<sup>32</sup> It is improper to delay the payment of a final dividend merely because certain creditors have not filed their claims.<sup>33</sup> It has been held that a final dividend may be declared on the expiration of three months from the time of the first dividend, notwithstanding the failure of creditors to prove their claims.<sup>34</sup> An application for such a dividend should be made upon an order to show cause, or other sufficient notice to all persons scheduled or appearing in any way in the proceedings as creditors, giving them an opportunity not only to know if the dividend, but notifying them that their claims should be proven, or their rights lost.<sup>35</sup>

#### IV. PREFERENCE TO RESIDENTS OF THE UNITED STATES.

Subsection *d* applies only to cases where the bankrupt has been so adjudged not only in the United States but in a foreign country. It is intended to accomplish equality of payment to resident creditors, wherever the law of such a country does not permit such residents to prove thereon. The subsection is rarely available and requires no discussion.

32. *Matter of Eldred* (D. C., N. Y.), 19 Am. B. R. 52, 155 Fed. 686.

33. *In re Stein* (D. C., Ind.), 1 Am. B. R. 662, 94 Fed. 124.

Stay to permit liquidation of contingent liability.—There is nothing in the Bankruptcy Act authorizing the holding up of the distribution of an estate to await the determination of a suit against the bankrupt on the result of which a claim may be proven. *Matter of Hutchcraft* (D. C., Ky.), 41 Am. B. R. 238, 247 Fed. 187.

34. *Matter of Bell Piano Co.* (D. C., N. Y.), 18 Am. B. R. 183, 155 Fed. 272. In this case the court said: "To say that the final dividend shall not be declared within three months after the first dividend is declared does, in my judgment, say by implication that a final dividend may be declared on the expiration of three months from the

time of the first dividend." See *In re Coulter* (D. C., Pa.), 30 Am. B. R. 75, 206 Fed. 906, in which it was held that the provisions of section 65-b of the Bankruptcy Act, providing for the declaration of dividends, by necessary implication authorize the final closing of the estate and the declaration of the final dividend any time after four months from adjudication; and under section 65-c, providing that the rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends, creditors have a vested right in dividends as soon as declared, which cannot be affected.

35. *Matter of Eldred* (D. C., N. Y.), 19 Am. B. R. 52, 155 Fed. 686.

## SECTION SIXTY-SIX.

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### UNCLAIMED DIVIDENDS.

§ 66. **Unclaimed Dividends.**—*a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

*b* Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

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**Analogous provisions:** In U. S.: None.

In Eng.: Act of 1883, § 162; General Rules 345, 346A.

In Can.: Act of 1919, §§ 37, 38.

**Cross-references:** To the law: Declaration and payment of dividends, § 65, and cross-references thereunder.

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### SYNOPSIS OF SECTION.

#### I. Unclaimed Dividends, 1029.

- a. Comparative legislation, 1029.*
- b. In general, 1029.*
- c. Payment of balance to bankrupt, 1030.*
- d. Illustrative cases, 1030.*

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### I. UNCLAIMED DIVIDENDS.

*a. Comparative legislation.*—This section is new. There was nothing like it in our previous laws. The English statute requires the payment of unclaimed dividends into the Bank of England, where they remain subject to the demands of the creditors entitled thereto and the orders of the Board of Trade.<sup>1</sup> There seems to be no provision in that act for a distribution among creditors who have already claimed and had their dividends. The Canadian Act provides for the payment of unpaid dividends to the Receiver General of Canada who is to pay to each unpaid creditor his proper dividend as shown by a list furnished by the trustee.<sup>1a</sup>

*b. In general.*—The practice here is simple. If for any reason a creditor entitled to a dividend does not accept it, the trustee must wait until six months after the declaration of the final dividend and then pay the money into court. If such dividends are not claimed for one year after the final dividend is declared, the same must be distributed to creditors whose claims

1. Act of 1883, § 162.

1a. Can. Bankr. Act of 1919, § 37.



have been allowed but not paid in full, or, after they are paid, to the bankrupt. The purpose clearly is to distribute every dollar declared by way of dividends, that there may be no bankruptcy funds "in chancery," as under our law of 1867<sup>2</sup> and the present English law. The saving clause as to dividends due minors should be noted. While the consideration deposited for the purpose of carrying out a composition<sup>3</sup> is not strictly dividends, good practice would seem to require the deposit of the unclaimed funds in such a proceeding in a special account and its ultimate distribution as suggested by subsection b.<sup>4</sup> Dividends in the hands of the trustee are not property but a right to secure property,<sup>5</sup> and are not subject to attachment by a creditor of the dividend creditor.<sup>6</sup>

c. **Payment of balance to bankrupt.**—Subsection b provides that after the claims of creditors have been paid in full the balance shall be paid to the bankrupt. The balance meant is not a surplus, but the remainder of unclaimed dividends—the remainder of sums allotted to creditors who have failed to claim them; the remainder, after satisfying in full the claims of other creditors who have not failed to claim their dividends.<sup>7</sup>

d. **Illustrative cases.**—There are but few cases. Some of them will be found in the foot-note.<sup>8</sup>

2. See remarks of Phillips, J., in *In re Fielding* (D. C., Mo.), 3 Am. B. R. 135, 96 Fed. 800.

3. Bankr. Act, § 12-b-e.

4. For practice on "Payments of Moneys Deposited," see General Order XXIX.

5. *Gilbert v. Lynch*, 17 Blatchf. 402.

6. *Jackson v. Miller*, 9 N. B. R. 143.

7. **Disposition of balance after payment of claims.**—In the case of *Johnson v. Norris* (C. C. A., 5th Cir.), 27 Am. B. R. 107, 190 Fed. 459, it was held that the surplus, remaining after the payment of all claims, proved against the bankrupt estate, and interest thereon to the date of the filing of a voluntary petition by a partnership, should be applied to the payment of interest accruing on the claims subsequent to the filing of the petition, and the balance then remaining should be returned to bankrupt. The court said, in speaking of this provision of the subsection: "This section relates to unclaimed dividends only. It shows that the legislature intended (exempt property and costs, and debts having priority, being excepted) that the entire estate should be divided *pro rata* among the creditors by the declaration of dividends. When a dividend is unclaimed, it provides for its disposition—it is to go to the satisfaction of other claims till they are paid in full. It is only after the claims are paid in full that 'the balance shall be paid to the bankrupt.' The balance meant is not a surplus, but the remainder of unclaimed dividends—the remainder of sums allotted to creditors who have failed to

claim them; the remainder, after satisfying in full the claims of other creditors who have not failed to claim their dividends. This section gives no authority to pay a surplus to the bankrupt which has never been embraced in a declaration of dividends, and it shows that the Act neither contemplates the existence nor provides for the disposition of any surplus which shall not be embraced in the declaration of dividends. But, unquestionably, a surplus after paying in full all debts, including all interest due on the debts accruing before and subsequent to the filing of the petition, would equitably belong to the bankrupt, and no statute would be needed to authorize the court to direct its payment to the bankrupt."

**Right of administration of deceased bankrupt to surplus.**—Where a bankrupt dies pending bankruptcy proceedings, and there remains any surplus after the payment of all allowed claims, commissions and expenses, such surplus becomes a part of the deceased bankrupt's estate and should be paid over by the trustee in bankruptcy to the said bankrupt's administrator or executor and not to his heirs at law. *Matter of Ohl* (D. C., N. Y.), 44 Am. B. R. 328, 260 Fed. 338.

8. *In re Fielding* (D. C., Mo.), 3 Am. B. R. 135, 96 Fed. 800. As to the method of distribution now fixed by subs. b, see *In re Haynes*, Fed. Cas. 6,269; *In re James*, Fed. Cas. 7,175. Somewhat contra: *In re Hoyt*, Fed. Cas. 6,806. Compare also *In re Blight*, Fed. Cas. 1,540. And see *In re Bridgman*, Fed. Cas. 1,867.

## SECTION SIXTY-SEVEN.

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### LIENS.

§ 67. **Liens.**—*a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

*b* Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

*c* A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

*d* Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, *to the extent of such present consideration only*,\* not be affected by this act.

*e* That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person

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\*Amendments of 1910 in italics.

adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.\**

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

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\* Amendment of 1903 in italics.

**Analogous provisions:** In U. S.: As to fraudulent transfers, Act of 1867, § 35, R. S., § 5129; As to liens which are unaffected, Act of 1867, § 20, R. S., § 5075; Act of 1841, § 2; Act of 1800, § 63; As to dissolution of attachment liens, Act of 1867, § 14, R. S., § 5044.

**In Eng.:** None.

**In Can.:** Act of 1919, §§ 11, 29, 30, 32, 34.

**Cross-references:** To the law: Definition of transfer, § 1(25).

Insolvency; what includes; when person deemed insolvent, § 1(15).

Jurisdiction of bankruptcy court to cause estates to be collected and reduced to money, § 2(7).

Fraudulent transfer as act of bankruptcy, § 3-a(1); preferential transfer, § 3-a(2); permitting preference through legal proceedings, § 3-a(3).

Fraudulent transfer or concealment as objection to discharge, § 14-b(4).

Preferences, what constitute, § 60.

Power of trustee to avoid fraudulent transfer, § 70-e.

**To the General Orders:** Redemption by trustee of property mortgaged or pledged, XXVIII.

**To the Forms:** Petition and order for redemption of property from lien, No. 43.

See also Supplementary Forms; Hagar and Alexander's Bankruptcy Forms (2d ed.).

## SYNOPSIS OF SECTION.

### LIENS.

#### I. Liens in General, 1035.

- a. *Comparative legislation*, 1035.
- b. *Scope of section*, 1035.
- c. *Construction and general effect*, 1036.
- d. *Cross-references*, 1036.

#### II. Claims Void for Want of Record or Other Reasons, 1036.

- a. *In general*, 1036.
- b. *State law controls*, 1037.
- c. *Want of record*, 1038.
  - (1) **IN GENERAL**, 1038.
  - (2) **WHAT CONSTITUTES WANT OF RECORD AFFECTING VALIDITY**, 1039.
  - (3) **CHATTEL MORTGAGES AND CONTRACTS FOR CONDITIONAL SALE**, 1039.
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    - (IV) *Withholding from record or filing*, 1043.
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- a. *In general*, 1050.
- b. *Good faith of transaction*, 1050.
- c. *Jurisdiction of bankruptcy court to determine validity of lien*, 1051.
- d. *Miscellaneous valid liens*, 1052.
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- j. *Lien of pledgee*, 1058.
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  - (2) **EQUITABLE LIENS**, 1060.
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  - (4) **BANKER'S LIEN; LIENS FOR SERVICES**, 1060.
  - (5) **MARITIME LIENS**, 1061.
  - (6) **FACTOR'S LIEN**, 1061.
  - (7) **TRUST AND OTHER TRANSFERS**, 1061.
- l. *Effect of valid liens on distribution*, 1062.

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- a. *In general*, 1062.
- b. *Scope of subsection*, 1063.
- c. *Insolvency not essential*, 1063.
- d. *Within four months prior to filing the petition*, 1063.
- e. *Intent to hinder, delay or defraud*, 1064.
  - (1) **IN GENERAL**, 1064.
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    - (I) *In general*, 1065.
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- h. *Practice on suits to annul liens*, 1088.
- i. *Preserving liens*, 1088.
- j. *Saving clause*, 1089.

## I. LIENS IN GENERAL.

a. *Comparative legislation.*—The act of 1898 is much more explicit in respect to liens than any previous bankruptcy law. In England, while a fraudulent transfer is an act of bankruptcy,<sup>1</sup> there is no statutory provision that such a transfer is void. Nor is that statute any more explicit as to liens, save those available as acts of bankruptcy. The only lien through legal proceedings in terms dissolved by bankruptcy under our law of 1867, was that of an attachment on *mesne* process. Fraudulent transfers, on the other hand, were interdicted,<sup>2</sup> but were made up of elements more numerous and difficult of proof than those specified in the present law. Much of the section under discussion is new. Indeed, the law of 1898 is, in this particular, far more favorable to the creditor than was that of 1867.

b. *Scope of section.*—Starting with the well-recognized doctrine that a trustee in bankruptcy merely steps into the bankrupt's shoes and, therefore, takes his property subject to all valid liens,<sup>3</sup> the statute proceeds to declare what liens are not to be considered valid, as, in substance, (1) those which are invalid under the laws of a State,<sup>4</sup> and, provided they are less than four months old, (2) those which were not recorded or are invalid "for other reasons,"<sup>5</sup> (3) those which were given with intent to hinder, delay, or defraud creditors,<sup>6</sup> and (4) those which were obtained through legal proceedings;<sup>7</sup> with the further proviso that even liens so declared invalid shall not be so as to *bona fide* purchasers without notice. While somewhat out of

1. English Act of 1883, § 4(1) (b).

2. Act of 1867, § 35, R. S., § 5129.

3. Compare discussion under this section, *post*, subtitle "*Valid Liens*." See *Continental Bank v. Katz* (Super. Ct., Ill.), 1 Am. B. R. 19; *In re Moore* (D. C., Vt.), 6 Am. B. R. 175, 107 Fed. 234; *Ex parte Christy*, 3 How. 292; *Yeatman v. Savings Inst.*, 95 U. S. 764; *Stewart v. Platt*, 101 U. S. 731; *In re Stuyvesant Bank*, 49 How. Pr. 133.

4. *In re Davis*, Fed. Cas. 3,618; *Peck v. Jenness*, 7 How. 612; *Downer v. Brackett*, 21 Vt. 599.

5. See discussion under this section, *post*, subtitle "*Claims Void for Want of Record, or other Reasons*."

6. See discussion under this section, *post*, subtitle "*Fraudulent Transfers and Liens*."

7. See discussion under this section, *post*, subtitle "*Liens through Legal Proceedings*."

place in this section, the allied subject of fraudulent transfers is here interdicted in much the same way; they are null and void as to creditors, if made by an insolvent with intent to hinder, delay, or defraud and within four months of the bankruptcy. The section also phrases the doctrine of subrogation with regard to liens which, because declared void, a mere creditor cannot enforce. Read together, its various paragraphs and salient features make the section consistent and far-reaching in the extreme.

**c. Construction and general effect.**—The following general suggestions may be made: Liens more than four months before the bankruptcy are, unless fraudulent, not affected;<sup>8</sup> no more are liens acquired after the bankruptcy.<sup>9</sup> On the other hand, while subdivision *c* is in itself a statute of limitations on fraudulent transfers, if the transfer is also interdicted by the law of the State, it may, under § 70-e, be attacked within the much longer period fixed by the State statute.<sup>10</sup> Further, while liens through legal proceedings within the four months' period are dissolved by bankruptcy, other liens are not, unless the lienor was insolvent at the time and there was "intent to hinder, delay, or defraud."<sup>11</sup> It follows also that a trustee, not being a purchaser for value,<sup>12</sup> not only stands in the shoes of the bankrupt as to his property, but, as the representative of creditors, may sue to avoid the effect of the bankrupt's acts.<sup>13</sup> But the trustee does not represent creditors who are secured by valid liens; and, therefore, he has no interest in the respective rights of priority of such creditors.<sup>14</sup> Liens here referred to are liens within the meaning of the common law; the term does not occur in the civil law.<sup>15</sup> It has also been held that, where a valid lien is incident to a debt and the debt is discharged, the lien nevertheless remains.<sup>16</sup> Subsections *a* and *b* of this section apply only to liens created by the debtor.<sup>17</sup>

**d. Cross-references.**—This section is closely connected with both § 60-a-b, on voidable preferences, and § 70-e, on fraudulent transfers voidable under the State law; somewhat less closely with § 3-a (1), § 3-a (2), and § 3-a (3), where similar transactions are declared acts of bankruptcy; while by § 14-b (4) a fraudulent transfer, as defined in words almost identical with those in subsection *c*, is made an objection to discharge. What is said in the appropriate paragraphs under the corresponding sections of this work should be consulted here.

## II. CLAIMS VOID FOR WANT OF RECORD OR OTHER REASONS.

**a. In general.**—Subsection *a* precludes claims attaching as liens, which would not have been valid liens as against the claims of the creditors of the

8. *In re Dunavant* (D. C., N. Car.), 3 Am. B. R. 41, 96 Fed. 542; *Doe v. Childress*, 21 Wall. 642.

9. *Kinmouth v. Braeutigam* (Sup. Ct. N. J.), 4 Am. B. R. 344, 46 Atl. 769; *In re Engle* (D. C., Pa.), 5 Am. B. R. 372, 105 Fed. 893.

10. *In re Adams* (Ref., N. Y.), 1 Am. B. R. 94; *In re Dunavant* (D. C., N. Car.), 3 Am. B. R. 41, 96 Fed. 542. See cases cited under Section Seventy of this work.

11. See discussion under this section, *post*, subtitle "*Fraudulent Transfers and Liens*."

12. *Chattanooga Bank v. Rome Iron Co.* (C. C., Ga.), 4 Am. B. R. 441, 102 Fed. 755. *Contra: In re Booth* (D. C., Or.), 3 Am. B. R. 574, 98 Fed. 975.

13. *In re Legg*, 96 Fed. 326; *In re Leigh* (Ref., Colo.), 2 Am. B. R. 606, *affd.* 96 Fed. 806. *Contra: In re Ohio Co-operative Shear Co.* (Ref., Ohio), 2 Am. B. R. 775.

14. *Goldman v. Smith* (Ref., Ky.), 2 Am. B. R. 104; *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136.

15. *Matter of Pilar Hermanos* (D. C., Porto Rico), 37 Am. B. R. 405.

16. *Bank of Commerce v. Elliot* (Sup. Ct., Wis.), 6 Am. B. R. 409, 109 Wis. 678. Compare *Bracken v. Johnston*, Fed. Cas. 1,761.

17. *Mishawaka Woolen Mfg. Co. v. Smith* (D. C., Wis.), 20 Am. B. R. 317, 158 Fed. 885; *revd.* on other grounds, *sub nom.* *In re Bement* (C. C. A., 7th Cir.), 22 Am. B. R. 616, 172 Fed. 98.

bankrupt, "for want of record or for other reasons." It will be noticed that the subsection applies to claims which are ineffectual as liens against the creditors of the bankrupt for any reason; not alone "for want of record."<sup>18</sup> This subsection should be read in connection with the next to the last sentence in subsection *a*.

**b. State law controls.**—Clearly the reference is to the State law. If not yet a lien, properly so called, under that law, as, for want of record or "for other reasons," it cannot be recognized in bankruptcy; it is the statute or judicially established rule of the State which must control in every case.<sup>19</sup> In the absence of a decision by the highest court of a State as to the validity of a lien the bankruptcy court will be governed by the decision of the United States Circuit Court of Appeals.<sup>19a</sup> If once it is apparent that the State court founds its decisions as to the effect of a lien, upon a State statute, even though a Federal court has decided precisely the same question directly the contrary, the determination of the State court is controlling.<sup>20</sup> This rule is subject to certain exceptions, as where the decision of a State court was rendered by a single trial judge,<sup>20a</sup> or after rights had accrued or liabilities have been incurred, which are the subject of determination by a court of the United States; in such a case the latter court is not bound by the decision of the State court, but exercises its independent judgment, although it will lean toward an agreement with the State court.<sup>21</sup> Whether and to what extent a lien is valid is a local question, to be determined by the decisions of State courts, at least in the absence of Federal statute.<sup>22</sup> It is the law of the State

**18. Application to other liens.**—The provision of this section that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate," does not mean that no lien may be maintained against an estate unless or until it has been recorded. *Matter of Lane Lumber Co. (C. C. A., 9th Cir.)*, 33 Am. B. R. 491, 217 Fed. 550.

**19. *Humphrey v. Tatman***, 108 U. S. 91, 14 Am. B. R. 74, 49 L. Ed. 956, 25 Sup. Ct. 567; *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 49 L. Ed. 577, 25 Sup. Ct. 306; *In re First Nat. Bank of Canton (C. C. A., 6th Cir.)*, 14 Am. B. R. 180, 135 Fed. 62; *Bryant v. Swafford Bros. Co.*, 214 U. S. 279, 22 Am. B. R. 115, 53 L. Ed. 997, 29 Sup. Ct. 614; *Reardon v. Rock Island Plow Co. (C. C. A., 7th Cir.)*, 22 Am. B. R. 26, 168 Fed. 654; *In re Burke (D. C., Ga.)*, 22 Am. B. R. 69, 168 Fed. 994; *Mattley v. Wolfe (D. C., Nebr.)*, 23 Am. B. R. 673, 175 Fed. 619; *In re Hurley (D. C., Mass.)*, 26 Am. B. R. 434, 185 Fed. 831; *Matter of Harrington (D. C., Mass.)*, 32 Am. B. R. 828, 212 Fed. 642; *Scandinavian-American Bank v. Sabin (C. C. A., 9th Cir.)*, 36 Am. B. R. 151, 227 Fed. 579; *Matter of Kliggerman (D. C., Pa.)*, 33 Am. B. R. 608, 219 Fed. 758; *Grimes v. Clark (C. C. A., 4th Cir.)*, 37 Am. B. R. 142; *Matter of Davidson (D. C., Ala.)*, 37 Am. B. R. 480, 233 Fed. 462; *Pretorius v. Anderson (C. C. A., 5th Cir.)*, 38 Am. B. R. 98; *Babbitt v. Read (C. C. A., 2d Cir.)*, 38 Am. B. R. 303, 236 Fed. 42; *Davis v. Billings (Pa. Sup. Ct.)*, 38 Am. B. R. 957, 99 Atl. 103, holding that unless the bankruptcy law otherwise provides the validity of an assignment or lien is to be determined in accordance with the principles of the local law. *Matter of Rosenthal (D. C., Ga.)*, 39 Am. B. R. 30, 238 Fed. 597; *Border Nat. Bank v. Coupland (C. C. A., 5th Cir.)*, 39 Am. B. R. 165, 240 Fed. 355; *Robertson v. Schlottz-hauer (C. C. A., 7th Cir.)*, 40 Am. B. R. 237, 243 Fed. 324; *Matter of Peterson (D. C., Nev.)*, 40 Am. B. R. 653, 252 Fed. 846; *Matter of R. J. Sullivan Co., Inc. (D. C., N. Y.)*, 41 Am. B. R. 129, 247 Fed. 139, *affd.* 42 Am. B. R. 530, 254 Fed. 600; *Garrison v. Kurt (C. C. A., 8th Cir.)*, 41 Am. B. R. 291, 249 Fed. 672; *Fifth National Bank v. Lyttle (C. C. A., 2d Cir.)*, 41 Am. B. R. 370, 250 Fed. 361; *Stewart v. Asbury (Mo. Ct. of App.)*, 41 Am. B. R. 337, 201 S. W. 949; *Goldberg v. Brule Timber Co. (Minn. Sup. Ct.)*, 41 Am. B. R. 674, 168 N. W. 22; *Matter of Bettman-Johnson Co. (C. C. A., 6th Cir.)*, 42 Am. B. R.

123, 250 Fed. 657; *Matter of Drag (D. C., Mich.)*, 43 Am. B. R. 59, 254 Fed. 474; *Matter of Flint (D. C., N. Y.)*, 43 Am. B. R. 243; *Matter of Peerless Weaving Co. (D. C., Pa.)*, 43 Am. B. R. 764, 259 Fed. 610; *Jones v. Bank of Excelsior Springs (Mo. Ct. of App.)*, 44 Am. B. R. 90, 213 S. W. 892; *Matter of Dagwell (D. C., Mich.)*, 45 Am. B. R. 353, 263 Fed. 406.

The validity of a pledge made, executed and to be performed in New York, and the rights of the parties thereunder are governed by the State law. *Hiscock v. Varick Bank*, 206 U. S. 23, 18 Am. B. R. 1, 6, 51 L. Ed. 945, 27 Sup. Ct. 681, *affg.* 15 Am. B. R. 362, 142 Fed. 445; *Matter of P. J. Sullivan Co., Inc. (D. C., N. Y.)*, 41 Am. B. R. 189, 247 Fed. 139, *affg.* 42 Am. B. R. 530, 254 Fed. 660.

**19a. *Matter of Davies (D. C., Tenn.)***, 43 Am. B. R. 453, 256 Fed. 52; *Matter of Ballard (D. C., Tex.)*, 44 Am. B. R. 651.

**20. *Babbitt v. Read (C. C. A., 2d Cir.)***, 38 Am. B. R. 303, 236 Fed. 42.

**20a. *Matter of F. & D. Company (C. C. A., 2d Cir.)***, 43 Am. B. R. 68, 256 Fed. 73.

**21. *State of Missouri v. Angle (C. C. A., 8th Cir.)***, 38 Am. B. R. 394, 236 Fed. 644, *affg.* 35 Am. B. R. 436, 224 Fed. 525.

**22. *Matter of Virgin (D. C., Ga.)***, 35 Am. B. R. 491, 224 Fed. 128; *Matter of Heffron Co. (D. C., N. Y.)*, 33 Am. B. R. 443, 216 Fed. 642; *Matter of Kliggerman (D. C., Pa.)*, 33 Am. B. R. 608, 219 Fed. 758; *Frey v. McGaw (Md. Ct. of App.)*, 35 Am. B. R. 822; *Matter of Mutual Motors Co. (D. C., Mich.)*, 44 Am. B. R. 337, 260 Fed. 341. See Am. Bankr. Dig. § 428.

**State law to control.**—In the case of *In re Wade (D. C., Mo.)*, 28 Am. B. R. 109, 173, 185 Fed. 664, the court said: "Whether, and to what extent, a mortgage of this kind is valid is a local question and the decision of the State court will be followed by this court in such case. *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 308, 45 L. Ed. 457; *Thompson v. Fairbanks*, 196 U. S. 516, 15 Am. B. R. 633, 25 Sup. Ct. 306, 49 L. Ed. 577. In short, it seems to be the settled rule that the trustee in bankruptcy takes the property of the bankrupt, subject to all the rights, claims, and equities that have been impressed upon it in the hands of the bankrupt, and that the validity of such rights, claims, and equities is to be determined, in the absence of federal statute, by the local law as



where the property is located which governs.<sup>23</sup> Where goods are sold under a conditional bill of sale in a State where registration of such sale is not required, but, by the contract, are to be delivered in another State where such registration is required, the law of the latter State prevails.<sup>24</sup> This is the corollary of the proposition that the property of the bankrupt comes to the trustee charged with all valid liens. The subsection is merely declaratory of the law.

c. **Want of record.**—(1) **IN GENERAL.**—The laws of many of the States require chattel mortgages, contracts of conditional sale and other similar instruments to be recorded or filed in order that the lien thereby created shall be valid as against other creditors having judgments, or other judicial process. The absence of recording does not necessarily affect the validity of the lien as between the immediate parties; usually it affects such validity merely as to creditors of a certain class,<sup>25</sup> nor does it affect the provability of the claim.<sup>26</sup> The effect of this subsection is to preserve liens on the bankrupt's property, as against the other creditors, where such liens have been duly recorded or filed, as required by a State statute. The construction and effect of such a statute will largely depend upon State decisions. Reference should be had to such decisions for a determination of the effect of a failure to record or file. Where a contract of conditional sale is made in one State, under the terms of which the goods are to be delivered in another State, the validity of the transaction, and the rights of the parties in respect thereto, will be governed by the laws of the latter State.<sup>27</sup> It will not be possible for us to more than suggest the principles involved in such a determination. The cases are numerous which involve the question of the validity of unfiled or unrecorded chattel

evidenced by the decisions of the State courts." Citing *Thomas v. Taggart*, 200 U. S. 335, 19 Am. B. R. 710, 28 Sup. Ct. 519, 52 L. Ed. 845; *Bryan, Trustee v. Swoford Bros. Dry Goods Company*, 214 U. S. 279, 22 Am. B. R. 111, 29 Sup. Ct. 614, 53 L. Ed. 997; *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74, 25 Sup. Ct. 567, 49 L. Ed. 856; *In re Dunlop* (C. C. A., 8th Cir.), 19 Am. B. R. 361, 156 Fed. 945, 86 C. C. A. 455; *In re Great Western Manufacturing Company* (C. C. A., 8th Cir.), 18 Am. B. R. 259, 152 Fed. 123, 81 C. C. A. 341; *Title Guaranty & Surety Co. v. Witmire* (C. C. A., 6th Cir.), 28 Am. B. R. 235, 185 Fed. 41.

23. So held in respect to a mortgage executed in New York upon property in Connecticut. *In re Greene* (D. C., Conn.), 13 Am. B. R. 504, 134 Fed. 137. See also *In re Gray* (D. C., Okla.), 21 Am. B. R. 575, 170 Fed. 638; *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173; *Matter of Davies* (D. C., Tenn.), 43 Am. B. R. 458, 256 Fed. 52; *Hoyt v. Zibell* (C. C. A., 7th Cir.), 43 Am. B. R. 538, 259 Fed. 186.

24. *Lex loci contractus.*—The case of *In re Yukon Woolen Co.* (D. C., Conn.), 2 Am. B. R. 805, 96 Fed. 326, follows the general principle of law recognized by the Federal courts that where a contract contemplates or provides that property is to be delivered or used in another State the *lex loci solutionis* governs. See also *Matter of Southern Textile Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 172, 174 Fed. 523. The construction placed by the State courts upon a State statute relating to conditional sales will be adopted by the bankruptcy court. *Matter of Pacific Electric & Automobile Co.* (D. C., Wash.), 35 Am. B. R. 222, 224 Fed. 220.

25. *First Nat'l Bank v. Connett* (C. C. A., 8th Cir.), 15 Am. B. R. 662, 142 Fed. 33; *Loeser v.*

*Savings Bank & Dep. Co.* (C. C. A., 6th Cir.), 17 Am. B. R. 628, 148 Fed. 975; *In re McGhee* (D. C., Ga.), 21 Am. B. R. 656, 166 Fed. 928.

An assignment made by a contractor of its plant to its surety under an agreement in the suretyship contract that in case the principal failed to complete the contract he would transfer the plant to the surety, is a present one and does not constitute a chattel mortgage required to be recorded in order to be valid. *Angle v. Bankers' Surety Co.* (C. C. A., 2d Cir.), 41 Am. B. R. 90, 244 Fed. 401. Compare *Matter of Schilling and Loller* (D. C., Ohio), 41 Am. B. R. 705, 251 Fed. 972, 966.

26. *In re Burlage Bros.* (D. C., Ia.), 22 Am. B. R. 410, 169 Fed. 1006.

27. *In re Wall* (D. C., Okla.), 29 Am. B. R. 901, 207 Fed. 994, holding that in determining the validity of a contract of conditional sale, where the laws of the State in which the contract was made are not pleaded, the court will presume that they are similar to the laws of the State where the goods were delivered and where they were when bankruptcy intervened; *Matter of Anson Mercantile Co.* (D. C., Tex.), 38 Am. B. R. 952, 203 Fed. 871.

*When law of situs governs application of recording statute.*—Where an excavating machine, purchased under a conditional sale, was shipped by the vendors to another State to be there used quasi permanently, the recording statute of the State to which it was shipped applies. And upon failure to record the contract as required by the laws of that State, the title of a trustee in bankruptcy is good as against an attempted reclamation by the vendor. *Potter Mfg. Co. v. Arthur* (C. C. A., 6th Cir.), 34 Am. B. R. 75, 220 Fed. 843.

mortgages or contracts of conditional sale as against general judgment creditors of the bankrupt. The determination of the question must necessarily depend upon the statutes and decisions of the several States,<sup>28</sup> and they do not, therefore, admit of ready classification. A number of these cases are cited in the note.<sup>29</sup>

(2) WHAT CONSTITUTES WANT OF RECORD AFFECTING VALIDITY.—A mortgage given and received in fraud of creditors, or to hinder, delay, or defraud creditors is invalid as to creditors. But a mortgage not so given, that is, not given and received for such a purpose, if there be a good present consideration and it is given more than four months prior to the filing of the petition in bankruptcy in New York, is good and valid as to creditors and the trustee in bankruptcy, whether recorded or not. A mortgage is not "required" to be recorded as to general creditors and a trustee in bankruptcy, when it is not required to be recorded except as to subsequent purchasers in good faith and subsequent mortgagees. If good as to general creditors without being recorded, then as to general creditors and the trustee in bankruptcy representing them and their interests it is not "required" to be recorded within the meaning of the bankruptcy act.<sup>30</sup>

(3) CHATTEL MORTGAGES AND CONTRACTS FOR CONDITIONAL SALE.—(I) *In general*.—The object of recording acts is to prevent the obtaining of credit by reason of the ostensible ownership of property which in reality is covered by a secret lien by giving notice to those intending to purchase such property and to creditors who give credit on the faith thereof.<sup>31</sup> A trustee in bankruptcy is, generally speaking, in the shoes of the bankrupt; he acquires no better title than that of the bankrupt, and, except for the provisions of

<sup>28</sup>. In re Beede (D. C., N. Y.), 11 Am. B. R. 387, 126 Fed. 853; In re Andrae Co. (D. C., Wis.), 9 Am. B. R. 135, 117 Fed. 561; In re Antigo Screen Door Co. (U. C. A., 7th Cir.), 10 Am. B. R. 359, 123 Fed. 249; Matter of McDonald (D. C., Mass.), 23 Am. B. R. 51, 173 Fed. 99; In re Nuckols (D. C., Tenn.), 29 Am. B. R. 867, 201 Fed. 437.

The rights of creditors to avoid unrecorded liens, which the bankruptcy act confers on trustees in bankruptcy, are to be determined by the laws of the State requiring the record. In re Dancy Hardware & Furniture Co. (D. C., Ala.), 28 Am. B. R. 444, 198 Fed. 336; Matter of Rosenthal (D. C., Ga.), 39 Am. B. R. 30, 238 Fed. 597; Matter of Terrell (C. C. A., 8th Cir.), 40 Am. B. R. 713, 246 Fed. 743; American Laundry Mach. Co. v. Everybody's Laundry (Ia. Sup. Ct.), 43 Am. B. R. 294, 171 N. W. 161.

<sup>29</sup>. In re Harrison (N. Y.), 2 N. B. N. Rep. 541; In re Booth (D. C., Or.), 3 Am. B. R. 574, 98 Fed. 975; In re Tatem et al. (D. C., N. Car.), 6 Am. B. R. 426, 110 Fed. 519; In re N. Y. Econ. Printing Co. (C. C. A., 2d Cir.), 6 Am. B. R. 615, 110 Fed. 514; In re Sewell (D. C., Ky.), 7 Am. B. R. 123, 111 Fed. 791; In re Wilkes (D. C., Ark.), 7 Am. B. R. 574, 112 Fed. 975; In re Pekin Plow Co. (C. C. A., 8th Cir.), 7 Am. B. R. 369, 112 Fed. 308; In re Hull (D. C., Vt.), 8 Am. B. R. 302, 115 Fed. 858; Dunplain Silk Co. v. Spencer (C. C. A., 3d Cir.), 8 Am. B. R. 367, 115 Fed. 689; In re Josephson (D. C., Ga.), 8 Am. B. R. 423, 116 Fed. 404; In re Gosch (C. C. A., 5th Cir.), 12 Am. B. R. 149, 126 Fed. 627; revg. 9 Am. B. R. 610, 121 Fed. 602; In re Raubenau (D.

C., Mo.), 9 Am. B. R. 180, 118 Fed. 471. Equitable claim on proceeds of sale. Hanson v. Blake & Co. (D. C., Me.), 19 Am. B. R. 325, 155 Fed. 342; Pontiac Buggy Co. v. Skinner (D. C., N. Y.), 20 Am. B. R. 206, 158 Fed. 858; Deupree v. Watson (C. C. A., 6th Cir.), 32 Am. B. R. 407, 216 Fed. 483; Grimes v. Clark (C. C. A., 4th Cir.), 37 Am. B. R. 142; Davis v. Harlow (Md. Ct. of App.), 39 Am. B. R. 300, 100 Atl. 102; Matter of Terrell (C. C. A., 8th Cir.), 40 Am. B. R. 713, 246 Fed. 743. See discussion and cases cited under this section, post, subtitles, "Mechanics' Liens," "Chattel Mortgages," "By Judgment and Execution," "By Creditors' Bill," etc.

Laws of place where property is situated.—Where mortgaged property, at the time of the execution of the mortgage, is situated in a State other than that in which the mortgagor is domiciled and the mortgage executed, the question of the preservation of the lien acquired by such mortgage, under the laws in reference to registration and the priority of such lien over the rights and interests subsequently acquired by third persons, should be determined by the law of the place where the property is situated at the time the mortgage is executed. In re Nuckols (D. C., Tenn.), 29 Am. B. R. 867, 201 Fed. 437.

<sup>30</sup>. Matter of Mosher (D. C., N. Y.), 35 Am. B. R. 284, 224 Fed. 739; Robertson v. Schlotsbauer (C. C. A., 7th Cir.), 40 Am. B. R. 237, 243 Fed. 324.

<sup>31</sup>. Object of recording acts.—In re Cannon (D. C., S. Car.), 10 Am. B. R. 64, 121 Fed. 552; In re Claussen (D. C., N. Car.), 21 Am. B. R. 34, 164 Fed. 300; Matter of Southern Textile Co. (C. C. A., 2d Cir.), 23

§ 47-a (2), as amended by the act of 1910, is not in any sense a subsequent purchaser in good faith within the meaning of recording acts.<sup>32</sup> One purpose of the amendment of 1910 to § 47-a (2) was to reach that class of cases in which no creditors had acquired a lien by legal or equitable proceedings, so as to vest in the trustee for the benefit of all the creditors the potential rights of a creditor having such a lien.<sup>33</sup> A mortgagee, taking possession before the commencement of bankruptcy proceedings against the mortgagor of after-acquired property covered by the mortgage, is entitled under the laws of some states to hold it against the trustee.<sup>34</sup> If actual notice of the chattel mortgage or conditional sale is shown, the failure to record or file is immaterial.<sup>35</sup>

(II) *Effect of failure to file or record; New York rule.*—Under the law in New York an unfiled chattel mortgage is void only as against judgment creditors of the mortgagor, and it has been held that a general creditor upon obtaining judgment and issuing execution may impeach the validity of the mortgage for non-filing, although in the meantime it may have been filed.<sup>36</sup> The Court of Appeals of New York has held that the trustee of a bankrupt mortgagor could attack a mortgage for failure to file to the extent of the claims of those creditors whose claims accrued prior to the time when the

Am. B. R. 172, 174 Fed. 523. See *Bayley v. Greenleaf*, 7 Wheat. (U. S.), 46, 5 L. Ed. 393, where Chief Justice Marshall says: "There is not perhaps a State in the Union, the laws of which do not make all conveyances not recorded and all secret trusts void as to creditors, as well as subsequent purchasers without notice. To support the secret lien of a vendor against a creditor who is a mortgagee would be to counteract the spirit of these laws." *Cooper Grocery Co. v. Penland* (C. C. A., 5th Cir.), 40 Am. B. R. 589, 247 Fed. 480.

32. *In re Wade* (D. C., Mo.), 26 Am. B. R. 169, 185 Fed. 664; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 986, 24 Sup. Ct. 690; *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 49 L. Ed. 577, 25 Sup. Ct. 806; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782, 28 Sup. Ct. 481.

33. *In re Calhoun Supply Co.* (D. C., Ala.), 26 Am. B. R. 528, 189 Fed. 537; *In re Hartdagen* (D. C., Pa.), 26 Am. B. R. 532, 189 Fed. 546; *Lake View State Bank v. Jones* (C. C. A., 7th Cir.), 40 Am. B. R. 148, 242 Fed. 821.

Conditional sale; failure to record; rights of trustee under section 47-a (2) as amended in 1910.—Where a vendor under a conditional sale contract, failed to record such contract in a State whose laws required record and avoided contracts unrecorded, as against purchasers for a valuable consideration, mortgages and judgment creditors without notice, said vendor could not reclaim the chattel covered by the contract from the trustee in bankruptcy of the vendee, since the purpose of the amendment to section 47-a (2) of the bankruptcy act, enacted June 25, 1910, providing "and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon" was

to obviate the previous rule that the title of the vendor, in an unrecorded conditional sale contract, would prevail over that of the trustee in bankruptcy of the vendee. The operation of the amendment of 1910 to section 47-a (2) of the bankruptcy act was not intended to be restricted to cases in which a creditor had in fact acquired a lien by legal or equitable proceedings, as it would then add nothing to section 67 of the original act permitting the subrogation of the trustee to such a lien, if created within four months; but the class of cases, unprovided for by the original act, and intended to be reached by the 1910 amendment, was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens. *In re Bazemore* (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236. See *In re Dancy Hardware & Furniture Co.* (D. C., Ala.), 28 Am. B. R. 444, 198 Fed. 336.

Conditional sale contract; failure to record.—Where a State statute renders a contract of conditional sale invalid as to lien creditors or *bona fide* purchasers where it is not registered, a seller of property by conditional sale who has failed to register his contract has no remedy as against the trustee in bankruptcy to enforce his lien, and he cannot recover the property from a purchaser at the trustee's sale, but he is a mere general creditor with a right to share in the assets of the estate. *Hinton v. Williams* (N. C. Sup. Ct.), 35 Am. B. R. 878, 86 S. E. 994.

34. *In re Hurley* (D. C., Mass.), 26 Am. B. R. 434, 185 Fed. 851; *Jones v. Bank of Excelsior Springs* (Mo. Ct. of App.), 44 Am. B. R. 99, 213 S. W. 892.

35. *In re Bazemore* (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236; *First Nat. Bank v. Wegener* (Ore. Sup. Ct.), 44 Am. B. R. 587, 186 Pac. 41.

36. *In re Beede* (D. C., N. Y.), 11 Am. B. R.

mortgage was filed, although if any one of such creditors sought relief against such mortgage it would be necessary for him to put his claim into a judgment.<sup>37</sup> This ruling of the Court of Appeals of New York would seem conclusive upon this question, in view of the determination of the Supreme Court of the United States,<sup>38</sup> already referred to, to the effect that Federal courts are required in all such cases to follow the rules laid down by State courts.<sup>39</sup> The rule in force in New York depends upon a construction of the New York statute; it does not necessarily apply in other jurisdictions.<sup>40</sup>

337, 120 Fed. 853; *In re Beede* (D. C., N. Y.), 14 Am. B. R. 697, 138 Fed. 441, in which cases Judge Ray considered at length and in full all the New York authorities applicable to the validity of unfilled chattel mortgages.

37. *Skilton v. Codrington*, 15 Am. B. R. 810, 185 N. Y. 80, 77 N. E. 790, disapproving *In re New York Economical Printing Co.* (C. C. A., 2d Cir.), 6 Am. B. R. 615, 110 Fed. 514. See also *Gove v. Morton Trust Co.*, 12 Am. B. R. 297, 96 N. Y. App. Div. 177, 89 N. Y. Supp. 247; *Matter of Metropolitan Store, etc. Co.* (Ref., N. Y.), 15 Am. B. R. 119; *In re Beede* (D. C., N. Y.), 11 Am. B. R. 387, 126 Fed. 853; *Matter of Thompson* (D. C., N. Y.), 10 Am. B. R. 242, 122 Fed. 174; *In re Ducker* (C. C. A., 6th Cir.), 13 Am. B. R. 760, 133 Fed. 771; *In re Schiebier* (D. C., N. Y.), 21 Am. B. R. 309, 165 Fed. 863; *In re Thomas* (D. C., N. Y.), 29 Am. B. R. 945, 199 Fed. 214; *Matter of Palmer* (D. C., N. Y.), 33 Am. B. R. 689, 218 Fed. 74; *Matter of Perpall* (C. C. A., 2d Cir.), 44 Am. B. R. 519, 261 Fed. 858. As to effect of failure to record assignment of mortgage upon subsequent assignee, see *In re Buchner* (D. C., Ill.), 29 Am. B. R. 179, 202 Fed. 979.

**Failure to file within reasonable time.**—In New York, a chattel mortgage must be filed within a reasonable time after the execution, and a failure to file it for nearly three months after its execution renders it invalid as against all the creditors of the bankrupt even though the mortgagee was unable to speak the English language and was apparently entirely unacquainted with business, and such failure was through the omission of her attorney either to do so or to tell her to do so. *Matter of Schmidt* (C. C. A., 2d Cir.), 24 Am. B. R. 687, 181 Fed. 73.

**Failure to refile chattel mortgage; New York statute.**—Where, as in New York, the statute provides that a chattel mortgage shall be invalid as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith after the expiration of one year from its original filing, unless refiled within thirty days next preceding the expiration of such time, a failure to refile a mortgage given by bankrupt until some five months after the expiration of one year from the date of its original filing, renders such mortgage invalid as against the bankrupt's creditors and may be attacked by the trustee. *Matter of Watts-Woodward Press, Inc.* (C. C. A., 2d Cir.), 24 Am. B. R. 684, 181 Fed. 71; *Matter of Flint* (D. C., N. Y.), 43 Am. B. R. 243; *Benedict v. Zutes* (N. Y. Sup. Ct.), 88 Misc. 214, 150 N. Y. Supp. 147.

38. *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74, 49 L. Ed. 968, 26 Sup. Ct. 567.

39. Compare *In re Burnham* (D. C., N. Y.), 15 Am. B. R. 548, 140 Fed. 928.

40. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782, 26 Sup. Ct. 481; *Crosby v. Miller* (Ct. App., D. C.), 16 Am. B. R. 905, 25 R. I. 172; *In re Doran* (D. C., Ky.), 17 Am. B. R. 799, 148 Fed. 327; *In re Thomas* (D. C., N. Y.), 29 Am. B. R. 945, 199 Fed. 214; *Foerstner v. Citizen's Savings & Trust Co.* (C.

C. A., 6th Cir.), 26 Am. B. R. 377, 186 Fed. 1; *Davis v. Hanover Savings Fund Society* (C. C. A., 4th Cir.), 31 Am. B. R. 388, 210 Fed. 768, as to effect of failure to record against general creditors under West Virginia statute. *Matter of Terrell* (C. C. A., 8th Cir.), 40 Am. B. R. 713, 246 Fed. 743; *American Laundry Mach. Co. v. Everybody's Laundry* (Ia. Sup. Ct.), 43 Am. B. R. 294, 171 N. W. 161.

Under the Michigan statute where possession of the mortgaged property is not transferred, failure to properly file the chattel mortgage renders it absolutely and conclusively void as to creditors of the mortgagor who become such after the mortgage is given and before the statute is complied with, and such creditors may attack the mortgage although they did not acquire a lien during the period of non-compliance with the statute. *Goldberg v. Brule Timber Co.* (Minn. Sup. Ct.), 41 Am. B. R. 674, 168 N. W. 22; *Matter of Am. Steel Supply Synd., Inc.* (D. C., Mich.), 43 Am. B. R. 271, 256 Fed. 876; *Matter of Mutual Motors Co.* (D. C., Mich.), 44 Am. B. R. 337, 260 Fed. 341. Compare *In re Ottenwess v. Huxall* (C. C. A., 6th Cir.), 27 Am. B. R. 579, 193 Fed. 851; *Detroit Trust Co. v. Pontiac Sav. Bank* (C. C. A., 6th Cir.), 27 Am. B. R. 821, 196 Fed. 29, aff'd, 237 U. S. 186, 34 Am. B. R. 759, 59 L. Ed. 907, 35 Sup. Ct. 509.

It is settled law in the State of Ohio that a chattel mortgage not filed for record and under which possession had not previously been taken by the mortgagee, is void as to all creditors of the mortgagor, and subsequent purchasers and mortgagees in good faith. *Matter of Schilling and Loller* (D. C., Ohio), 41 Am. B. R. 706, 251 Fed. 966.

Under §103 of the Code of West Virginia, providing that a deed of trust shall be void as to creditors "until and except from the time it is duly admitted to record," an unrecorded deed of trust is not void as to general creditors; and the holders of bonds secured by an unrecorded deed of trust merely lose their right to priority as against creditors who have obtained judgments or other liens on the property. *In re Charles Town Light & Power Co.* (D. C., W. Va.), 29 Am. B. R. 721, 199 Fed. 848.

In Kentucky, an unrecorded contract of conditional sale, with reservation of title in the vendor, is good as against the trustee of the vendee, though some of the creditors did not sustain that relation at the time the contract was entered into. The word "creditors" as used in the statute includes only such as have acquired a lien. *Crucible Steel Co. of America v. Holt* (C. C. A., 6th Cir.), 23 Am. B. R. 302, 174 Fed. 127; *In re Ducker* (D. C., Ky.), 13 Am. B. R. 760, 133 Fed. 771.

In Missouri it has been held that the instituting of bankruptcy proceedings amounts to an effectual sequestration of the bankrupt's property in favor of all the creditors, and that therefore an unrecorded chattel mortgage is invalid as against the trustee representing all the creditors. *Bradley v. McAfee* (D. C., Mo.),

(III) *Bankrupt remaining in possession.*—If a bankrupt gave a lien on certain chattels to secure an antecedent indebtedness, the bankrupt remaining in possession, with the power of disposition, and no notice by filing or otherwise being given, the lien is not effectual against the bankrupt's creditors, such lien being regarded as fraudulent against creditors.<sup>43</sup> It has been held

17 Am. B. R. 499, 149 Fed. 254; In re Pekin Plow Co. (C. C. A., 8th Cir.), 7 Am. B. R. 369, 112 Fed. 308; In re Martin (C. C. A., 8th Cir.), 23 Am. B. R. 151, 173 Fed. 597; In re Wade (D. C., Mo.), 26 Am. B. R. 169, 185 Fed. 664.

In Kansas, where the title of an assignee for the benefit of creditors is good as against an unfilled contract of conditional sale, the rights of creditors of the assignor under such contract may be enforced by his trustee. In re Fish Bros. Wagon Co. (C. C. A., 8th Cir.), 21 Am. B. R. 149, 164 Fed. 553.

Under the law of Maryland, although subsequent creditors of the mortgagee without notice are not affected by an unrecorded chattel mortgage, a creditor whose debt has been contracted prior to the making of such mortgage is, so far as the mortgaged property is concerned, postponed to the mortgagee's claim, notwithstanding that he has reduced his claim to judgment and levied execution upon the mortgaged property. Hence, in determining the question of priority of the distribution of the proceeds of the property so mortgaged, the mortgagee's rights are not affected by the amendment of 1910 to section 47-a (2) of the bankruptcy act, vesting in the trustee, who represents the general creditors, all the rights and priorities which by State law are accorded a creditor holding a lien by legal or equitable proceedings on the property, but he is entitled to share in the proceeds with the subsequent creditors. In re Riehl (D. C., Md.), 29 Am. B. R. 613, 200 Fed. 455.

Under the law of Arkansas, a contract of conditional sale, although unrecorded, is valid as against the vendee's trustee in bankruptcy, and vests no title in the vendee, even as against *bona fide* purchasers without notice, until performance of the conditions. In re Lutz (D. C., Ark.), 28 Am. B. R. 649, 197 Fed. 492.

The Washington statute is similar to the New York act, and it has been held thereunder that the courts will not restrict the word "creditors" but will declare a chattel mortgage not filed within ten days from the time of its execution to be of no force or effect as to any creditor, whether prior or subsequent, at least until it is actually filed. In re Mission Fixture & Mantel Co. (D. C., Wash.), 24 Am. B. R. 873, 180 Fed. 263; Pacific State Bank v. Coats (C. C. A., 9th Cir.), 30 Am. B. R. 655, 205 Fed. 618; In re United States Lumber Co. (D. C., Wash.), 30 Am. B. R. 682, 206 Fed. 236.

Under the Washington statute a chattel mortgage, not filed within ten days, but filed before bankruptcy proceedings were commenced and before the bankrupt had any creditors, is valid as against the trustee in bankruptcy of the mortgagor. Matter of Bolstad (D. C., Wash.), 35 Am. B. R. 355, 224 Fed. 283.

Under the law of North Carolina, which declares every mortgage or deed of trust to be invalid as against creditors until its registration, a trustee in bankruptcy may avoid and set aside a chattel mortgage which, although given before and for a consideration passing at the time of its execution, was not recorded until within four months prior to the beginning of bankruptcy proceedings, and which operated at the date of its registration to give the mortgagee a preference over other creditors. Brigman v. Covington (C. C. A., 4th Cir.), 33 Am. B. R. 644, 219 Fed. 500.

Under the law of Minnesota, a chattel mortgage vests the legal title to the mortgaged property in the mortgagee, and, although unrecorded, is good as against general creditors of the mortgagor who have not seized the mortgaged property by legal process or acquired some lien upon it. Title Guaranty & Surety Co. v. Witmire (C. C. A., 6th Cir.), 28 Am. B. R. 235, 195 Fed. 41.

A trust receipt under which money is advanced to a manufacturer for the purchase of property, is so far in the nature of a conditional sale as to fall within the Ohio statute. Matter of Bettman-Johnson Co. (C. C. A., 6th Cir.), 42 Am. B. R. 128, 250 Fed. 657.

43. In re Bellevue Pipe & Foundry Co. (Ref., Ohio), 22 Am. B. R. 97, citing Ohio cases. See also In re Braselton (D. C., Ga.), 22 Am. B. R. 419, 169 Fed. 960; Williamson v. Richardson (C. C. A., 9th Cir.), 30 Am. B. R. 559, 205 Fed. 245; Covington v. Brigman (D. C., N. Car.), 32 Am. B. R. 35, 210 Fed. 499; Matter of P. J. Sullivan Co., Inc. (D. C., N. Y.), 41 Am. B. R. 189, 247 Fed. 139, *aff'd* 42 Am. B. R. 530, 254 Fed. 660; Matter of Schilling & Loller (D. C., Ohio), 41 Am. B. R. 698, 251 Fed. 972. See Am. Bankr. Dig., § 442.

44. In re Bement (C. C. A., 7th Cir.), 22 Am. B. R. 616, 172 Fed. 98; In re Burke (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994; In re Dancy Hardware & Furniture Co. (D. C., Ala.), 28 Am. B. R. 444, 198 Fed. 336.

45. Stellwagen v. Clum (C. C. A., 6th Cir.), 38 Am. B. R. 904, 218 Fed. 730. See also Matter of Schilling & Loller (D. C., Ohio), 41 Am. B. R. 688, 251 Fed. 972.

Sale to person living with bankrupt.—Where a bankrupt and his wife lived with his mother-in-law, a sale of personal property made by him in good faith to her is not void as to creditors under the law of Pennsylvania, upon the ground that there was no obvious change of possession, since under the circumstances a change of possession was not practicable. Matter of Komara (C. C. A., 3d Cir.), 42 Am. B. R. 236, 251 Fed. 47.

46. State Bank v. Cox (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91; Cruchet v. Red Rover Co. (C. C., Mass.), 18 Am. B. R. 814, 155 Fed. 486; Clay v. Waters (C. C. A., 8th Cir.), 24 Am. B. R. 293, 178 Fed. 389; Schuapp v. Miller (D. C., Ore.), 30 Am. B. R. 699, 206 Fed. 575.

47. Duffy v. Charak. 236 U. S. 97, 34 Am. B. R. 5, 59 L. Ed. 483, 35 Sup. Ct. 264.

under a statute requiring a contract for the sale of personal property, where the title is to remain in the seller, and the possession in the purchaser, to be filed, that an unfiled contract for the sale of goods intended for resale, with reservation of title in the vendor until payment of the purchase price, is invalid as against general creditors of the vendee; in such a case the trustee in bankruptcy of the vendee may contest the validity of such contract in behalf of such creditors.<sup>44</sup> Where there has been no actual change of possession but circumstances, as where the property was marked as belonging to the purchaser, indicate that title has been passed under a bill of sale, the trustee does not take title, although the bill of sale was not recorded.<sup>45</sup> Possession of the property by the mortgagee, taken after the filing of the petition in bankruptcy, cannot avail the mortgagee as against the trustee in bankruptcy.<sup>46</sup> But the holder of an unrecorded chattel mortgage may take possession of the property, subject to possession by an officer of a State court under an attachment, so as to render the mortgage valid under a State law providing that an unrecorded mortgage is invalid against third parties unless the property is in the possession of the mortgagee.<sup>47</sup>

(IV) *Withholding from record or filing.*—Where chattel mortgages are withheld from record contrary to the provisions of a statute for the purpose of enabling the mortgagor to preserve his credit, such mortgages are not entitled to priority of payment in bankruptcy over claims arising subsequent to the execution of the mortgages and before they were recorded.<sup>48</sup> An agreement to withhold from record, for the purpose and with the effect of securing credit not justified by the debtor's financial status, is evidence of fraud which is of itself sufficient to vitiate the transfer.<sup>49</sup> But the failure to promptly

43. *Clayton v. Exchange Bank of Macon* (C. C. A., 5th Cir.), 10 Am. B. R. 173, 121 Fed. 630; *Guras v. Porter* (D. C., Cal.), 9 Am. B. R. 271, 118 Fed. 668; *In re Andrae Co.* (D. C., Wis.), 9 Am. B. R. 135, 117 Fed. 561; *Orr v. Park* (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683; *In re Jacobson & Perrill* (D. C., Ga.), 29 Am. B. R. 603, 200 Fed. 812; *National Bank of Bakersfield v. Moore* (C. C. A., 9th Cir.), 41 Am. B. R. 409, 247 Fed. 913; *Stewart v. Asbury* (Mo. Ct. of App.), 41 Am. B. R. 387, 201 S. W. 949.

*Withholding from record.*—A trust deed or mortgage, executed by a corporation as security against indorsements of notes, withheld from record for the purpose of avoiding publicity and injury to the credit of the corporation, and not mentioned in a bill of sale to the bankrupt, was not a valid incumbrance on the property purchased as against the bankrupt, and did not constitute a valid consideration for the delivery of bonds by the bankrupt to the indorser, who was a director of the bankrupt. *Butterfield v. Woodman* (C. C. A., 1st Cir.), 34 Am. B. R. 510, 223 Fed. 956, modifying 33 Am. B. R. 154, 216 Fed. 208.

*Agreement to withhold.*—Mortgages with-

held from record by agreement for the purpose of enabling the mortgagor to preserve his credit, are fraudulent as against subsequent creditors. *Hawkins v. Dannenberg Co.* (D. C., Ga.), 37 Am. B. R. 262, 234 Fed. 752.

49. *In re Duggan* (D. C., Ga.), 25 Am. B. R. 105, 182 Fed. 252, *affd.* 25 Am. B. R. 479, 183 Fed. 405; *Orr v. Park* (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683; *McAtee v. Shade* (C. C. A., 8th Cir.), 26 Am. B. R. 151, 163, 185 Fed. 442; *In re Bothe* (C. C. A., 8th Cir.), 23 Am. B. R. 151, 173 Fed. 597; *Fourth Nat'l Bank v. Willingham* (C. C. A., 5th Cir.), 32 Am. B. R. 159, 213 Fed. 219; *Covington v. Brigman* (D. C., N. Car.), 32 Am. B. R. 35, 210 Fed. 499; *Matter of National Boat & Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208.

*Secret agreement to withhold chattel mortgage from record; void as to both prior and subsequent creditors.*—Where a bankrupt gave a chattel mortgage to a creditor with a secret agreement that the same should be withheld from the record, and which was so withheld for a period of many months, during which time other creditors, unaware of this undisclosed mortgage, sold him goods,

record or file a mortgage is not in itself fraudulent as to other creditors, where there is no proof of fraudulent intent.<sup>50</sup> In some jurisdictions and under some statutes it must affirmatively appear in order to invalidate the mortgage that it was withheld from record by agreement, or that some prejudice resulted to creditors on account of its not having been filed for record.<sup>51</sup>

(V) *Recording or filing within four months' period.*—In Massachusetts a chattel mortgage made prior to the four months' period and recorded within that period is good as against the mortgagor's trustee in bankruptcy.<sup>52</sup> The same rule apparently exists in Maine under a similar statute.<sup>53</sup> The contrary rule, however, is maintained in North Carolina,<sup>54</sup> Missouri,<sup>54a</sup> and New Jersey.<sup>54b</sup> A failure to record a real property mortgage until after the adjudication of the bankrupt mortgagor and the appointment of his trustee has been

which they had refused to do while a prior mortgage to the same mortgagee was on record, and which, for that reason, was canceled of record and the mortgage in question given, the mortgage was fraudulent and void, not only as to subsequent creditors, but as to prior creditors as well. In *re Duggan* (C. C. A., 5th Cir.), 25 Am. B. R. 479, 183 Fed. 405, affg. 25 Am. B. R. 105, 182 Fed. 252.

50. *Bean v. Orr* (C. C. A., 5th Cir.), 25 Am. B. R. 400, 182 Fed. 599, revg. In *re Tysor-Cheatham Mercantile Co.*, 24 Am. B. R. 434, 178 Fed. 733, and distinguishing *Clayton v. Exchange Bank* (C. C. A., 5th Cir.), 10 Am. B. R. 173, 121 Fed. 630, 57 C. C. A. 656. Compare In *re Sturtevant* (C. C. A., 7th Cir.), 26 Am. B. R. 574, 188 Fed. 196.

51. *Deland v. Miller & Cheney Bank*, 11 Am. B. R. 744, 119 Iowa, 368; In *re Williams* (D. C., Ga.), 9 Am. B. R. 731, 120 Fed. 542. See also *Hawkins v. Dannenberg* (C. C. A., 5th Cir.), 42 Am. B. R. 332, 253 Fed. 529.

Intervention of bankruptcy before time for recording contract of conditional sale has expired.—Under the requirement of § 3394 of Civil Code of Alabama of 1907 that where personal property is delivered from without the State to a purchaser under a contract of conditional sale whereby the vendor retains title until payment of the purchase price the contract must, within three months of the time the property subject to the condition comes into the State, be recorded, the failure to record such a contract within the stated period avoids the condition in favor of the purchaser's trustee in bankruptcy, though at the time bankruptcy intervened the property had not been within the State for the full period of three months allowed by the statute for the purpose of recording. In *re Dancy Hardware & Furniture Co.* (D. C., Ala.), 28 Am. B. R. 444, 198 Fed. 336.

Rights of creditors subsequent to unrecorded instrument; withholding from record.—Under the law of Iowa a creditor, subsequent to an unrecorded instrument, has no equity and no right to assert a claim superior to the rights accruing under the unrecorded instrument, unless before record, he acquires a lien by attachment, execution or otherwise;

but, he has the right to allege that the unrecorded instrument was withheld from record as part of a fraudulent scheme to procure credit. Where conditional contracts were filed for record before the filing of a petition in bankruptcy, the trustee in bankruptcy acquired no rights greater than those which would be acquired by creditors who on the day that the petition in bankruptcy was filed secured a lien by attachment or otherwise. A mortgage, executed more than four months before the bankruptcy petition is filed, is valid as against the trustee, even though the same is not recorded until three days previous to the filing of the petition in bankruptcy, where there is no claim of preference. *Emerson-Brantingham Implement Co. v. Lawson* (D. C., Iowa), 38 Am. B. R. 344, 237 Fed. 877.

52. *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74, 49 L. Ed. 956, 25 Sup. Ct. 567. The rule in Ohio seems to be the same. In *re First Nat. Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62.

Recording mortgage within four months' period.—A mortgage executed and delivered by an insolvent debtor more than four months prior to the filing of his voluntary petition, but not recorded within the statutory four months, has been held a valid and subsisting lien as against the trustee. In *re Wright* (D. C., Ga.), 2 Am. B. R. 364, 96 Fed. 187; *Matter of Virgin* (D. C., Ga.), 35 Am. B. R. 494, 224 Fed. 128.

53. In the case of *Matter of Marriner* (D. C., Me.), 34 Am. B. R. 444, 220 Fed. 542, it was held that since, under the Maine statute, a chattel mortgage, made in good faith, is valid against all parties who, previous to the date of its record, have not acquired a lien by attachment, levy, or some such proceeding, it is valid as to creditors who extend credit to the mortgagor prior to its record, where it appears that it was not withheld from record for the purpose of giving the mortgagor a fictitious credit, and that the subsequent record was not made in contemplation of bankruptcy, or with any corrupt purpose. See also *De Laval Separator Co. v. Jones* (Me. Sup. Ct.), 41 Am. B. R. 440, 102 Atl. 968.

54. *Brigman v. Covington* (C. C. A., 4th Cir.), 33 Am. B. R. 644, 219 Fed. 500.

54a. *Stewart v. Ashbury* (Mo. Ct. of App.), 41 Am. B. R. 387, 201 S. W. 949.

54b. *Matter of Capital City Cap Co.* (D. C., N. J.), 41 Am. B. R. 604, 251 Fed. 664.

held, under the Pennsylvania rule, to deprive the mortgagee of his lien as against the trustee.<sup>55</sup>

(VI) *Place of filing or recording.*—It has been held in Massachusetts under a statute (Rev. Laws, Mass., ch. 198, § 1) requiring a chattel mortgage to be recorded in the office of the clerk of the municipality where the mortgagor has his principal place of business and also in the clerk's office of the municipality where he lives, that a failure to file in the latter place defeats the lien of the mortgage as against the trustee in bankruptcy of the mortgagor, and such trustee is not estopped by the fact that the mortgagor stated in the mortgage that he lived in the municipality where the mortgage was filed.<sup>56</sup> A corporation is deemed a resident of the State wherein it is incorporated and its principal place of business is situated, within the meaning of an act relating to recording instruments, and the county of its residence must be taken to be the county in which such place of business is located.<sup>57</sup> The trustee in bankruptcy of the corporation representing the creditors for whose protection the recording act was passed may assail the validity of a chattel mortgage which was not recorded in the proper county.<sup>58</sup> Where a chattel mortgage is properly recorded in the State where it is made, the subsequent removal of the property to another State, with the consent of the mortgagee, does not affect the validity of the lien, although the mortgage was not recorded in the second State.<sup>59a</sup>

(VII) *Unrecorded contracts for conditional sale.*—Where a State statute provides that an unrecorded contract for the conditional sale of chattels, with reservation of title, is good as between the parties, such contract is not void as to creditors who have not acquired a specific lien, and under such statute the trustee of the bankrupt vendee has not acquired such a lien by the adjudication of the vendee, and may not avoid the contract.<sup>59</sup> But the opposite is true where the State law provides that, in order to be valid and binding as against creditors, instruments evidencing conditional sales must be filed of record.<sup>59a</sup> Where a conditional sale consists of two separate written instruments and one only was recorded, and the unrecorded one materially altered

55. *In re Lukens* (D. C., Pa.), 14 Am. B. R. 683, 133 Fed. 188. Compare as to mortgage executed in good faith but not recorded, *Rogers v. Page* (C. C. A., 8th Cir.), 15 Am. B. R. 502, 140 Fed. 596, 72 C. C. A. 164.

56. *Matter of McDonald* (D. C., Mass.), 23 Am. B. R. 51, 173 Fed. 90.

57. *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, 36 Sup. Ct. 466, affg. 32 Am. B. R. 381, 212 Fed. 688.

58. *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, 36 Sup. Ct. 466, affg. 32 Am. B. R. 381, 212 Fed. 688.

59a. *Hoyt v. Zibell* (C. C. A., 7th Cir.), 43 Am. B. R. 538, 259 Fed. 186; *Matter of Davies* (D. C., Tenn.), 43 Am. B. R. 455, 256 Fed. 52.

59. *Matter of Terrell* (C. C. A., 8th Cir.), 40 Am. B. R. 713, 246 Fed. 743; *De Laval Separator Co. v. Jones* (Me. Sup. Ct.), 41 Am. B. R. 440, 102 Atl. 968; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 632, 50 L. Ed. 782, 26 Sup. Ct. 461; *Matter of Superior Drop Forge & Mfg. Co.* (D. C., Ohio), 31 Am. B. R. 455, 208 Fed. 813. The statute under consideration in this case was similar to that under consideration in the following cases, where a different rule was applied: *In re Press Post Printing Co.* (D. C., Ohio), 13 Am. B. R. 797, 134 Fed. 998; *In re Dunn Hardware & Furniture Co.* (D. C., N. Car.), 13 Am. B. R. 147, 132 Fed. 719. As to property sold on condition with possession in purchaser, see discussion under § 70, *post*, head-

ing, "Property sold to bankrupt on condition."

Conditional sale, what constitutes.—Where a contract in writing, under which goods were delivered to bankrupts in Arkansas, to be resold in the usual course of business, provided that the title to and right of possession thereof, and all proceeds of resales thereof, should be vested and remain in the seller until payment of the purchase price, and that except for the right to resell the goods in the ordinary course of business, the bankrupts should not remove them from the city in which they were doing business, an obligation arose upon the part of the bankrupts to account for and pay over what was collected of the proceeds of resales, and the transaction constituted a conditional sale. The trustee is bound by the terms of such contract. *Bryant v. Swafford Bros. Dry Goods Co.*, 214 U. S. 279, 22 Am. B. R. 111, 53 L. Ed. 997, 29 Sup. Ct. 614. See also *In re McGhee* (D. C., Ga.), 21 Am. B. R. 656, 166 Fed. 928.

Sale dependent upon condition subsequent.—Since a conditional sale may be made to depend upon a condition subsequent as well as a condition precedent, a bill of sale, in the form of a deed of indenture which, after conveying personal property with covenants of warranty, provides that in default in payment by the vendee when due the vendors may declare the sale forfeited and retake the property, makes the sale conditional, and, the condition having been broken by default in payment, the vendors have the right to retake the property.



the legal effect of the other, the provisions of the statute requiring record have not been complied with.<sup>60</sup>

(VIII) *Effect of amendment of § 47-a (2).*—Under § 47-a (2), as amended by the act of 1910, trustees have the rights and remedies of lien creditors or judgment creditors as against unrecorded transfers or incumbrances.<sup>61</sup> So that equities or rights in favor of such creditors as against a chattel mortgage or other instrument which for want of record or other reason is invalid as to them, may be asserted with the same force and effect by the trustee of the bankrupt debtor.<sup>62</sup> Prior to the amendment of 1910 to § 47-a (2) it was held under the New York statute that an unfiled conditional sale contract accompanied by delivery of the goods, being void only as against "subsequent purchasers, pledgees and mortgagees in good faith," was valid as against a trustee in bankruptcy.<sup>63</sup>

d. *Invalid for other reasons.*—Where for a reason contained in a State statute a lien is invalid as against a person's creditors, it is also invalid as against such creditors in bankruptcy. As where it is provided that a chattel mortgage, containing a provision for the sale of the goods mortgaged, and the use of the proceeds thereof other than in payment of the debt, is void as to creditors; in such a case the mortgage is not valid as against the creditors

In re Lutz (D. C., Ark.), 28 Am. B. R. 649, 197 Fed. 492.

*Effect of unfiled contract.*—A vendor, under a contract of conditional sale which provides that he shall be entitled to possession of the property whenever he may feel insecure or when the vendee may become insolvent or bankrupt, is entitled to the possession of property sold thereunder, as against the trustee in bankruptcy of the vendee and other creditors, although the contract was not filed until a few days before the bankruptcy of the vendee, when it appears that no creditors were misled thereby. Deere Plow Co. v. Edgar Farmer Store Co. (Wis. Sup. Ct.), 31 Am. B. R. 156, 143 N. W. 194. Under New Jersey statute, see Matter of Vandewater Co. Ltd. (D. C., N. J.), 33 Am. B. R. 671, 219 Fed. 627.

Under the recording law of Kansas a conditional sale contract is valid between the parties, whether filed for record or not, but is void as against a creditor who fastens a lien upon the property by execution, attachment, or like legal proceedings before the contract is recorded. Bailey v. Baker Ice Machine Co. (U. S. Sup. Ct.), 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 276, 36 Sup. Ct. 50.

*Washington statute.*—Under section 47a (2) of the bankruptcy act, as amended in 1910, creating a lien in favor of the trustee upon all property in the custody, or coming into the custody of the bankruptcy court, the lien of a trustee supercedes any rights existing in favor of a conditional sale, a memorandum of which was not recorded pursuant to section 8670 of the Washington Code. Matter of Pacific Electric & Automobile Co. (D. C., Wash.), 35 Am. B. R. 222, 224 Fed. 220.

*Effect of permission to sell.*—Where a written contract between a manufacturer and a dealer, under which automobile parts were delivered to the latter, contained a formal reservation of title, but the understanding when the contract was made and their subsequent course of dealing contradicted the written instrument, the written contract was held to be merely colorable and not enforceable against the dealers trustee in bankruptcy. Matter of Har-

rington (D. C., Mass.), 32 Am. B. R. 828, 212 Fed. 542.

*See.* In re King Motor Car Co. (Ref., Mich.), 31 Am. B. R. 172; Stewart v. Asbury (Mo. Ct. of App.), 41 Am. B. R. 387, 201 S. W. 949. Compare Smith v. Carukin (C. C. A., 6th Cir.), 44 Am. B. R. 278, 269 Fed. 51.

*See.* In re Bazemore (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236.

*Part of contract not recorded.*—Where the clause of a conditional sale contract retaining title in the vendor is not recorded the conditional sale is not valid against a trustee in bankruptcy. Matter of A. E. Savare Baking Co. (D. C., N. J.), 43 Am. B. R. 721, 269 Fed. 607.

*See* discussion under § 47a (2) and cases cited, *ante*.

*See.* Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, 36 Sup. Ct. 466; Lake View State Bank v. Jones (C. C. A., 7th Cir.), 40 Am. B. R. 148, 242 Fed. 821; Matter of P. J. Sullivan Co., Inc. (D. C., N. Y.), 41 Am. B. R. 189, 247 Fed. 139, *aff'd*, 42 Am. B. R. 530, 254 Fed. 600; Matter of Bettman-Johnson Co. (C. C. A., 6th Cir.), 42 Am. B. R. 128, 250 Fed. 657; Matter of Mutual Motors Co. (D. C., Mich.), 44 Am. B. R. 337, 260 Fed. 311.

The proceeds of property on which there is a lien, invalid for failure to record, must be distributed among all of the creditors of the bankrupt without distinction. Matter of Rosenthal (D. C., Ga.), 39 Am. B. R. 80, 238 Fed. 597.

Under the amendment of 1910 to section 47-a (2) of the Bankruptcy Act, which clothed the trustee with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, the trustee's lien cannot antedate the institution of bankruptcy proceedings, so as to affect the validity of a chattel mortgage executed more than four months prior to bankruptcy, but recorded within the four months' period. Matter of Virgin (D. C., Ga.), 35 Am. B. R. 494, 224 Fed. 128.

of the bankrupt mortgagor.<sup>64</sup> The trustee may attack the validity of such a mortgage, as conclusively as though fraudulent intent were shown to exist.<sup>65</sup> A collusive arrangement between the holders of liens and a bankrupt to keep such liens alive for the individual benefit of the bankrupt and against the interests of his creditors, will nullify the liens.<sup>66</sup> A contract for the conditional sale of a chattel is subject to the same rule.<sup>67</sup> Any defect in the execution of a chattel mortgage or other instrument, resulting in its invalidity, as where there was a failure to obtain the necessary consent of stockholders in case of a corporation, may be taken advantage of by the trustee, in behalf of the creditors.<sup>68</sup> So a pledge of property is not effective against the trustee where the property has not been delivered to the pledgee at the time of the filing of the petition.<sup>68a</sup> No part of this section makes invalid a chattel mortgage merely because it was given at a time when the mortgagor was insolvent, and within four months of the filing of the petition.<sup>68b</sup>

### III. SUBROGATION OF TRUSTEE TO RIGHTS OF CREDITORS.

a. **In general.**—Subsection *b* in effect provides that when a creditor is prevented by bankruptcy from enforcing his rights against a lien created, or attempted to be created, by his debtor, the trustee in bankruptcy is subrogated to the rights of such creditors for the benefit of the estate. This provision preserves for the benefit of the estate a right which some particular creditor had been prevented from enforcing by the intervention of the debtor's bankruptcy.<sup>69</sup> The subsection is doubtless declaratory of the rule at law.<sup>70</sup> This

63. *Holt v. Henley*, 232 U. S. 637, 32 Am. B. R. 161, 58 L. Ed. 767, 34 Sup. Ct. 459; *Matter of White's Express Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 74, 215 Fed. 894.

64. *In re National Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62; *In re Marine Construction & Dry Dock Co.* (D. C., N. Y.), 14 Am. B. R. 466, 135 Fed. 921; *Skillen v. Endelman*, 11 Am. B. R. 706, 39 Misc. 261, 79 N. Y. Supp. 413; *Dodge v. Nodin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363 (under Colorado statute); *In re Hull* (D. C., Vt.), 8 Am. B. R. 302, 115 Fed. 868; *In re Volence* (D. C., N. Y.), 27 Am. B. R. 914, 197 Fed. 232; *Matter of Purteel* (D. C., N. Y.), 32 Am. B. R. 824, 215 Fed. 191; *Matter of Swain* (D. C., N. Y.), 44 Am. B. R. 475, 259 Fed. 900.

Right of mortgagor to sell for own benefit; validity.—*In New York*, a chattel mortgage is not per se void because of a provision contained in it permitting the mortgagor to sell the mortgaged property provided the mortgage also requires the mortgagor on making sales to pay over the proceeds thereof and apply them to the payment of the mortgage debt; but a chattel mortgage given and filed is fraudulent and void as to creditors when accompanied by an agreement between the parties, whether found in the mortgage or not, which authorizes and permits the mortgagor to treat and deal with the mortgaged property as his own and to sell the same and use the proceeds or any part thereof for his own benefit. *In re Hartman* (D. C., N. Y.), 26 Am. B. R. 6, 189 Fed. 196.

Mortgagor permitted to sell and use proceeds; Wisconsin statute.—Where, under Wisconsin statute, a chattel mortgage is not valid as against creditors unless accompanied by an actual and continued possession of the property by the mortgagee, or the mortgage be filed, or, if the mortgagor remains in possession of a stock of goods, the mortgage shall cease to be a lien except as between the parties, unless the mortgagor shall file a statement every sixty days showing the amount of sales

therefrom, amount applied on mortgage and amount of new stock bought, a chattel mortgage, providing that the mortgagor may remain in possession of the stock of goods, applying the proceeds of sale thereof to its own use, providing for a sinking fund and stipulating that the mortgagee may consent to waive the requirements as to any payments into the sinking fund in his discretion, is fraudulent and void as to creditors, even in the absence of intentional bad faith, no statement of the amount of sales, amount of new stock bought and amount applied on the mortgage having been filed, as required by the Wisconsin statute. *In re Standard Telephone & Electric Co.*, 216 U. S. 545, 24 Am. B. R. 761, 54 L. Ed. 610, 30 Sup. Ct. 412.

65. *In re Standard Telephone & Electric Co.*, 216 U. S. 545, 24 Am. B. R. 761, 54 L. Ed. 610, 30 Sup. Ct. 412.

66. *In re Kyte* (D. C., Pa.), 25 Am. B. R. 337, 182 Fed. 166.

67. *In re Garcewich* (C. C. A., 2d Cir.), 8 Am. B. R. 149, 115 Fed. 87.

68. The provision of the New York Stock Corporation Law (sec. 6), requiring, except in certain cases, the consent of two-thirds of the stockholders of a corporation to the execution of a mortgage by the corporation may be taken advantage of by the trustee in bankruptcy of a corporation in contesting the validity of a chattel mortgage executed by its officers. *Matter of Progressive Wall Paper Corporation* (D. C., N. Y.), 37 Am. B. R. 207, 230 Fed. 171.

68a. *Matter of P. J. Sullivan Co., Inc.* (D. C., N. Y.), 41 Am. B. R. 189, 247 Fed. 139, *aff'd*, 42 Am. B. R. 530, 254 Fed. 660.

68b. *Matter of Schilling and Loller* (D. C., Ohio), 41 Am. B. R. 688, 251 Fed. 963, 972.

69. *In re New York Economical Printing Co.* (C. C. A., 2d Cir.), 6 Am. B. R. 615, 110 Fed. 518; *Matter of Schwelzer* (D. C., Pa.), 33 Am. B. R. 212, 217 Fed. 495.

70. Compare *In re Yukon Woolen Co.* (D. C., Conn.), 2 Am. B. R. 805, 96 Fed. 323.

provision of the statute does not transfer to the trustee the right of a judgment creditor to enforce an equitable lien acquired by the filing of a creditor's bill before bankruptcy proceedings were begun, or abate such creditor's right to prosecute suit.<sup>71</sup> The word "prevented," as used in this subsection, means prevented by the bankruptcy proceedings.<sup>72</sup> The trustee under subdivisions *a* and *b* of this section stands in the position of creditors.<sup>73</sup> He is in the precise situation of a junior judgment creditor with an execution lien, and has the right to invalidate a prior lien, either for *laches*, fraud or dormancy, as of the date of the filing of the petition in bankruptcy.<sup>74</sup> The trustee is not only invested with the title to the bankrupt's property, but since, after the filing of the petition, the creditors are powerless to pursue and enforce their rights, the trustee is vested with their rights of action with respect to all property of the bankrupt transferred or incumbered by him in fraud of his creditors.<sup>75</sup> A trustee is not, however, an innocent purchaser or a lien creditor, but, generally speaking, he takes the bankrupt's property subject to such claims and with such rights as the bankrupt himself had,<sup>76</sup> subject, of course, to the powers now conferred upon trustees by the amendment of § 47-a (2) by the act of 1910. Where because of the failure to record a mortgage certain equities exist in the property covered by such mortgage in favor of creditors, such equities follow the property into the hands of the trustee.<sup>77</sup> Where a bankrupt borrowed money upon collaterals in excess of the debt, the trustee may pay the debt out of the funds of the estate and become subrogated to the rights of the creditor, and upon a sale of the collaterals divide the surplus among the general creditors.<sup>78</sup> Other cases in point are referred to in the foot-note.<sup>79</sup>

**b. Is the trustee a "judgment creditor?"—(1) RULE UNDER FORMER ACT.—** The majority of cases under the law of 1867 held that, since the bankruptcy arrests proceedings in the State courts, the assignee (trustee), as the representative of the whole body of creditors, could bring any of that class of equitable actions where the existence of a judgment and execution returned

71. *Taylor v. Taylor*, 59 N. J. Eq. 86, 45 Atl. 440.

72. *In re Doran* (C. C. A., 6th Cir.), 18 Am. B. R. 760, 154 Fed. 467, modifying 17 Am. B. R. 799, 148 Fed. 327; *Matter of Schweitzer* (D. C., Pa.), 33 Am. B. R. 212, 217 Fed. 495.

73. *Matter of Gerstman & Bandman* (Spec. M., N. Y.), 17 Am. B. R. 882.

74. *Matter of Zels* (D. C., N. Y.), 36 Am. B. R. 581, 229 Fed. 472.

75. *In re Rodgers* (C. C. A., 7th Cir.), 11 Am. B. R. 79, 93, 125 Fed. 169, *revd.* on other grounds, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051, 25 Sup. Ct. 693; *Bush v. Export Storage Co.* (C. C., Tenn.), 14 Am. B. R. 138, 136 Fed. 918; *Mitchell v. Mitchell* (D. C., N. C.), 17 Am. B. R. 382, 389, 147 Fed. 280; *In re Bement* (C. C. A., 7th Cir.), 22 Am. B. R. 616, 172 Fed. 98; *In re Burke* (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994; *Reardon v. Rock Island Plow Co.* (C. C. A., 7th Cir.), 22 Am. B. R. 66, 168 Fed. 654; *Barrett v. Kaigler* (Ala. Sup. Ct.), 40 Am. B. R. 161, 78 So. 320; *Stewart v. Asbury* (Mo. Ct. of App.), 41 Am. B. R. 387, 201 S. W. 949. This subject is further discussed under Section Seventy of this work.

76. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782, 26 Sup. Ct. 481; *In re Fish Bros. Wagon Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 149, 151, 164 Fed. 553; *Foerstner*

*v. Citizens' Savings & Trust Co.* (C. C. A., 6th Cir.), 26 Am. B. R. 377, 186 Fed. 1; *In re Charles Town Light & Power Co.* (D. C., W. Va.), 29 Am. B. R. 721, 190 Fed. 846; *Matter of Roseboom* (D. C., N. Y.), 42 Am. B. R. 437, 253 Fed. 126.

77. *In re Wade* (D. C., Mo.), 26 Am. B. R. 169, 185 Fed. 664.

78. *Matter of Kessler* (C. C. A., 2d. Cir.), 37 Am. B. R. 325, 186 Fed. 127.

79. *In re Kenney* (D. C., N. Y.), 3 Am. B. R. 353, 97 Fed. 554; *In re Boston* (D. C., Neb.), 3 Am. B. R. 388, 98 Fed. 587; *In re Howland* (D. C., N. Y.), 6 Am. B. R. 495, 109 Fed. 869; *Barnes Mfg. Co. v. Norden* (Sup. Ct., N. J.), 7 Am. B. R. 553, 67 N. J. Law 493; *Patten v. Carley*, 8 Am. B. R. 432, 69 N. Y. App. Div. 423, 74 N. Y. Supp. 993; *In re Beede* (D. C., N. Y.), 14 Am. B. R. 697, 138 Fed. 441; *Receivers of Virginia Iron, etc., Co. v. Staake* (C. C. A., 4th Cir.), 13 Am. B. R. 281, 133 Fed. 717; *Kobre Assets Corp. v. Baker* (N. Y., Sup. Ct.), 39 Am. B. R. 276, 178 App. Div. 62; *Robertson v. Schlotschauer* (C. C. A., 7th Cir.), 40 Am. B. R. 237, 243 Fed. 342; *Matter of American Paper Co.* (D. C., N. J.), 42 Am. B. R. 716, 255 Fed. 121; *Matter of Tietje* (D. C., N. Y.), 44 Am. B. R. 638, 263 Fed. 917.

unsatisfied are necessary elements; *i. e.*, that he was in effect, if not in name, a judgment creditor.<sup>80</sup>

(2) **RULE UNDER PRESENT ACT.**—The rule formerly existing has been applied under the present act.<sup>81</sup> This seems justified in view of the words "may enforce such rights of such creditor for the benefit of the estate." The phrasing of § 70-e, limiting actions to avoid transfers to such suits as a creditor could have brought, again opened the question. Thus, it has been held in a well-considered case,<sup>82</sup> that only a judgment creditor can share in property of the bankrupt, affected by a chattel mortgage not duly refiled as provided in the New York statute, *i. e.*, that the trustee is a judgment creditor only so far as he represents judgment creditors, the New York law denying to creditors whose debts are not reduced to judgment the remedy of a suit to set it aside. There never has been a doubt about the trustee's power to sue to set aside a transaction which amounts to a fraud in fact, whether on the law or on the creditors; and that, too, irrespective of whether any of the creditors had obtained judgments. Where, however, the wrong on creditors is purely constructive, and the remedy is denied until certain statutory preliminaries are observed, the case was different. The creditor whose debt was not in judgment could, of course, complain that the bankruptcy prevented him from observing those preliminaries, but, in a vast majority of cases, the judgment creditors might have rejoined that the complaining creditor might have had a judgment had he been vigilant and was, therefore, not in a position to ask equity. Such a distinction harmonized with the doctrine that the trustee took the assets in the "plight and condition" they were in on the day of bankruptcy.<sup>83</sup>

(3) **EFFECT OF AMENDMENT OF § 47-A (2) BY AMENDMENT OF 1910.**—Section 47-a (2), as amended by the act of 1910, has substantially modified the rules declared as to the power of a trustee to take advantage of the privileges accorded a judgment creditor, as against a lien which is invalid for want of record. The provisions of this subsection, as so amended, should be construed with subsection *b* of this section. It is there provided that the trustee "as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." The purpose and effect of this amendment has already been considered.<sup>84</sup> This amendment effectually disposes of any doubt which may have existed as to the right of

80. *Barker v. Barker's Assignee*, Fed. Cas. 986; *Beecher v. Clark*, Fed. Cas. 1,223; *In re Duncan*, Fed. Cas. 4,131; *In re Metzger*, Fed. Cas. 9,510. See under the present act, *Skilton v. Codrington*, 15 Am. B. R. 810, 185 N. Y. 80, 77 N. E. 790. *Contra*: *In re Collins*, Fed. Cas. 3,007; *Cook v. Whipple*, 55 N. Y. 150. But see *post* in this paragraph. Compare *Platt v. Stewart*, Fed. Cas. 11,277, as *revid.* as *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 954.

81. Compare *In re McNamara*, 2 N. B. N. Rep. 341; *In re Harrison*, 2 N. B. N. Rep. 541.

82. *In re New York Economical Printing Co.* (C. C. A., 2d Cir.), 6 Am. B. R. 615,

110 Fed. 514. Compare *In re Schmitt* (D. C., Ohio), 6 Am. B. R. 150, 109 Fed. 267, *affd.* as *In re Shirley* (C. C. A., 6th Cir.), 7 Am. B. R. 299, 112 Fed. 301; *In re Haase* (D. C., Tex.), 30 Am. B. R. 83, 206 Fed. 789.

83. This rule has been held not to apply to liens, which, although valid as to the bankrupt, are invalid as to creditors. *First Nat. Bank v. Staake*, 202 U. S. 141, 15 Am. B. R. 639, 50 L. Ed. 967, 26 Sup. Ct. 580. See *Corey v. Blackwell Lumber Co.* (Idaho Sup. Ct.), 31 Am. B. R. 135, 135 Pac. 742.

84. See discussion under Section Forty-seven of this work.

a trustee to proceed as a judgment creditor against conveyances invalid for failure to record or file, or because of fraud as against creditors.<sup>85</sup>

#### IV. VALID LIENS.

a. **In general.**—Subsection *d* is also declaratory of the law. It is intended to preserve liens created in good faith, "and not in contemplation of a fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice." It is the converse of subsections *c*, *e* and *f*, and is emphasized by subsection *b*, the saving clause in the body of subsection *e* and the proviso clause at the end of subsection *f*. It is much broader than the corresponding clauses of the act of 1867, which protected liens by mortgage only.<sup>86</sup>

b. **Good faith of transaction.**—"Good faith,"<sup>87</sup> and "not in contemplation of or in fraud upon the bankruptcy act," are of the essence of this subsection without which the liens therein mentioned cannot be upheld even though there be a present consideration for them.<sup>88</sup> For instance, where an assignment of accounts due a corporation is made by the corporation to its president to secure moneys previously advanced by him to the corporation, he knowing at the time that the corporation was in a precarious condition, there is an absence of good faith which will render the assignment ineffectual as a lien.<sup>89</sup> Want of present consideration or failure to record where record is necessary to impart notice are important. These are often elements of proof on the

<sup>85</sup>. In re Bazemore (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236; In re Calhoun Supply Co. (D. C., Ala.), 26 Am. B. R. 528, 189 Fed. 537; In re Buchner (D. C., Ill.), 29 Am. B. R. 179, 202 Fed. 979; In re Geiver (D. C., So. Dak.), 28 Am. B. R. 413, 193 Fed. 128; Matter of Fitzhugh Hall Amusement Co. (D. C., N. Y.), 36 Am. B. R. 289, 228 Fed. 169, *affd.* 36 Am. B. R. 493, 230 Fed. 811; Matter of Zeis (D. C., N. Y.), 36 Am. B. R. 581, 229 Fed. 472; Lake View State Bank v. Jones (C. C. A., 7th Cir.), 40 Am. B. R. 148, 242 Fed. 821; National Bank of Bakersfield v. Moore (C. C. A., 9th Cir.), 41 Am. B. R. 409, 247 Fed. 913.

<sup>86</sup>. Act of 1867, § 14, R. S., § 5052.

<sup>87</sup>. In re Soudans Mfg. Co. (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 804; Matter of Baar (C. C. A., 2d Cir.), 32 Am. B. R. 465, 213 Fed. 628.

**Protection of liens.**—It is the intention of the bankruptcy act to protect all liens, whether arising by contract or by statute, except only such as are expressly declared annulled or invalidated. It is not intended to avoid a lien secured by the act of labor and preserved and enforced by legal proceedings especially where such lien attached more than eight months before proceedings in bankruptcy were commenced, and the action to foreclose the lien was commenced long prior thereto. Tube City Mining & Milling Co. v. Otterson (Ariz. Sup. Ct.), 35 Am. B. R. 500, 148 Pac. 203. See also Border Nat. Bank v. Coupland (C. C. A., 5th Cir.), 39 Am. B. R. 165, 240 Fed. 355.

<sup>88</sup>. Powell v. Gate City Bank (C. C. A., 8th Cir.), 24 Am. B. R. 316, 178 Fed. 609; Hardcastle v. National Clothing Co. (Tenn. Sup. Ct.), 38 Am. B. R. 719, 191 S. W. 524; Matter of Stone (Ref., Mass.), 37 Am. B. R. 138; Lott v. Salisbury (C. C. A., 4th Cir.), 37 Am. B. R. 796; Matter of Baar

(C. C. A., 2d Cir.), 32 Am. B. R. 465, 213 Fed. 628.

**Mortgage within four months' period to secure existing debt; present consideration.**—A corporation, subsequently bankrupt, borrowed money from a bank in which its officers held office. The amount of the indebtedness was found to be largely in excess of that which, by the statutes of the State, the bank might loan to one corporation. Individual notes were accepted by the bank in place of the corporation's obligations. These being criticised by the bank examiner, the bank's cashier thereafter individually indorsed such notes, and thus became their guarantor, the consideration being founded on the abandonment of complaints on the part of the examiner. Thereafter these notes were taken up by the cashier who assumed the indebtedness of the corporation to the bank and took the note of the corporation to himself, secured by a mortgage which he did not place on record until shortly before the bankruptcy. The officers of the corporation and the cashier knew that it was insolvent. It became a bankrupt within four months from the giving of the mortgage. Held, that the cashier by indorsing said notes became the creditor of the corporation, and that the unrecorded mortgage was not given by the corporation nor accepted by him in good faith for a present consideration, under § 67-d of the bankruptcy act, but was a voidable preference under § 60-b thereof. McAttee v. Shade (C. C. A., 8th Cir.), 26 Am. B. R. 151, 185 Fed. 442.

<sup>89</sup>. In re Richards (Ref., D. C., Sup. Ct.), 38 Am. B. R. 636.

question of good faith.<sup>90</sup> The amendment of 1910 inserted the words "to the extent of such present consideration only," thus preserving the security which a creditor has obtained only so far as the same is based upon the original consideration.<sup>91</sup> A mortgage given to secure indorsers upon the bankrupt's notes is for a present consideration under this clause, since such indorsers became creditors contingently at the time of their indorsement.<sup>92</sup> As will soon be seen, *bona fides* is not material where the lien is through legal proceedings. The universal recognition of the rule of law here phrased into the statute results in cases construing it being rare, perhaps unnecessary.

c. **Jurisdiction of bankruptcy court to determine validity of lien.**—One who, prior to the filing of a petition in bankruptcy, has acquired by other means than the legal proceedings specified in § 67, c and f, a lien upon the property of a party subsequently adjudged bankrupt, is an adverse claimant, and is entitled to the rights and privileges of such claimant, to the same extent as one who has acquired a claim of title to property from such a party.<sup>93</sup> A bankruptcy court has no authority or jurisdiction in the absence of lawful possession of the property by its officers to draw to itself and determine in a summary proceeding the adverse claim of one claiming for his own benefit a lien upon or title to property of the bankrupt which was created, or is claimed to have been created, otherwise than by the legal proceeding specified in subsections c and f of this section prior to the filing of the petition in bankruptcy.<sup>94</sup> A lienholder may establish his lien in any court having jurisdic-

<sup>90</sup> Compare sub. 2; In re Soudans Mfg. Co. (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 804; In re Durham (D. C., Md.), 8 Am. B. R. 115, 114 Fed. 750.

<sup>91</sup> In re Foster (D. C., Vt.), 25 Am. B. R. 96, 181 Fed. 703.

Present consideration covers interest and principal of note secured by mortgage but not an attorney's fee stipulated for in the note. Matter of Mobile Chair Mfg. Co. (D. C., Ala.), 40 Am. B. R. 134, 245 Fed. 211.

<sup>92</sup> In re Farmers' Supply Co. (D. C., Ohio), 22 Am. B. R. 460, 170 Fed. 502.

<sup>93</sup> American Trust & Savings Bank v. Ruppe (C. C. A., 8th Cir.), 38 Am. B. R. 621, 237 Fed. 581; In re Rathman (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913; Stone-Ordean-Wells Co. v. Mark (C. C. A., 8th Cir.), 35 Am. B. R. 663, 227 Fed. 975; In re Shea (D. C., Ky.), 31 Am. B. R. 697, 211 Fed. 365, 369; Jaquith v. Rowley, 138 U. S. 620, 621, 625, 626, 47 L. Ed. 620, 23 Sup. Ct. 369; Harris v. First National Bank, 216 U. S. 382, 23 Am. B. R. 632, 54 L. Ed. 528, 30 Sup. Ct. 296; In re McMahon (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 684; Frank v. Vollkommer, 205 U. S. 521, 17 Am. B. R. 806, 51 L. Ed. 911, 27 Sup. Ct. 596; Carling v. Seymour Lbr. Co. (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; In re Silberhorn (D. C., Ill.), 5 Am. B. R. 568, 105 Fed. 899. See also Am. Bankr. Dig. § 469.

**Assignment of fire insurance policy.**—Where a fire insurance policy on a stock in trade is made payable to the vendor as his interest may appear in pursuance of the contract of sale, the assignment of the policy is for a present consideration and comes within

the protection of this section. Sullivan v. Meyer (Tenn. Sup. Ct.), 39 Am. B. R. 314, 193 S. W. 124.

<sup>94</sup> Matter of Atkinson-Kreco Grocery Co. (D. C., Ga.), 39 Am. B. R. 819, 245 Fed. 181; In re Rathman (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, 925-927, 106 C. C. A. 253, 265-267; First National Bank v. Title & Trust Co., 198 U. S. 280, 281, 282, 14 Am. B. R. 102, 49 L. Ed. 1051, 25 Sup. Ct. 693; Louisville Trust Co. v. Comigor, 184 U. S. 18, 25, 7 Am. B. R. 421, 46 L. Ed. 413, 22 Sup. Ct. 293; Murphy v. John Hofman Co., 211 U. S. 562, 569, 570, 21 Am. B. R. 487, 53 L. Ed. 327, 29 Sup. Ct. 154; Tripp v. Mitschrich (C. C. A., 8th Cir.), 31 Am. B. R. 662, 211 Fed. 424, 426, 128 C. C. A. 96, 98. In the case of American Trust & Savings Bank v. Ruppe (C. C. A., 8th Cir.), 38 Am. B. R. 621, 237 Fed. 581, it appeared that at the time of the filing of the petition in bankruptcy a bank had a lien upon the mortgaged property which had been created prior to that time without suits or legal proceedings and had the possession of the mortgaged property. The action in replevin did not create the lien of the bank. That lien was created in May, 1914, by the act of the parties to the mortgage and the laws of the State of New Mexico, the petition in bankruptcy being filed in October, 1914. The bank was adverse claimant in possession when the petition for the adjudication in bankruptcy was filed. Neither the bankruptcy court nor any of its officers ever acquired any possession of the mortgaged property or of its proceeds. It was held that the bank had the right to the trial of its claim in a plenary action according to the course of the common law, or in a suit in equity according to the rules and principles of equity jurisprudence, and the bankruptcy court was without authority or jurisdiction in the absence of the consent of the bank to adjudge in a summary proceeding either the validity or the extent of its claim.

**Jurisdiction of Bankruptcy Court.**—Although under section 67-d of the bankruptcy act, valid liens are protected and preserved in bankruptcy, the holder of a mortgage or a security deed takes his security subject to the chance that proceedings in bankruptcy may be instituted and that the property held

tion;<sup>95</sup> although if the property is in possession of the court the bankruptcy court has jurisdiction,<sup>96</sup> and under certain conditions may proceed summarily as to such property.<sup>97</sup>

**d. Miscellaneous valid liens.**—The rule seems to be that where the lien does not contravene the bankruptcy law, and is recognized by the State law, it will be preserved.<sup>98</sup> Likewise, a vendor's lien on land will be valid against a trustee in bankruptcy and courts of bankruptcy will recognize and give effect to such a lien provided for by the statutes of a State, in the absence of some act of the vendor or claimant inconsistent with the purpose of claiming a lien or with its continued existence.<sup>99</sup> And liens for the wages of employees under a State law are not to be affected by the act, and such liens are to be given full force and effect, although such wages are entitled to priority of payment under § 64-b (5); where such liens exist they must be recognized and satisfied in full out of the proceeds of the property to which they attach, without regard to the priority of other claims which precede them under the terms of such § 64-b.<sup>100</sup> A lien created by a verbal agreement, made

by him as security may be subject to become administered by the bankruptcy court. *Cohen v. Nixon & Wright* (D. C., Ga.), 37 Am. B. R. 646. See also *Matter of North Star Ice & Coal Co.* (D. C., Tenn.), 42 Am. B. R. 76, 262 Fed. 801.

<sup>95.</sup> *Matter of Hosmer* (D. C., Ia.), 37 Am. B. R. 464, 233 Fed. 318; *Matter of North Star Ice & Coal Co.* (D. C., Tenn.), 42 Am. B. R. 76, 252 Fed. 801, citing *Collier on Bankruptcy* (11th ed.) 1061.

<sup>96.</sup> *Waiver of right to proceed in State court.*—*Nelson Supply Co. v. Leary* (Utah Sup. Ct.), 39 Am. B. R. 755, 164 Pac. 1047.

<sup>97.</sup> *Karasik v. People's Trust Co.* (D. C., N. Y.), 39 Am. B. R. 830, 241 Fed. 939; *Brown Bros. Co. v. Smith Bros. Co.* (D. C., La.), 37 Am. B. R. 30, 231 Fed. 476, holding that the proper and most convenient method of claiming a lien on property in the possession of the bankruptcy court is by ancillary bill filed in the bankruptcy proceedings, and not by a separate plenary suit.

<sup>98.</sup> See discussion under § 23-b, *ante*, heading "Summary jurisdiction."

<sup>99.</sup> *Davis v. Billings* (Pa. Sup. Ct.), 38 Am. B. R. 957, 99 Atl. 163; *Kemp Lumber Co. v. Howard* (C. C. A., 8th Cir.), 38 Am. B. R. 608, 237 Fed. 574; *Matter of Mossler Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 604; *Prestorius v. Anderson* (C. C. A., 5th Cir.), 38 Am. B. R. 93; *Matter of Cutler & John* (D. C., No. Car.), 36 Am. B. R. 420, 228 Fed. 771; *Cullen v. Armstrong* (D. C., Md.), 33 Am. B. R. 735, 200 Fed. 704; *In re Lowensohn* (D. C., N. Y.), 4 Am. B. R. 79, 100 Fed. 776; *In re Alverson Bros.* (Ref., So. Car.), 5 Am. B. R. 855; *In re Byrne* (D. C., Iowa), 3 Am. B. R. 268, 97 Fed. 762; *In re Gerry* (D. C., Pa.), 7 Am. B. R. 459, 461, 112 Fed. 957, 959; *In re West Norfolk Lumber Co.* (D. C., Va.), 7 Am. B. R. 648, 112 Fed. 759; *McNair v. McIntyre* (C. C. A., 4th Cir.), 7 Am. B. R. 638, 113 Fed. 113; *Evans v. Rounsaville* (Sup. Ct., Ga.), 8 Am. B. R. 236, 115 Ga. 684; *In re Hersey* (D. C., Iowa), 22 Am. B. R. 863, 171 Fed. 998; *Harvey v. Smith* (Sup. Ct., Mass.), 7 Am. B. R. 497; *In re Standard Laundry Co.* (C. C. A., 9th Cir.), 8 Am. B. R. 538, 116 Fed. 476; *In re Klapholz* (D. C., Pa.), 7 Am. B. R. 703, 113 Fed. 1,002; *Clark v. Iselin*, 21 Wall. 360; *In re Hutto*, Fed. Cas. 6,960; *In re N. Y. Mail, etc., Co.*, Fed. Cas. 10,209; *In re Dunkerson*, Fed. Cas. 4,156; *Gardner v. Cook*, Fed. Cas. 5,226.

Under the Mississippi statute, giving vendors of personal property a lien for the purchase money, the assignee of a note given for the balance of the purchase price of personal property has a lien which is not affected by the bankruptcy act, within the meaning of section 67-d, although acquired within four months of the filing of a petition against the assignor. *Norris v. Trenholm* (C. C. A., 5th Cir.), 31 Am. B. R. 353, 209 Fed. 827.

<sup>99.</sup> *Vendor's lien.*—Under the Idaho Revised Codes, sections 3441 and 3443, and the bankruptcy act, a vendor of land to a bankrupt has a lien thereon, as against the trustee in bankruptcy, and he is not guilty of laches in waiting until after the filing of a petition in bankruptcy against the vendee before asserting his vendor's lien. *Matter of Lane Lumber Co.* (C. C. A., 9th Cir.), 33 Am. B. R. 491, 217 Fed. 550.

<sup>100.</sup> *In re McDavid Lumber Co.* (D. C., Fla.), 27 Am. B. R. 39, 190 Fed. 97.

**Liens of employees under State Law.**—In the case of *In re Yoke Vitrifed Brick Co.* (D. C., Kan.), 25 Am. B. R. 18, 180 Fed. 235, the court said: "When viewed in this light, it readily appears if the only prior right of payment provided for in section 64-b of the Bankruptcy Act had been debts owing to any person who by the laws of the State are entitled to priority of payment, and the State statute should receive the construction above conceded, such provision in the act would not have affected the rights of a lienholder who received his lien after the State statute had become a law of the State. But such are not the terms of the Bankruptcy Act. Instead of claimants here demanding priority of payment of their claims under the State law in question, receiving their demands, as commanded by the terms of the statute, 'from the money thereof which shall first come into the hands of such receiver or assignee' (in this case, trustee), the provisions of the Bankruptcy Act are such that four classes of claimants must be first paid in

in good faith and with the knowledge of the bankrupt's creditors, is valid.<sup>101</sup>

**e. Mechanics' liens.**—Here there was some question under the former law.<sup>102</sup> There is none under the present.<sup>103</sup> Such a lien is not one through legal proceedings,<sup>104</sup> and, unless so, cannot be attacked, save for intention to hinder, delay, or defraud, an element not likely to appear in liens of this class.<sup>105</sup> It seems even that such a lien may be perfected after bankruptcy.<sup>106</sup> A mechanic's lien is not lost by the adjudication of bankruptcy, even though the lien did not attach until notice, and the notice was filed within four months preceding the bankruptcy adjudication.<sup>107</sup> Being liens created by statute, without the necessity of legal proceedings or judicial process, they are not ordinarily dissolved by an adjudication in bankruptcy within four months after they are acquired.<sup>108</sup> A materialman's lien may be asserted whether the owner of the property against which it is claimed was solvent or insolvent at the time it was filed.<sup>109</sup> A laborer's or materialman's lien for labor performed for, or materials furnished to, a subcontractor is not affected by the bankruptcy of the subcontractor.<sup>110</sup> In determining the validity of such liens

full before one claiming priority of payment of his demand under the State law may be paid anything, and of the four classes of demands entitled to be so paid in preference to one claiming priority of payment under the State law are such demands as filing fees, and certain costs of administration not going to the preservation of the estate, and which do not protect or further the interest of the lienholder, and which for this reason, as against his rights, cannot be ordered paid out of the estate on which his lien holds against his consent. It therefore follows, of necessity, if such demands must be paid before one demanding priority of payment under the laws of the State can be paid, and as such prior demands, which by the very terms of the act itself must be first paid, cannot be enforced against the rights of a valid lienholder, to enforce the rights of petitioners in accordance with the statute of the State, as it is contended by them should be done, would operate to affect the fixed liens thereon, and thus contravene the express provision of section 67-d of the Bankruptcy Act."

101. *Goodnough Mercantile & Stock Co. v. Galloway* (D. C., Oregon), 19 Am. B. R. 244, 136 Fed. 504, holding that a lien on certain logs and lumber, created anterior to the four months' period to receive money advanced for labor and supplies, is valid.

102. *In re Dey*, Fed. Cas. 3,871; *In re Coulter*, Fed. Cas. 3,276; *Sabin v. Connor*, Fed. Cas. 12,197; *In re Cook*, Fed. Cas. 3,151.

103. *In re Kerby-Dennis* (C. C. A., 7th Cir.), 2 Am. B. R. 402, 95 Fed. 166, affg. s. c., 2 Am. B. R. 218, 94 Fed. 818; *In re Emslie* (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed. 291, revg. s. c., 3 Am. B. R. 282, 97 Fed. 929; *In re Coe-Powers Co.* (C. C. A., 6th Cir.), 6 Am. B. R. 1, 109 Fed. 550; *In re Beck Prov. Co.*, 2 N. B. N. Rep. 532. See cases digested in Am. Bankr. Dig. § 445.

104. *Howard v. Cunliff* (Ct. App., Mo.), 10 Am. B. R. 71, 69 S. W. 737; *In re Emslie* (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed.

292; *Fairlamb v. Smedley Const. Co.*, 22 Am. B. R. 824, 36 Pa. Super. Ct. 17; *Tube City Mining & Milling Co. v. Otterson* (Ariz. Sup. Ct.), 35 Am. B. R. 500, 146 Pac. 203, holding that a lien, under a State statute for labor performed and material furnished is not a "lien obtained through legal proceedings" even though it was necessary to file a claim and initiate the prosecution of a suit to preserve and enforce it; *Kemp Lumber Co. v. Howard* (C. C. A., 8th Cir.), 38 Am. B. R. 608, 237 Fed. 574.

105. *In re Kyte* (D. C., Pa.), 25 Am. B. R. 337, 182 Fed. 166.

106. *In re Houston* (Ref., N. Y.), 7 Am. B. R. 92; *Moreau Lumber Co. v. Johnson* (Sup. Ct., N. Dak.), 33 Am. B. R. 717, 150 N. W. 563; *Matter of Campbell* (D. C., Ala.), 39 Am. B. R. 423.

107. *In re Emslie* (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed. 292; *Hildreth Granite Co. v. Watervelt* (N. Y., App. Div.), 31 Am. B. R. 703, 161 N. Y. App. Div. 420, 146 N. Y. Supp. 449.

108. *Kemp Lumber Co. v. Howard* (C. C. A., 8th Cir.), 38 Am. B. R. 608, 237 Fed. 574.

109. *Lloyd v. Sickler* (Wash. Sup. Ct.), 38 Am. B. R. 785, 162 Pac. 979.

110. *Crane Co. v. Smythe*, 11 Am. B. R. 747, 94 N. Y. App. Div. 53, 87 N. Y. Supp. 917; *Kane Co. v. Kinney*, 9 Am. B. R. 778, note, 174 N. Y. 69, 66 N. E. 619; *In re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966; *Matter of Grissler* (C. C. A., 2d Cir.), 13 Am. B. R. 508, 136 Fed. 754, holding that where a mechanic's lien has been perfected as provided by a State statute, an action to enforce it will not be stayed by the bankruptcy court; *Fehling v. Goings*, 13 Am. B. R. 154, 67 N. J. Eq. 375; *Nelson Supply Co. v. Leary* (Utah Sup. Ct.), 39 Am. B. R. 755, 164 Pac. 1047, quoting *Collier on Bankruptcy* (9th ed.) 945.

Money due under building contract.—In the case of *Matter of Roeber* (C. C. A., 2d Cir.), 9 Am. B. R. 308, 121 Fed. 449, revg. 9 Am. B. R. 778, 121 Fed. 444, it was held that a trustee in bankruptcy takes title to the money due to a bankrupt under a building contract, free from the liens of



the law of the State will control.<sup>111</sup> A mechanic's lien, defective upon its face, is not entitled to priority of payment in the distribution of the funds.<sup>112</sup> A failure to file a notice of lien as required by the statute, or otherwise to comply with the statute, affects the validity of the lien and it is not enforceable as such.<sup>113</sup> Akin to mechanics' liens are all liens which exist by, or whose priority rests on, special statutes.<sup>114</sup>

**f. Landlords' liens.**—At common law, before distraint, the landlord has no lien on any particular portion of the goods of his tenant, and is only an ordinary creditor, except that he has the right of distress by reason of which he may place himself in a better position.<sup>115</sup> In some States a landlord is given a statutory lien, either after or before distraint for rent. Such statutory liens must be treated as having been given in good faith and independently of the bankruptcy act, and are not affected by such act.<sup>116</sup> A landlord's statutory lien for rent is entitled to priority of payment over the claims of general creditors,<sup>117</sup> and will attach to such portion of the bankrupt tenant's property and will accrue as to such portion of the unpaid rent, as may be prescribed by the statute creating the lien.<sup>118</sup> The requirements of the State statute must be strictly observed or the lien will not be recognized.<sup>119</sup> If dis-

subcontractors for labor and materials furnished for the building, although the notices of liens were filed pursuant to the statute, but after the contractor had filed his petition in bankruptcy.

111. *Morgan v. First Nat. Bank* (C. C. A., 4th Cir.), 16 Am. B. R. 639, 145 Fed. 466; *Lowe & Co. v. Leary* (Utah Sup. Ct.), 39 Am. B. R. 774, 164 Pac. 1062; *Fels v. Leders & Co.* (C. C. A., 6th Cir.), 40 Am. B. R. 851, 246 Fed. 436.

**Validity under Washington code.**—Petitioner contracted with the bankrupt to furnish labor and materials for putting in certain chain and railing for the bankrupt. While this work was in progress the bankrupt contracted with another to furnish labor and materials for the construction of tables. The latter contractor not having the materials, the bankrupt agreed with the petitioner that, if he would furnish the materials he would pay him direct therefor. Petitioner so furnished the materials and subsequently filed a lien under sections 1154 and 1155 of Rem. & Bal. Code of Washington, upon the several articles as constructed under one contract. *Held*, that the lien cannot be sustained, as the labor and material was furnished under two distinct contracts. *Matter of Shute and Wife* (D. C., Wash.), 37 Am. B. R. 554, 233 Fed. 544.

112. *In re Miner's Brewing Co.* (D. C., Pa.), 20 Am. B. R. 717, 162 Fed. 327.

113. *In re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966.

**Failure to perfect.**—Before a creditor can claim a lien given by a State statute he must comply with the statute and perfect his lien. It is only after so perfected that the lien is protected by a court of bankruptcy or any other court. *In re Franklin* (D. C., N. Car.), 18 Am. B. R. 218, 220, 151 Fed. 642.

**Verbal notice of lien.**—Where the statute of a State requires that a person claiming a lien on property shall "notify" the owner of his claim, a verbal notice to the owner is a sufficient notice upon which to predicate

a lien and base a claim of priority over subsequent lienholders on real estate which was formerly owned by a bankrupt and sold by his trustee. *In re Boner* (D. C., Ohio), 26 Am. B. R. 321, 189 Fed. 93.

114. For instance, in cases like *In re Matthews* (D. C., Ark.), 6 Am. B. R. 96, 109 Fed. 603; *In re Gosch* (D. C., Ga.), 9 Am. B. R. 613, 121 Fed. 604. But see *In re Fall City Shirt Co.* (D. C., Ky.), 3 Am. B. R. 437, 98 Fed. 592.

115. *Henderson v. Mayer*, 225 U. S. 631, 28 Am. B. R. 387, 56 L. Ed. 1233, 32 Sup. Ct. 699.

116. *Courtney v. Fidelity Trust Co.* (C. C. A., 6th Cir.), 33 Am. B. R. 400, 219 Fed. 57.

117. *In re V. D. L. Co.* (D. C., Ga.), 23 Am. B. R. 643, 175 Fed. 635; *In re Burns* (D. C., Ga.), 23 Am. B. R. 640, 175 Fed. 633; *Matter of Southern Hardware & Supply Co.* (D. C., Ala.), 32 Am. B. R. 92, 210 Fed. 881, citing *Collier on Bankruptcy* (9th ed.), §45; *Lontos v. Coppard* (C. C. A., 5th Cir.), 40 Am. B. R. 575, 246 Fed. 808. See cases digested in Am. Bankr. Dig. § 449.

118. Under the statute of Louisiana, giving a landlord a lien for rent and providing that in case of the failure or death of a lessee of a building used wholly or in part for mercantile purposes, the right so given "shall not extend \* \* \* in such a way as to receive rent for a term of more than one year after such failure or death," a lease, having more than a year to run at the date of the bankruptcy of the lessee, mercantile company, gave the landlord a lien for the accrued rent and for the rent for one year after the bankruptcy, and said lien is saved by section 67-d of the Bankruptcy Act, from being affected by the act. *Fudickar P. Glenn* (C. C. A., 5th Cir.), 38 Am. B. R. 237, 237 Fed. 808.

119. *Marshall v. Knox*, 16 Wall. 551; *In re McIntire* (D. C., W. Va.), 16 Am. B. R.

traint is necessary and has not been resorted to, there is no lien.<sup>120</sup> But it has been held that the lien is valid although the distress warrant was levied within four months prior to bankruptcy.<sup>121</sup> Where a lien is given for the "current contract year," the landlord may enforce such lien against the trustee for rent due after the adjudication of the tenant, and for the remainder of such year.<sup>122</sup> Where a landlord's lien is not recognized by statute, a lien under a distress warrant is avoided by subsection *f*.<sup>123</sup> But where a statute gives a general lien to a landlord on the property of his tenant, which dates from and is enforceable by a levy of a distress warrant, such lien is not one created by a judgment nor "obtained through legal proceedings," so as to be void under subsection *f*.<sup>124</sup> Under such a statute the landlord's lien takes effect as of the date of the levy of the distress warrant, and all liens antedating the levy, including that of the trustee based on the adjudication in bankruptcy of the tenant in favor of general creditors, are superior to that of the landlord.<sup>125</sup> Even where such

80, 142 Fed. 593; *Prestorius v. Anderson* (C. C. A., 5th Cir.), 38 Am. B. R. 93.

**Lien under unrecorded lease of real estate.**—A lease of real estate in the State of Rhode Island, containing a reservation of personal property on the premises as security for rent to become due, need not be recorded in order to render the lien valid. Hence, the trustee in bankruptcy of the lessee is not entitled under section 47a (2) of the Bankruptcy Act, as amended in 1910, to the personal property in question, although the lease was not recorded until within four months of bankruptcy. *Dellinger v. Waite Thresher Co.* (C. C. A., 1st Cir.), 35 Am. B. R. 802, 228 Fed. 506.

120. *In re Ruppel* (D. C., Pa.), 3 Am. B. R. 233, 97 Fed. 778; *In re Bayley* (Ref., Pa.), 22 Am. B. R. 249; *In re German* (Ref., Pa.), 2 Am. B. R. 170; *Matter of Printograph Sales Co.* (D. C., Pa.), 31 Am. B. R. 539, 210 Fed. 567.

Under the Maryland statute a landlord who fails to exercise his right to distrain before insolvency proceedings are begun has no right to preferential payment. *In re Chaudron & Peyton* (D. C., Md.), 24 Am. B. R. 811, 820, 180 Fed. 841.

121. *In re Robinson & Smith* (C. C. A., 7th Cir.), 18 Am. B. R. 503, 154 Fed. 343; *Bird v. City of Richmond* (C. C. A., 4th Cir.), 39 Am. B. R. 1, 240 Fed. 545, aff'd 43 Am. B. R. 260, 39 Sup. Ct. 186.

122. *Martin v. Orgain* (C. C. A., 5th Cir.), 23 Am. B. R. 454, 174 Fed. 772, arising under Texas Stats., Art. 3,251; *In re Meyer & Bieler* (D. C., La.), 28 Am. B. R. 17, 195 Fed. 653, arising under Louisiana Civil Code, Art. 2,705; *Matter of Southern Hardware, etc., Co.* (D. C., Ala.), 32 Am. B. R. 92, 210 Fed. 381, citing *Collier on Bankruptcy* (9th ed.) 946; *Lontos v. Coppard* (C. C. A., 5th Cir.), 40 Am. B. R. 575, 246 Fed. 808.

123. *In re Dougherty* (D. C., Ga.), 6 Am. B. R. 457, 109 Fed. 480.

**Landlord's lien under Illinois statute.**—The lien of a landlord upon the property of a tenant for unpaid rent, acquired under the Illinois statute by the levy of a distress warrant within four months of the bankruptcy of the tenant, is null and void under section

67-f of the Bankruptcy Act, except as to "crops grown or growing" upon the premises. *Matter of United Motor Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 694, 220 Fed. 772.

124. *Matter of Mossler Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 604; *In re West Side Paper Co.* (C. C. A., 3d Cir.), 20 Am. B. R. 660, 159 Fed. 241; *Bird v. City of Richmond* (C. C. A., 4th Cir.), 39 Am. B. R. 1, 240 Fed. 545, aff'd 43 Am. B. R. 260, 39 Sup. Ct. 186.

Under section 2795 of the Georgia Code, providing that landlords shall have a general lien on the property of the tenant liable to levy and sale which dates from the levy of the distress warrant to enforce the same, the landlord has a right to a statutory lien from the beginning of the tenancy; and the lien is not created by a judgment nor "obtained through legal proceedings," so as to be void under section 67f of the Bankruptcy Act, even though it was enforced and attached by the levy of a distress warrant within four months of the lessee's bankruptcy. *Henderson v. Mayer*, 225 U. S. 631, 28 Am. B. R. 387, 56 L. Ed. 1233, 39 Sup. Ct. 699.

125. *Prestorius v. Anderson* (C. C. A., 5th Cir.), 38 Am. B. R. 93.

**Landlord's lien invalid as against trustee.**—In the case of *Southern Railway Co. v. Wilder* (C. C. A., 5th Cir.), 36 Am. B. R. 747, 231 Fed. 933, the court had occasion to consider the lien of the landlord as opposed to the trustee's lien in favor of general creditors given under the bankruptcy law, and stated as follows: "Under Civ. Code Ga. 1895, § 2787, establishing liens in favor of landlords, section 3124, empowering them to distrain for rent as soon as the same is due, and section 2795, giving them a general lien on the property of the tenant liable to levy and sale, which dates from the levy of the distress warrant to enforce the same, the lien of the landlord for rent prior to distress is inchoate, and covers no specific property, and gives no priority over the lien given to the trustee in bankruptcy by § 47a (2) of the Bankruptcy Act, as amended by 'the Act of 1910.'"

a lien is given, it is waived by the landlord taking a chattel mortgage for the rent.<sup>126</sup> The lien attaches to the proceeds of the sale of the goods upon which it exists, even though the sale was had pursuant to a court order, and such order made no provision therefor.<sup>127</sup> But where a landlord consents to the sale of property to which his lien has attached in bulk with other property not affected thereby he loses his lien, since under such circumstances it would be impossible to determine how much of the proceeds of sale was the product of the property covered by his lien.<sup>128</sup> A materialman's lien, which exists at the time of the delivery of the goods and which under the statutes of Kentucky has priority over other liens thereafter created, takes precedence over a landlord's lien under a lease subsequently executed.<sup>129</sup> It seems that this subsection does not include a landlord's lien under the Missouri or Pennsylvania statutes.<sup>130</sup> Cases under the law of 1867 will be found in the foot-note.<sup>131</sup>

**g. Mortgages to secure further advances and on after-acquired property.**—Mortgages given in good faith by way of continuing collateral are valid to the amount advanced before the petition is filed.<sup>132</sup> So also, it is thought, of mortgages purporting to cover property to be acquired.<sup>133</sup> A chattel mortgage, covering after-acquired property in the possession of the mortgagor, valid under the laws of the State where given, is effectual as against the mortgagor's trustee in bankruptcy, and the taking possession of the property by the mortgagee after a condition broken within the period of four months prior to filing the petition against the mortgagor is not a preference.<sup>134</sup>

126. *In re Wolf* (D. C., Iowa), 3 Am. B. R. 558, 98 Fed. 84.

127. Equitable lien on proceeds of sale of stock of goods.—Where a sale of a bankrupt tenant's entire stock of goods is made without notice or objection by the landlord, under an order of the court authorizing the receiver to continue the business of the bankrupt, thereby divesting the landlord of his lien on the goods sold which he had by the law of the State for further accruing rent, the landlord is equitably entitled to a lien on the proceeds of such sale, even though the decree of sale made no such provision. *In re Varley & Bauman Clothing Co.* (D. C., Ala.), 26 Am. B. R. 104, 188 Fed. 761; *Matter of Southern Hardware, etc., Co.* (D. C., Ala.), 32 Am. B. R. 92, 210 Fed. 381.

128. *Keyser v. Wessel* (C. C. A., 3d Cir.), 12 Am. B. R. 126, 128 Fed. 251, affg. 10 Am. B. R. 586, 123 Fed. 188, and distinguishing *Carroll v. Young* (C. C. A., 3d Cir.), 9 Am. B. R. 643, 119 Fed. 577. See also *In re Bayley* (Ref., Pa.), 22 Am. B. R. 249.

129. *Louisville Woolen Mills v. Tapp* (C. C. A., 6th Cir.), 38 Am. B. R. 529, and see *Courtney v. Fidelity Co.* (C. C. A., 6th Cir.), 33 Am. B. R. 400, 219 Fed. 57 and *Louisville Woolen Mills v. Johnson* (C. C. A., 6th Cir.), 37 Am. B. R. 67, 228 Fed. 606.

130. *In re Consumer's Coffee Co.* (D. C., Pa.), 18 Am. B. R. 500, 151 Fed. 933. In Pennsylvania, a landlord's right of distraint upon the goods and chattels on leased premises is not considered a superior lien to that of an execution against the owner of said goods. *In re De Lancy Stables Co.* (D. C., Pa.), 22 Am. B. R. 406, 170 Fed. 800; *Jones v. Ford* (C. C. A., 8th Cir.), 43 Am. B. R. 88, 254 Fed. 645.

131. *In re Bowne*, Fed. Cas. 1,741; *Trim v. Wagner*, Fed. Cas. 14,174; *Bailey v. Loeb*, Fed. Cas. 739.

132. *Marvin v. Chambers*, Fed. Cas. 9,179. See *Davis v. Turner* (C. C. A., 4th Cir.), 9 Am. B. R. 704, 120 Fed. 605; *In re Williams* (D. C., Ga.), 9 Am. B. R. 731, 120 Fed. 542; *Stedman v. Bank of Monroe* (C. C. A., 8th Cir.), 9 Am. B. R. 4, 117 Fed. 237; *Matter of United States Food Co.*

(Ref., Mich.), 15 Am. B. R. 329; *In re Hawks* (D. C., Kan.), 30 Am. B. R. 305, 204 Fed. 308. See Am. Bankr. Dig. § 443.

As to distinction between mortgage and deed conveying property described therein to secure a debt, under Georgia statute, see *In re Caldwell* (D. C., Ga.), 24 Am. B. R. 496, 178 Fed. 377.

133. *Barnard v. Norwich, etc., Co.*, Fed. Cas. 1,007; *In re Sentenne & Green Co.* (D. C., N. Y.), 9 Am. B. R. 643, 120 Fed. 436. Compare *Brett v. Carter*, Fed. Cas. 1,844.

**Mortgage on future crops.**—*Butter Cotton Oil Co. v. Collins* (Ala. Sup. Ct.), 40 Am. B. R. 200, 75 So. 975.

**Title acquired after mortgage given.**—The discharge of a bankrupt does not obviate the attachment of a mortgage as a lien on real property mortgaged where the title was acquired after the mortgage was given. *Bisby v. Walker* (Ia. Sup. Ct.), 43 Am. B. R. 173, 169 N. W. 467.

134. *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 49 L. Ed. 577, 25 Sup. Ct. 306; *In re Rogers* (D. C., Va.), 13 Am. B. R. 75, 133 Fed. 560; *In re Hersey* (D. C., Iowa), 22 Am. B. R. 863, 171 Fed. 908; *Garrison v. Kurt* (C. C. A., 8th Cir.), 41 Am. B. R. 291, 249 Fed. 672; *Matter of Erie Lithograph Co.* (D. C., Pa.), 43 Am. B. R. 397, 260 Fed. 490; *Matter of Dagwell* (D. C., Mich.), 45 Am. B. R. 358, 263 Fed. 406.

**Mortgage on wheat in bins.**—*Matter of Ballard* (D. C., Tex.), 44 Am. B. R. 651.

The validity of a mortgage on after-acquired property as against a trustee in bankruptcy depends upon the laws of the State wherein the property is situated; such a mortgage held invalid in New York. *In re Marine Const. & Dry Dock Co.* (C. C. A., 2d Cir.), 16 Am. B. R. 325, 144 Fed. 649; *In re Adamant Plaster Co.* (D. C., N. Y.), 14 Am. B. R. 815, 137 Fed. 251; *Zartman v. National Bank*, 16 Am. B. R. 152, 109 N.

**h. Mortgagor in possession.**—A chattel mortgage is not void for indefiniteness of description which purports to be upon all property "now being and remaining in the possession" of the mortgagor.<sup>125</sup> Nor does an agreement therein permitting the mortgagor to sell the mortgaged goods and use the proceeds thereof invalidate the mortgage, where no fraudulent intention is found; the only effect of such agreement is to withdraw the goods sold from the operation of the mortgage.<sup>126</sup> The lien of a chattel mortgage may be retained so far as valid.<sup>127</sup> Where the mortgage was given for a present consideration upon property remaining in the possession of the mortgagor, it is valid, in the absence of proof of actual fraud; the knowledge of the mortgagee that the mortgagor was unable to pay his debts does not invalidate the mortgage if a present valid consideration exists at the time of the execution of the mortgage.<sup>128</sup>

**i. Liens on special funds; mingling with other funds.**—It is a familiar rule that where a wrongdoer knowingly mingles the property of another with his own in such a manner that it becomes indistinguishable, the true owner may claim the whole mass, or if it has been disposed of, may follow it or its proceeds as long as he can trace them, for the purpose of fastening an equitable lien for the property of which he has been dispossessed.<sup>129</sup> This principle has been applied in bankruptcy cases to preserve liens for funds and property of others in the possession of bankrupts who have commingled them with their

Y. App. Div. 406, 96 N. Y. Supp. 633. Compare *In re Burnham* (D. C., N. Y.), 15 Am. B. R. 548, 140 Fed. 928.

Under the decisions of Minnesota which do not limit the operation of a chattel mortgage on subsequently acquired property to such as is merely incidental to an existing body of property, the assignment of property to be thereafter acquired by bankrupts became effective as soon as such property was purchased, and title thereto vested in the surety company at that time, with a right on its part to take possession whenever a default occurred. *Title Guaranty & Surety Co. v. Whitmire* (C. C. A., 6th Cir.), 28 Am. B. R. 235, 195 Fed. 41.

A chattel mortgage purporting to cover after acquired property is void under the law of Maryland as to such property, and the mortgagee has no rights in such property as against subsequent creditors without security. *Grimes v. Clark* (C. C. A., 4th Cir.), 37 Am. B. R. 142.

Personal property used in bankrupt's business and consisting of machinery, tools and office fittings which were purchased with the proceeds of the sale of mortgage bonds, intermingled with other funds, does not pass under an after-acquired property clause in the mortgage given to secure the payment of such bonds, so that such property can be held by the mortgagee as against the trustee in bankruptcy who represents the general creditors. *In re Niagara Lead & Battery Co.* (D. C., N. Y.), 29 Am. B. R. 788, 202 Fed. 298.

125. *In re Beede* (D. C., N. Y.), 11 Am. B. R. 887, 126 Fed. 863; *Davis v. Turner* (C. C. A., 4th Cir.), 9 Am. B. R. 704, 120 Fed. 605. See *Jones Chatt. Mortg.*, § 65.

126. *In re Ball* (D. C., Vt.), 10 Am. B. R. 564, 123 Fed. 164. As to effect of mortgagor remaining in possession under Ohio law, see *In re First Nat. Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62; *In re National Valve Co.* (D. C., Ohio), 15 Am. B. R. 524, 140 Fed. 679; under New York law, see *Skilton v. Codrington*, 15 Am. B. R. 810, 185 N. Y. 80, 77 N. E. 790; *In re Mahland* (D. C., N.

Y.), 26 Am. B. R. 81, 184 Fed. 743; *Border Nat. Bank v. Coupland* (C. C. A., 5th Cir.), 39 Am. B. R. 165, 240 Fed. 355; *Peyton v. Farmers Nat. Bank* (C. C. A., 5th Cir.), 44 Am. B. R. 295, 261 Fed. 326.

A chattel mortgage on wheat in bins is not invalid under a statute, providing that a chattel mortgage on wares and merchandise exposed for sale in parcels shall not be valid. *Matter of Ballard* (D. C., Tex.), 44 Am. B. R. 661.

**Power of mortgagor to sell for own benefit.**—A chattel mortgage, executed by a bankrupt upon all his property at his designated place of business, made in good faith and for a present consideration, is not rendered void *in toto*, as against the bankrupt's trustee, because the bankrupt is permitted to continue a portion of the business without accounting to the mortgagee, but is void only to the extent of such portion. *Peterson v. Sabin* (C. C. A., 9th Cir.), 32 Am. B. R. 599, 214 Fed. 234.

127. *Matter of Davis* (D. C., N. Y.), 19 Am. B. R. 98, 155 Fed. 671; *Peterson v. Sabin* (C. C. A., 9th Cir.), 32 Am. B. R. 599, 214 Fed. 234; *Senft v. Lewis* (C. C. A., 2d Cir.), 39 Am. B. R. 240, 239 Fed. 116.

128. *In re Mahland* (D. C., N. Y.), 26 Am. B. R. 81, 184 Fed. 743; *In re Hawks* (D. C., Kan.), 30 Am. B. R. 365, 204 Fed. 309; *Matter of Baar* (C. C. A., 2d Cir.), 32 Am. B. R. 465, 213 Fed. 628.

**Mortgage by corporation to its directors.**—*Matter of Lake Chelan Land Co.* (C. C. A., 9th Cir.), 44 Am. B. R. 14, 257 Fed. 497.

**Chattel mortgage confirming bill of sale.**—A chattel mortgage, taken for the purpose of confirming an unrecorded bill of sale executed four days before, as security for a loan and duly filed, may be held valid under this section. *Lake View State Bank v. Jones* (C. C. A., 7th Cir.), 40 Am. B. R. 148, 242 Fed. 821.

129. *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Holder v. Western German Bank*, 136 Fed. 90; *Erie R. Co. v. Dial*, 140 Fed. 689; *Knatchbull v. Hallett*, 13 Ch. Div. (Eng.) 696.

own funds or property; as where a trustee of a fund uses the same in his own business and subsequently becomes bankrupt, the trustee, standing in the shoes of the bankrupt, and possessed only of his rights in respect to such fund, must recognize the lien of his bankrupt's beneficiary, and satisfy such lien out of the proceeds of the sale of the property purchased in whole or in part by the trust fund.<sup>140</sup> And the same principle will require the trustee of a bank which has become bankrupt to satisfy, out of the assets of the bank, a lien of a depositor whose deposit was received while the bank was insolvent and wrongfully mingled with its own funds.<sup>141</sup> A deposit of town funds with a bank without agreement that such funds shall be kept separate from other funds used by the banker in his business, does not create a lien upon the funds of the banker in the hands of his trustee in bankruptcy, to the extent of the deposit, unless the town funds can be identified.<sup>142</sup> If a trust fund which has been mingled and used in the bankrupt's general business for a considerable time, may have been used in the payment of losses, debts and expenses, and is not shown to have materially increased the assets which came into the trustee's possession, a lien does not exist against the general body of the assets received by the bankrupt's trustee.<sup>143</sup>

**j. Lien of pledgee.**—The lien of a pledgee is not only recognized, but is unimpaired, and he has the right to retain the property until it is released by a payment of his claim.<sup>144</sup> The validity of a contract of pledge must be decided by the law of the State where made.<sup>145</sup> Generally speaking, and under the laws of most of the States, there must be a delivery of the possession of

140. *Smith v. Township of Au Gres* (C. C. A., 6th Cir.), 17 Am. B. R. 745, 150 Fed. 257; *In re Taft*, 13 Am. B. R. 417, 133 Fed. 511.

141. *Smith v. Mottley* (C. C. A., 6th Cir.), 17 Am. B. R. 983, 150 Fed. 268; *Clark v. Iselin*, 21 Wall. 360.

**Mingling property of another with own; misappropriation of deposits by bank.**—A bank received cash on deposit and certain securities for collection which it proceeded to collect, the proceeds from which, together with the cash deposit, it mingled with its own funds, and had failed to remit to the depositor, at the time of the bank's failure, in accordance with instructions. *Held*, that where the bank had made investment loans after receiving this trust fund cash, the presumption would be that the loans were made out of his own funds and not out of trust funds, which presumption could only be met by proof that at the close the bank on the day of the investment, the bank did not have remaining in its vaults money equal to and out of which it could repay the trust fund; and that in the absence of such proof, a lien should not be allowed against such investments, but only upon the cash on hand when the bank closed. *In re City Bank of Dowagiac* [appeal of Spaulding] (D. C., Mich.), 25 Am. B. R. 276, 186 Fed. 413. See also *In re City Bank of Dowagiac* [claim of Nelson] (D. C., Mich.), 25 Am. B. R. 286, 186 Fed. 250.

142. *In re Nichols* (D. C., N. Y.), 22 Am. B. R. 216, 166 Fed. 603.

143. *In re Lindsley & Co.* (D. C., Mich.), 25 Am. B. R. 239, 185 Fed. 684.

144. *Jerome v. McCarter*, 15 N. B. R. 546; *Yeatman v. Savings Inst.*, 9 U. S. 764; *Clark v. Iselin*, 21 Wall. 360; *Matter of Harvey* (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340; *Griffin v. Smith* (Cal. Sup. Ct.), 41 Am. B. R. 354, 171 Pac. 92.

**Assignment of life insurance policy.**—*Matter of Baird* (D. C., Del.), 40 Am. B. R. 552, 245 Fed. 504; *Kellogg v. King* (Miss. Sup. Ct.), 39 Am. B. R. 762, 75 So. 134.

**Storage charges against pledged property.**—*Howard v. Mechanics' Bank* (D. C., N. Y.), 45 Am. B. R. 112, 262 Fed. 609.

**Right of pledgee under void contract.**—*Barker Piano Co. v. Com. Security Co.* (Conn. Sup. Ct. of Err.), 42 Am. B. R. 704, 105 Atl. 328; *Garden City, etc. Co. v. Commerce Trust Co.* (C. C. A., 7th Cir.), 44 Am. B. R. 340, — Fed. —.

**Time of enforcement.**—A bankrupt pledgor is not justified in asking that the exercise of a present right of the pledgee to realize upon his security be deferred indefinitely to await a purely problematical increase in the price which might be realized at the sale. Nor are the general creditors of the bankrupt pledgor entitled to this indulgence. *Griffin v. Smith* (Cal. Sup. Ct.), 41 Am. B. R. 354, 171 Pac. 92.

**Lien of pledgee.**—In the case of *Matter of Mayer, Leale and Baylis* (C. C. A., 2d Cir.), 19 Am. B. R. 356, 157 Fed. 836, it was held that a bankruptcy court is without power to restrain a sale by the pledgee of property held by him under a valid agreement of pledge by the bankrupt, and pursuant to its terms.

**Verbal pledge of insurance policies.**—The manual delivery of insurance policies, or other choses in action, to a pledgee with full power of control over them and with the intention of passing the equitable right to them is efficacious to that end, even if the legal title remains in the pledgor, and, constituting an equitable and enforceable pledge good between the parties, is good as against the trustee in bankruptcy of one of them. *Jones v. Coates* (C. C. A., 8th Cir.), 28 Am. B. R. 249, 196 Fed. 800.

145. *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291, 51 L. Ed. 1117, 27 Sup. Ct. 720; *Hartford Ins. Co. v. Railway*, 175 U. S. 91, 44 L. Ed. 84, 20 Sup. Ct. 33; *In re Industrial Iron Works* (D. C., Pa.), 25 Am. B. R. 221, 179 Fed. 151. *Matter of Harvey* (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340; citing *Collier on Bankruptcy* (9th Ed.), 948; *Taney v. Penn. National Bank*, 232 U. S. 174, 33 Am. B. R. 168; *Matter of P. J. Sullivan Co., Inc.* (D. C., N. Y.), 41 Am. B. R. 189, 247 Fed. 139, *affd.* 42 Am. B. R. 530, 254 Fed. 680; *Atherton v. Beaman* (C. C. A., 1st Cir.), 45 Am. B. R. 212, 264 Fed. 578.

the property pledged to the pledgee, to give rise to the lien in his favor;<sup>146</sup> for instance, under the laws of Wisconsin there can be no pledge of goods in a warehouse by the mere transfer of warehouse receipts.<sup>147</sup> But under circumstances showing that the transaction is in good faith, and that the requirement of delivery would be such a hardship as to defeat the purpose of the contract, the lien may be sustained as an equitable lien rather than a pledge.<sup>148</sup>

k. Other valid liens.—(1) VENDOR'S LIEN.—A contract of conditional sale may give rise to a valid lien,<sup>149</sup> which will not be affected by a discharge.<sup>150</sup> A purchase-money lien continues in full force notwithstanding the vendee has

146. In re Shulman (D. C., Pa.), 30 Am. B. R. 238, 206 Fed. 129; Matter of Harvey (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340; Matter of P. J. Sullivan Co., Inc. (D. C., N. Y.), 41 Am. B. R. 189, 247 Fed. 139, *affd.* 42 Am. B. R. 530, 254 Fed. 600; Matter of Imperial Textile Co. (D. C., N. Y.), 43 Am. B. R. 209, 255 Fed. 199.

Possession of pledgor.—When a vendee, or a pledgee, takes title to personal property, without taking possession of it, he takes the risk of the integrity and solvency of his vendor, or pledgor, when the rights of subsequent bona fide purchasers, or of levying creditors, arise. Bank of North America v. Penn Motor Car Co. (Pa. Sup. Ct.), 31 Am. B. R. 395, 83 Atl. 622.

Symbolical delivery.—Delivery of possession is indispensable to a valid pledge of personal property, but such delivery may be made symbolically, and the question of possession may largely depend upon the intention of the parties dealing in good faith and upon the nature and location of the property itself. Ward v. First Nat'l Bank of Ironton, Ohio (C. C. A., 6th Cir.), 29 Am. B. R. 312, 202 Fed. 609 (as to delivery of lumber in possession of pledgor, which was tagged and marked with initials of pledgee). See also Matter of P. J. Sullivan Co. Inc. (D. C., N. Y.), 41 Am. B. R. 189, 247 Fed. 139, *affd.* 42 Am. B. R. 530, 254 Fed. 600.

Return of pledged securities to trustee of pledgor.—Where a pledgee of securities, after he had returned them to the trustee in bankruptcy of the pledgor, discovered that he was exposed to liability in connection with the sale of certain other pledged securities, and that he would be entitled to reimbursement from the securities returned in case this liability should be adjudged against him, and the owners of the returned securities set up a decree of the District Court, affirmed by the Circuit Court of Appeals adjudging them to be the owners, and asserted these decrees to be conclusive, the referee properly directed the trustee to retain custody of the securities, until the court should determine whether the pledgee by returning them had lost the right to claim a lien thereon. Matter of Jamison Bros. & Co. (C. C. A., 3d Cir.), 35 Am. B. R. 725, 227 Fed. 30.

147. Security Warehousing Co. v. Hand, 206 U. S. 415, 19 Am. B. R. 291, 51 L. Ed. 1117, 27 Sup. Ct. 720.

Warehouse receipts.—As to validity of pledge of warehouse receipts to secure loans made to owner by trust company, see Union Trust Co. v. Wilson, 198 U. S. 530, 14 Am. B. R. 109, 49 L. Ed. 1154, 25 Sup. Ct. 766; Love v. Export Storage Co. (C. C. A., 6th Cir.), 16 Am. B. R. 171, 143 Fed. 1; Security Warehousing Co. v. Hand (C. C. A., 7th Cir.), 16 Am. B. R. 49, 143 Fed. 32; Britton v. Union Investment Co. (C. C. A., 8th Cir.), 44 Am. B. R. 531, 262 Fed. 111.

148. Matter of Harvey (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340; citing Collier on Bankruptcy (9th Ed.), 948, 950; Barker v. Com. Security Co. (Conn. Sup. Ct. of Err.), 42 Am. B. R. 704, 105 Atl. 328.

Retention of possession by pledgor for purposes of manufacture; equitable lien.—In the case of In re Industrial Iron Works (D. C., Pa.), 25 Am. B. R. 221, 179 Fed. 151, it appeared that the bankrupt, having contracted to supply a customer with a derrick car and equipment, bought the car itself from another company, upon a contract of conditional sale, title to remain in vendor until paid for. While engaged in the manufacture and erection of the equipment of the car, and more than four months before the filing of the petition in bankruptcy, the bankrupt assigned the car and its equipment and the money to be paid therefor by the bankrupt's customer, to a bank, in return for the discount of bankrupt's note for the amount of the purchase price. The purchaser was requested to pay the contract price to the bank, which it agreed to do; but when the car was delivered it was refused because not satisfactory under the contract. While in the custody of the carrier, after refusal, and after bankruptcy, the bank seized the car, with its equipment, in an action of replevin, as pledgee. It was held, that the conditional vendor of the car was entitled to the car or its value and that upon the payment of its value the bank might retain the car and its equipment; that under the law of Pennsylvania, the pledge to the bank was not invalid as against the trustee on the ground of retention of possession by the pledgor, because possession was necessarily so retained for the purpose of manufacture, the pledgor acting as a bailee for that purpose, and neither the bankrupt nor his trustee having had possession after refusal by the purchaser; and that the bank's claim could be sustained as an equitable lien upon the property, which, having been acquired more than four months before the filing of the petition, was not affected by the bankruptcy proceeding.

149. National Bank of Commerce v. Williams (C. C. A., 5th Cir.), 20 Am. B. R. 79, 159 Fed. 615; Matter of Johnson (D. C., Conn.), 33 Am. B. R. 104, 215 Fed. 666. See under heading "c. Want of record. (2) Chattel mortgages and contracts for conditional sale," *ante*.

150. Smith v. Turner (Sup. Ct., Ga.), 32 Am. B. R. 864, 80 S. E. 993.

151. Sheridan State Bank v. Rowell (D. C., Oregon), 32 Am. B. R. 747, 212 Fed. 529; Farrell v. Wysong (C. C. A., 8th Cir.), 40 Am. B. R. 740, 246 Fed. 281; American Bottle Co. v. Finney (Ala. Sup. Ct.), 43 Am. B. R. 685, 82 So. 106.

Priority over mechanics' lien.—See Matter of Atkinson-Kerce Grocery Co. (D. C., Ga.), 40 Am. B. R. 411, 245 Fed. 481.

Insurance policy for benefit of vendor.—Sullivan v. Myer (Tenn. Sup. Ct.), 39 Am. B. R. 314, 193 S. W. 124.

Decree in State court foreclosing lien before bankruptcy is *res judicata*. Rader v. Star Mill & Elevator Co. (C. C. A., 8th Cir.), 43 Am. B. R. 754, 258 Fed. 121.

been adjudicated a bankrupt.<sup>151</sup> The lien will exist and may be asserted against the bankrupt's trustee, although no claim thereto has been filed.<sup>152</sup>

(2) **EQUITABLE LIENS.**—Equitable liens, established in good faith in respect to any particular property, are cognizable in courts of bankruptcy and will be sustained against a holder who is not a purchaser for value and without notice and against trustees in bankruptcy.<sup>153</sup> An equitable lien as security for advances made to the bankrupt, created prior to the four months' period, may be enforced against the lienor's trustee in bankruptcy and will attend the fund arising from the sale of the property to which the lien attaches.<sup>154</sup> The lien of a partner upon the partnership property for the surplus which may be due to him after the partnership debts have been paid, will be recognized by the bankruptcy court; and if prior to the proceedings in bankruptcy a receiver has been appointed in an action to dissolve the partnership and procure an accounting and has taken possession of the property, the possession of the State court through its officers will not be disturbed.<sup>155</sup>

(3) **ATTORNEY'S LIEN.**—An attorney's lien on the papers of his client,<sup>156</sup> or on a judgment,<sup>157</sup> or on a chattel mortgage which came into his possession before the filing of the petition,<sup>158</sup> or on other property coming into his hands,<sup>159</sup> may be enforced notwithstanding bankruptcy. A voluntary surrender of the papers or property to the trustee in bankruptcy amounts to a waiver of the lien.<sup>159a</sup>

(4) **BANKER'S LIEN; LIENS FOR SERVICES.**—A bank's lien on securities of a customer coming into his possession,<sup>159b</sup> or on the dividends to its stockholders who are debtors,<sup>160</sup> and the special lien given by a State statute to the manufacturer of machinery supplied to a factory,<sup>161</sup> or to laborers for wages,<sup>162</sup> are

A stockholder of a bankrupt corporation is not estopped from asserting a vendor's lien held by him, by the fact that the corporation, subsequent to the accrual of his lien makes, without his knowledge, an equitable or legal lien upon the property. *Roder v. Star Mill & Elevator Co.* (C. C. A., 8th Cir.), 43 Am. B. R. 754, 256 Fed. 121.

152. *Whalen v. Wolford* (Kan. Sup. Ct.), 35 Am. B. R. 117, 150 Pac. 608, in which case it appeared that a father contracted to convey to his son a tract of land for \$5,000, crediting \$1,000 thereof as a gift, the remainder to be paid in five equal payments, with 6 per cent per annum. Afterwards, before paying any part of the \$4,000 the son on his own petition was adjudged a bankrupt. It was held in an action by his trustee to quiet his title to the land as against the father, that the latter was entitled to a lien for the \$4,000 and interest, and was not precluded therefrom by reason of having filed no claim with the trustee.

Where a lien on real estate is attempted to be created by a mortgage which fails because the mortgage is insufficient as such, the recording of such insufficient mortgage is not sufficient notice of the existence of a vendor's lien. *Davis v. Harlow* (Md. Ct. of App.), 39 Am. B. R. 300, 100 Atl. 102.

153. *Root Manufacturing Co. v. Johnson* (C. C. A., 7th Cir.), 34 Am. B. R. 247, 219 Fed. 397, citing *Walker v. Brown*, 165 U. S. 654, 41 L. Ed. 866, 17 Sup. Ct. 453; *Sexton v. Kesler*, 225 U. S. 90, 28 Am. B. R. 85, 56 L. Ed. 995, 32 Sup. Ct. 657; *Van Iderstine v. Nat. Discount Co.*, 227 U. S. 575, 29 Am. B. R. 478, 57 L. Ed. 652, 33 Sup. Ct. 343; *Greay v. Dockendorff*, 231 U. S. 513, 31 Am. B. R. 407, 58 L. Ed. 339, 34 Sup. Ct. 166; *McDonald v. Daskam*, 8 Am. B. R. 543, 116 Fed. 276; *Baker Motor Vehicle Co. v. Hunter* (C. C. A., 2d Cir.), 39 Am. B. R. 122, 238 Fed. 894; *Matter of McGarry & Son* (C. C. A., 7th Cir.), 39 Am. B. R. 224, 240 Fed. 400; *Page v. Old Dominion Trust Co.* (C. C. A., 4th Cir.), 43 Am.

B. R. 26, 257 Fed. 402; *Matter of Pemberton* (D. C., Fla.), 43 Am. B. R. 149, 260 Fed. 521. See also Am. B. R. Dig. § 455.

Assignment of accounts.—*Matter of Imperial Textile Co.* (D. C., N. Y.), 43 Am. B. R. 209, 255 Fed. 199.

Equitable lien of surety of government contractor.—*Cox v. New England Equitable Ins. Co.* (C. C. A., 8th Cir.), 40 Am. B. R. 793, 247 Fed. 955.

Chattel mortgage on after acquired property.—*Matter of Roseboom* (D. C., N. Y.), 43 Am. B. R. 437, 253 Fed. 136.

Failure to record chattel mortgage.—Under sections 67d and 67e, a bank which, notwithstanding knowledge which its officers had of the financial difficulties of a mortgagor, deliberately kept the existence of the mortgages secret and refrained from putting them on record, is not in a position to claim an equitable lien. *National Bank of Bakersfield v. Moore* (C. C. A., 9th Cir.), 41 Am. B. R. 409, 247 Fed. 913.

154. *Goodnough Mercantile & Stock Co. v. Galloway* (D. C., Oreg.), 22 Am. B. R. 808, 171 Fed. 940; *Gage Lumber Co. v. McElDowney* (C. C. A., 6th Cir.), 30 Am. B. R. 251, 207 Fed. 255; *Matter of Imperial Textile Co.* (D. C., N. Y.), 39 Am. B. R. 534, 239 Fed. 775; *Matter of Imperial Textile Co.* (D. C., N. Y.), 43 Am. B. R. 209, 255 Fed. 199.

155. *Clark v. Bininger*, 38 How. Pr. 341, 3 N. B. R. 518.

156. *Rogers v. Winsor*, Fed. Cas. 12,023; *In re N. Y. Mail, etc. Co.*, Fed. Cas. 10,200; *Matter of Brown & Fleming Co.* (Ref., N. Y.), 21 Am. B. R. 662; *Matter of Luber* (D. C., Pa.), 44 Am. B. R. 292, 261 Fed. 221. See cases digested Am. Bankr. Dig. § 446.

157. *Matter of Pennell* (D. C., N. J.), 18 Am. B. R. 909, 159 Fed. 500.

Attorney's lien.—A creditor's attorney, who has successfully prosecuted a claim, has a lien for his services which may be enforced in the

valid, if perfected as required by such statute.<sup>163</sup> A livery stable keeper's statutory lien does not depend for its existence upon the institution of judicial or other proceedings, but is a perfect lien under the statute, and as such is cognizable and enforceable in bankruptcy.<sup>164</sup> An artisan has a lien for repairs and improvements made to a bankrupt's automobile after petition filed and before adjudication.<sup>165</sup>

(5) **MARITIME LIENS.**—Maritime liens for repairs and supplies furnished to vessels will be enforced in a court of bankruptcy.<sup>166</sup> Where a libel in admiralty was filed against a vessel before the filing of an involuntary petition in bankruptcy against the owner of the vessel, but the arrest of the vessel was not made until after the adjudication, it was held that the admiralty court would retain jurisdiction for the purpose of determining all questions of maritime liens.<sup>167</sup> On the other hand, where a bankruptcy court has taken possession, through its receiver, of a vessel belonging to the bankrupt, its jurisdiction is exclusive and will not be ousted to permit the enforcement of a maritime lien in a court of admiralty.<sup>168</sup>

(6) **FACTOR'S LIEN.**—A factor's lien, if valid and effectual under a State law, must be recognized and may be enforced; but it is absolutely essential to the validity of such a lien for advances, that the property consigned shall be delivered by the consignor to the consignee.<sup>169</sup> Where a bankrupt consigned its entire stock in trade to a factor under an agreement whereby he was to conduct the business and receive certain commissions and the factor took immediate possession of the business, and duly advertised the fact, a lien exists in favor of the factor, valid as against the bankrupt's trustee.<sup>170</sup>

(7) **TRUST AND OTHER TRANSFERS.**—Deeds of trusts and other transfers made in good faith to secure present loans, protected under a State statute, are within the protection of clause *d* of this section and valid liens.<sup>171</sup> But

bankruptcy court. *In re Rude* (D. C., Ky.), 4 Am. B. R. 319, 101 Fed. 805.

163. *Matter of Enrich's Fort Hamilton Brewery* (D. C., N. Y.), 19 Am. B. R. 798, 158 Fed. 644, holding that where an attorney, who had represented an alleged bankrupt in certain transactions, claims a lien for services upon certain chattel mortgages which came into his hands prior to the filing of the petition, the court may order that the mortgages and the assignments thereof be turned over to the receiver, subject to the lien of the attorney, who may have its amount determined either in the bankruptcy court or any other court of competent jurisdiction.

169. *Hartman v. Swiger* (D. C., W. Va.), 33 Am. B. R. 369, 215 Fed. 986.

169a. *Matter of Luber* (D. C., Pa.), 44 Am. B. R. 252, 261 Fed. 221.

169b. *Goodwin v. Barre Sav. Bank & Trust Co.* (Vt. Sup. Ct.), 39 Am. B. R. 153, 100 Atl. 84.

160. *In re Dunkerson*, Fed. Cas. 4,156; *Matter of Gesas* (C. C. A., 9th Cir.), 16 Am. B. R. 872, 146 Fed. 734. See also interesting case of *Hutchinson v. Otis* (C. C. A., 1st Cir.), 8 Am. B. R. 382, 115 Fed. 937.

161. *In re Matthews* (D. C., Ark.), 6 Am. B. R. 96, 109 Fed. 603; *In re Georgia Handle Co.* (C. C. A., 5th Cir.), 6 Am. B. R. 472, 109 Fed. 632; *In re Oconee Milling Co.* (C. C. A., 5th Cir.), 6 Am. B. R. 475, 109 Fed. 866; *Mott v. Wissler Mining Co.* (C. C. A., 4th Cir.), 14 Am. B. R. 321, 135 Fed. 697, 68 C. C. A., 335.

162. *Browder & Co. v. Hill*, (C. C. A., 6th Cir.), 1 Am. B. R. 619, 136 Fed. 821, where orders by a bankrupt corporation upon a merchant to supply goods to laborers as part payment of wages were held not to be assignments of wages so as to subrogate the merchant to

the rights of the laborers under a statute creating a lien in favor of such laborers.

163. *In re Lillingston Lumber Co.* (D. C., N. Car.), 13 Am. B. R. 153, 132 Fed. 886.

164. *In re Mero* (D. C., Conn.), 12 Am. B. R. 171; 128 Fed. 630; *In re Pratesi* (D. C., Del.), 11 Am. B. R. 319, 126 Fed. 588.

165. *In re Rich* (Ref., Ohio), 17 Am. B. R. 893.

166. *The Ironsides*, Fed. Cas. 7,069, 4 Biss. 518; *In re Kirkland*, Fed. Cas. 7,842, 12 Am. Law Reg. 300. See cases digested Am. Bankr. Dig. § 451.

Maritime liens may be enforced in a court of bankruptcy, although they are founded upon a State statute and are not strictly maritime liens. *In re Scott*, Fed. Cas. 12,517, 1 Abb. N. S. 336.

167. *The Philomena* (D. C., Mass.), 37 Am. B. R. 220, 200 Fed. 859; *The Bethulia* (D. C., Mass.), 37 Am. B. R. 223, 200 Fed. 862; *The Gelshah* (D. C., Mass.), 37 Am. B. R. 226, 200 Fed. 864.

Where a maritime lien exists, either a court of bankruptcy, or of equity will enforce such a lien with the same effect as would a court of admiralty. *Matter of New England Transp. Co.* (D. C., Ct.), 34 Am. B. R. 323, 220 Fed. 203.

168. *The Casco* (D. C., Mass.), 37 Am. B. R. 215, 230 Fed. 929.

**Administration expenses; priority.**—The proceeds of the sale in admiralty of a steamer belonging to bankrupt and subject to maritime liens are properly chargeable with expenses of administration in bankruptcy in so far as the expenses were incurred by the trustee in intervening to contest the lien claims where he could not determine with reasonable certainty the validity of such liens, although on the hearing it developed that no interest of value



a deed of trust made by a corporation to secure *ultra vires* notes has been held fraudulent and invalid.<sup>172</sup> A mortgage executed by the officers of a corporation, the proceeds being applied for the benefit of the corporation, but technically defective because not authorized by the directors, is valid as against the trustee of the bankrupt corporation.<sup>173</sup> When money is advanced to a debtor in pursuance of an express agreement that it is to be used to retire existing liens or incumbrances on his property, and that the creditor who loans the money is to have a first lien upon the property to secure its repayment, such creditor may be subrogated to the rights of the incumbrancer or lienor whose debt has been paid, and may assert his lien against the borrower's trustee in bankruptcy.<sup>174</sup> An assignment of future wages constitutes a valid lien which is not affected by the discharge in bankruptcy of the mortgagor.<sup>175</sup>

1. Effect of valid liens on distribution.—If valid, the lienor becomes a secured creditor, and must be treated as such.<sup>176</sup>

### V. FRAUDULENT TRANSFERS AND LIENS.

a. In general.—Subsection *e* nullifies (1) all "conveyances, transfers, assignments or incumbrances, or any part thereof," on the bankrupt's property, (2) made or created "within four months prior to the filing of the petition," (3) "with the intent to hinder, delay or defraud his creditors;" (4) "except as to purchasers in good faith and for a present consideration." All such property so disposed of remains as a part of the estate of the bankrupt and passes to his trustee, whose duty it is to recover the same for the benefit of the creditors.<sup>177</sup> The subsection then nullifies all conveyances, trans-

over and above the liens passed to the trustee; but charges not so incurred or due, though incurred in the administration of the estate as a whole should be borne by the unsecured creditors. *The Bethulia* (D. C., Mass.), 37 Am. B. R. 227, 200 Fed. 862.

169. *Ommen v. Talcott* (C. C. A., 2d Cir.), 26 Am. B. R. 689, 188 Fed. 401.

170. *Boise v. Talcott* (D. C., N. Y.), 38 Am. B. R. 838, 212 Fed. 268, *affd.* 45 Am. B. R. 117, 264 Fed. 611.

171. *Crim v. Woodford* (C. C. A., 4th Cir.), 14 Am. B. R. 302, 136 Fed. 34; *Matter of Alden* (Ref., Ohio), 16 Am. B. R. 362; *In re Noel* (D. C., Md.), 14 Am. B. R. 715, 137 Fed. 694; *Wilder v. Watts* (D. C., S. Car.), 15 Am. B. R. 57, 138 Fed. 426; *In re Clifford* (D. C., Iowa), 14 Am. B. R. 281, 136 Fed. 475; *In re Randolph* (D. C., W. Va.), 26 Am. B. R. 623, 187 Fed. 186.

Costs and fees.—*Matter of Russell Falls Co.* (D. C., Mass.), 41 Am. B. R. 448, 249 Fed. 260.

173. *American Wood Working Machinery Co. v. Norment* (C. C. A., 4th Cir.), 19 Am. B. R. 679, 157 Fed. 801, holding that where a corporation gives its notes, without consideration, to its principal stockholder and manager, who, as intended by the parties, pledges them as collateral security for his personal indebtedness to the knowledge of the pledgees, a deed of trust securing the notes given by the corporation while insolvent, and within four months of its bankruptcy, is fraudulent and void as to the creditors of the corporation.

173. A mortgage of a Minnesota corporation, executed by the president and secretary, with the seal of the corporation, to secure an indebtedness justly due from the corporation the proceeds of which it received and used in the conduct of its business, but which had not been authorized by the directors, is a valid lien against the trustee in bankruptcy of the corporation. *Galbraith v. First Nat. Bank of Alexandria* (C. C. A., 8th Cir.), 34 Am. B. R. 213, 221 Fed. 387.

174. *Union Central Life Ins. Co. & Burgoyne v. Drake* (C. C. A., 8th Cir.), 32 Am. B. R. 252,

214 Fed. 536; *In re Lee* (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579, citing *Association v. Thompson*, 32 N. J. Eq. 133; *Tyrell v. Ward*, 102 Ill. 29; *Bank v. Bierstadt*, 163 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; *Draper v. Ashley*, 104 Mich. 527, 62 N. W. 707; *Wilson v. Mayberry*, 75 Wis. 191, 43 N. W. 901, 6 L. R. A. 61, 17 Am. St. Rep. 193; *Levy v. Martin*, 48 Wis. 198, 4 N. W. 35; *Trust Co. v. Peters*, 72 Miss. 1058, 18 South. 497; *Dillon v. Kauffman*, 58 Tex. 696.

Contract to secure advances; objection made after securing possession of collateral.—Where after bankrupt's trustee, under sanction of the court, and with the assent of a debtor who had agreed to hold its stock as security for its debt which was evidenced by notes, had virtually exercised the power to take legal possession of such stock, it was too late for certain banks, which held some of those notes as collateral for loans made to bankrupt, to raise the question, as the result of an agreement thereafter made with such debtor, whether the original agreement as to the stock between bankrupt and the debtor was ineffective to operate as a lien as to creditors because of the want of delivery. *Merchants' Nat. Bank v. Sexton*, 228 U. S. 634, 30 Am. B. R. 278, 87 L. Ed. 998, 33 Sup. Ct. 725.

175. *Citizens' Loan Ass'n v. Boston & Maine R. R.* (Sup. Ct., Mass.), 19 Am. B. R. 660; *Mallen v. Wenham*, 200 Ill. 262, 18 Am. B. R. 210, 70 N. E. 664; *Monarch Discount Co. v. Chesapeake & Ohio Ry. Co.* (Ill. Sup. Ct.), 42 Am. B. R. 497, 120 N. E. 743.

176. See under Section Fifty-seven of this work.

177. Closely related to this clause is § 70-a (4), vesting title in the trustee of property transferred by the bankrupt in fraud of creditors; and also § 70-e, authorizing the trustee to avoid any transfer which any creditor of the bankrupt might have avoided. See also *Reggs v. Price* (Mo. Sup. Ct.), 43 Am. B. R. 413, 210 S. W. 420, citing *Collier on Bankruptcy* (11th ed.) 1062.

fers and incumbrances made by the bankrupt within four months prior to the filing of the petition, "which are held null and void against the creditor of such debtor" under State laws, and provides that such property shall pass to, and be recovered by, the trustee for the benefit of the creditors. The amendment of 1903 conferred concurrent jurisdiction upon courts of bankruptcy and State courts to recover property under the subsection.

b. *Scope of subsection.*—This subsection is somewhat out of place here. Its counterpart in the law of 1867 is both different in the minor matters of phrasing and the time limit, and in effect more favorable to the debtor than the present subsection. The important elements of proof in that law—the creditor's reasonable cause to believe the debtor insolvent and that the transaction was in fraud of the act—have given place to the single element of intent to hinder, delay or defraud.<sup>178</sup> The former law here interdicted transfers<sup>179</sup> only. The present subsection has to do with incumbrances, too, at least so far as such liens result from the voluntary act of the debtor.<sup>180</sup>

c. *Insolvency not essential.*—Unlike fraudulent preferences, fraudulent transfers may, it seems, be made at a time when the transferor is solvent,<sup>181</sup> but, intent to hinder, delay, or defraud being necessary, insolvency will usually be an element of proof.

d. "Within four months prior to filing the petition."—The meaning of these words is discussed elsewhere.<sup>182</sup> The practitioner should also note that, if the period has elapsed, there may still be a remedy under the State law, as pointed out by § 70-e.<sup>183</sup> But the words quoted above do not apply where the fraudulent transaction amounted to a voluntary gift;<sup>184</sup> nor where the transfer was made more than four months before the petition in bankruptcy was filed.<sup>185</sup> There is a clear distinction between the creation of a lien within the

178. *In re McLam* (D. C., Vt.), 3 Am. B. R. 245, 97 Fed. 922.

179. See Bankr. Act, § 1 (25) for elastic meaning now given the word.

180. That is mortgages, pledges and the like, as distinguished from judgments, attachments, and other liens through legal proceedings.

181. *Pollock v. Jones* (C. C. A., 4th Cir.), 10 Am. B. R. 616, 124 Fed. 163; *Seuf v. Lewis* (C. C. A., 2d Cir.), 39 Am. B. R. 240, 239 Fed. 116. Compare *In re McLam* (D. C., Vt.), 3 Am. B. R. 245, 97 Fed. 922; also *In re Soudans Mfg. Co.* (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 304; *Spencer v. Nekemoto* (D. C., Hawaii), 24 Am. B. R. 517; *Northrop v. Finn Construction Co.* (Pa. Sup. Ct.), 41 Am. B. R. 811, 103 Atl. 544, contra *Baldwin v. Kingston* (D. C., N. J.), 40 Am. B. R. 641, 247 Fed. 163.

182. See discussion under Section Sixty of this work, subtitle, "Within four months;" and also under Section Three, subtitle, "Time with which petition must be filed."

183. Compare *In re Adams* (Ref., N. Y.), 1 Am. B. R. 94; *In re Grahs* (Ref., Ohio), 1 Am. B. R. 465; *In re Taylor*, 95 Fed. 956.

184. *In re Schenck* (D. C., Wash.), 8 Am. B. R. 727, 116 Fed. 554.

*Gift of engagement ring within four months' period while insolvent.*—Where bankrupt, within four months of his bankruptcy and while insolvent, gave to defendant a diamond ring, the occasion being the announcement of his engagement to marry defendant, such ring or its value was recoverable by bankrupt's trustee, it being immaterial that in making the

gift bankrupt had no actual intent to hinder, delay or defraud his creditors, since he was in fact insolvent at the time. *Pollock v. Simon* (D. C., Pa.), 30 Am. B. R. 390, 205 Fed. 1005.

185. *Little v. Holly Brooks Hardware Co.* (C. C. A., 5th Cir.), 13 Am. B. R. 422, 133 Fed. 874; *Manning v. Evans* (D. C., N. J.), 19 Am. B. R. 217, 222, 156 Fed. 106; *Woodward v. Snow* (Mass. Sup. Jud. Ct.), 44 Am. B. R. 96, 124 N. E. 35.

A partnership assignment, made more than four months before the petition in bankruptcy was filed, cannot be recovered by the trustee under this provision. *In re J. M. Ceballos & Co.* (D. C., N. J.), 20 Am. B. R. 459, 466, 161 Fed. 445.

A general assignment for the benefit of creditors more than four months prior to the filing of a petition in voluntary bankruptcy by the assignor is irrevocable so far as the inhibition of § 67-e is concerned. *In re Shinn* (D. C., N. J.), 25 Am. B. R. 833, 185 Fed. 990.

*Written agreement evidencing prior parol assignment.*—Where petitioner sold merchandise to bankrupt anterior to the four months' period and subsequently, within such prohibitive period, received a written agreement and assignment of bankrupt's book accounts, as security for the payment of the purchase price of the goods, evidence examined and held, insufficient to sustain the findings of the referee that prior to the sale there was a parol assignment of the accounts operating *pro tanto*. *In re Stiger* (D. C., N. J.), 22 Am. B. R. 253, 202 Fed. 791.

four months' period and the enforcement of one previously acquired;<sup>186</sup> so that where a mortgage was given prior to such period, the mortgagee may, if authorized by the terms of the mortgage, take possession of the property, or do any other act with a view of enforcing the mortgage, at any time prior to the adjudication.<sup>187</sup> A complaint does not state a cause of action under this subdivision unless it is alleged that the transfers sought to be attacked were made within four months of the time the petition in bankruptcy was filed.<sup>188</sup>

**e. Intent to hinder, delay or defraud.**—(1) **IN GENERAL.**—The words "with intent to hinder, delay or defraud," as used in subsection *e*, have their immemorial meaning.<sup>189</sup> They have already been considered under sections three and fourteen. The cases under the former law, found in the footnote,<sup>190</sup> are thought still applicable, though in that statute used in defining an act of bankruptcy. Knowledge of, or participation in, the fraud by the creditor to whom the transfer was made is not material.<sup>191</sup> Transfers by this subsection are only those fraudulent and therefore voidable at common law, or, what is the same thing, such as constitute acts of bankruptcy under § 3 of the act.<sup>192</sup> A creditor's passive receipt of payment is not of itself sufficient to make it fraudulent.<sup>193</sup> An intent to defraud is the test; if the transaction was in good faith, there is no fraud.<sup>194</sup> It is not necessary in order to avoid a transfer as a transfer made to hinder and delay creditors that the transferor at the time of the transfer was insolvent, but if the circumstances are such that the jury can find that the transfer was made with intent to hinder and delay creditors it is voidable.<sup>195</sup>

186. *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 457, 49 L. Ed. 577, 25 Sup. Ct. 306.

187. *Woods v. Klein*, 22 Am. B. R. 722, 223 Pa. St. 257, 72 Atl. 523, citing *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 28 Sup. Ct. 67; *Davis v. Billings* (Pa. Sup. Ct.), 38 Am. B. R. 957, 99 Atl. 163.

188. *Thomas v. Roddy*, 19 Am. B. R. 873, 122 N. Y. App. Div. 851, 107 N. Y. Supp. 473.

189. See *Githens v. Shiffer Bros.* (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505.

190. *Sedgwick v. Place*, Fed. Cas. 12,620; *In re Cowles*, Fed. Cas. 3,297; *In re McKibben*, Fed. Cas. 8,859; *In re Williams*, Fed. Cas. 17,703; *Curran v. Munger*, Fed. Cas. 3,487.

191. *Sherman v. Luckhardt* (Sup. Ct., Kan.), 11 Am. B. R. 28, 67 Kan. 682. Compare *Stitch v. Berman*, 15 Am. B. R. 466, 49 N. Y. Misc. 104, 96 N. Y. Supp. 743; *In re Leader* (D. C., Ark.), 26 Am. B. R. 668, 190 Fed. 624.

192. *Wright v. Sampter* (D. C., N. Y.), 18 Am. B. R. 355, 152 Fed. 196; *Underleak v. Scott* (Sup. Ct., Minn.), 28 Am. B. R. 926, 134 S. W. 731; *Baldwin v. Kingston* (D. C., N. J.), 40 Am. B. R. 641, 247 Fed. 163.

It is not a fraud at common law for a debtor who is in straitened circumstances to prefer one or more creditors, though such payment may render it impossible to pay anything to his other creditors. Nor does it make any difference that both the creditor and debtor know that the effect of such appropriation will be to deprive other creditors of the power of reaching the debtors' property by legal process in satisfaction of their claims. If there is no secret trust agreed upon or understood between the debtor and creditor, but the sole object of the transfer of property is to pay or secure the payment of a debt, the transaction is valid at common law. *Lyon v. Wallace* (Mass. Sup. Ct.), 35 Am. B. R. 688, 108 N. E. 1075.

193. *Wright v. Sampter* (D. C., N. Y.), 18 Am. B. R. 355, 152 Fed. 196.

194. *In re Bloch* (C. C. A., 2d Cir.), 15 Am. B. R. 748, 142 Fed. 674, holding that where a

member of a firm pledges his life insurance policies to secure certain creditors with the understanding that they were not firm assets, fraudulent intent is not shown. *In re Benjamin* (D. C., Pa.), 15 Am. B. R. 351, 140 Fed. 330; *In re Longbottom* (D. C., Pa.), 15 Am. B. R. 437, 142 Fed. 291; *In re Hill* (D. C., Cal.), 15 Am. B. R. 490, 140 Fed. 964; *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 152 Fed. 943, modifying 16 Am. B. R. 583, aff'd, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436; *Vollmer v. Plage* (D. C., N. Y.), 26 Am. B. R. 590, 186 Fed. 598; *Matter of Braus* (C. C. A., 2d Cir.), 40 Am. B. R. 668, 248 Fed. 55; *Potter v. American Ptg. & Lith. Co.* (Ia. Sup. Ct.), 49 Am. B. R. 854, 165 N. W. 1044; *Keith v. Simpson* (Ga. Ct. of App.), 44 Am. B. R. 349, 100 S. E. 649; *Matter of Sola* (C. C. A., 1st Cir.), 44 Am. B. R. 872, 261 Fed. 822.

In order to render a conveyance void on the ground that it was intended to hinder or delay creditors, it must have been executed for that purpose, that is, to secure delay advantageous to the debtor and disadvantageous to his creditors. *Matter of Peterson* (D. C., Nev.), 49 Am. B. R. 653, 252 Fed. 846.

Successive assignments of accounts receivable by way of security, in pursuance of a contract under which advances were made to enable the assignor, subsequently adjudged a bankrupt, to get goods on the faith of the undertaking that the accounts should be assigned, are not fraudulent in law because the contract embraced all accounts, where neither party contemplated any fraud or knew that the assignor was insolvent. *Greey v. Dockendorff*, 231 U. S. 513, 31 Am. B. R. 407, 58 L. Ed. 339, 34 Sup. Ct. 166.

195. *Holbrook v. International Trust Co.* (Sup. Jud. Ct., Mass.), 33 Am. B. R. 806, 107 N. E. 665.

(2) **REVIVAL OF OUTLAWED DEBT.**—A bankrupt with knowledge of his insolvency, cannot on the eve of bankruptcy revive an outlawed claim by a written acknowledgment or by part payment,<sup>196</sup> although if the creditor or the bankrupt was ignorant of the fact of insolvency such revival may be effectual.<sup>197</sup>

(3) **EVIDENCE OF INTENT.**—(I) *In general.*—Whether a conveyance was made with intent to hinder, delay and defraud creditors is a question of fact.<sup>198</sup> It is only an intent to hinder, delay and defraud creditors unlawfully, and not every intent to hinder or delay them in collecting, or to prevent them from collecting their claims that avails to avoid a transfer.<sup>199</sup> A transfer alleged to be void under subsection e, so far as the purchase is concerned must be impugned, if at all, by actual fraud as distinguished from constructive fraud.<sup>200</sup> Actual fraud, as distinguished from constructive fraud based upon the failure to file or record, must appear.<sup>201</sup> There must be some evidence of actual fraud in order to invalidate a conveyance; mere suspicion of wrongdoing is insufficient.<sup>202</sup> In determining whether the result of a number of transactions was the consummation of a preconceived purpose to hinder, delay or defraud creditors, the court will not separately and independently regard each step which, of itself, might be innocent, but will consider the transactions in connection with what else appears, especially when they are in close consecutive association.<sup>203</sup> The rule that persons who do not meet their obligations as they mature in the ordinary course of business are "insolvent," within the meaning of bankruptcy and insolvency acts does not apply to all persons but does apply to traders. Hence where the bankrupt was a trader the fact that he was unable to pay his debts as they matured and became due and payable in the ordinary course of business as persons carrying on trade usually do is a fact to be given its full weight by the jury in determining whether the payments made by him were made with intent to hinder and delay his creditors.<sup>204</sup> To render a transfer of personal property valid as against creditors it must be accompanied by such change of possession as is consistent with the nature of the property and the situation of the parties.<sup>204a</sup>

(II) *Payments without fraudulent intent.*—An insolvent debtor has the *jus disponendi* of his property until the commencement of proceedings in

196. *Matter of Salmon* (D. C., N. Y.), 38 Am. B. R. 692.

197. *Matter of Banks* (D. C., N. Y.), 31 Am. B. R. 270, 207 Fed. 662; *Matter of Blankenship* (D. C., Cal.), 33 Am. B. R. 756, 220 Fed. 395.

198. *Matter of McKane* (D. C., N. Y.), 19 Am. B. R. 103, 155 Fed. 674; *Clingman v. Miller* (C. C. A., 8th Cir.), 20 Am. B. R. 360, 160 Fed. 326; *Maires v. Metal & Machinery Co.* (D. C., N. Y.), 33 Am. B. R. 422, 220 Fed. 115.

Use of defendant as witness for plaintiff.—*Campbell v. Berryman* (D. C., Ga.), 42 Am. B. R. 631, 256 Fed. 402.

199. *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 513, 152 Fed. 943, modifying 16 Am. B. R. 533, 145 Fed. 202, affd. 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436; *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 160 Fed. 57.

Actual fraud in securing present loan to prefer creditor.—This section applies only to actual fraud as distinguished from a mere preference, and the fact that a lender knew at the time of making a loan and taking security that the borrowed money would be used to prefer a creditor does not make the transaction fraudulent. But actual fraud exists where there is also an actual participation by the lender as agent of the borrower and for his benefit in carrying out the plan of preference

which it was obvious would result in closing the business of the debtor. *Dean v. Davis* (C. C. A., 4th Cir.), 31 Am. B. R. 808, 212 Fed. 88, affd. 242 U. S. 438, 38 Am. B. R. 664, 37 Sup. Ct. 30.

200. *Chambers v. Continental Trust Co.* (D. C., Ga.), 38 Am. B. R. 78, 235 Fed. 441, affd. 39 Am. B. R. 872, 239 Fed. 1020, holding that a transfer by a director of an insolvent bank to secure the payment of his note to another bank which had loaned money for the payment of the creditors of the insolvent bank, made for a present and fair consideration, and taken in good faith by the purchaser, is not invalid under section 67-e of the bankruptcy act, although the director knew of his own insolvency when he made the conveyance.

201. *McAtee v. Shade* (C. C. A., 8th Cir.), 26 Am. B. R. 151, 185 Fed. 442.

202. *Johnson v. Barrett* (D. C., Ga.), 38 Am. B. R. 404, 237 Fed. 112.

203. *Amundson v. Folsom* (C. C. A., 8th Cir.), 33 Am. B. R. 318, 219 Fed. 122; *Calkins v. Lichtig* (C. C. A., 6th Cir.), 42 Am. B. R. 306, 251 Fed. 844.

204. *Holbrook v. International Trust Co.* (Sup. Jud. Ct., Mass.), 33 Am. B. R. 808, 107 N. E. 665.

204a. *Northrop v. Finn Construction Co.* (Pa. Sup. Ct.), 41 Am. B. R. 811, 103 Atl. 544.

bankruptcy against him. So a preference of one creditor over others by a payment or by security, which is free from actual or constructive fraud, and from any purpose to affect other creditors injuriously beyond the necessary effect of the security or preference, is valid and lawful, and the fact that a creditor is so preferred is not in itself sufficient to show evidence of an intent to hinder, delay or defraud creditors so as to make the transaction void or voidable under this subsection,<sup>205</sup> yet, when the preferential transaction is so manipulated or when it is carried along into such later steps as to attempt to defeat the recovery of the preference by the trustee, it results that the parties are engaged in an attempt to defeat the intended operation of the Bankruptcy Act itself, and that they have placed themselves within the condemnation of subsection *e* of this section.<sup>205a</sup> As stated by the Supreme Court:<sup>206</sup> "Making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay or defraud creditors. The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all other creditors by continuing his business. The lender who makes an advance for that purpose with full knowledge of the facts may be acting in perfect 'good faith.' But where the advance is made to enable the debtor to make a preferential payment with bankruptcy in contemplation, the transaction presents an element upon which fraud may be predicated. The fact that the money advance is actually used to pay a debt does not necessarily establish good faith. It is a question of fact in each case what the intent was with which the loan was sought and made."<sup>207</sup> A mortgage taken to secure a loan with knowledge by the mortgagee

<sup>205</sup> *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 121, 160 Fed. 57; *Coder v. Arts*, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436; *Johnstone v. Babb* (C. C. A., 4th Cir.), 38 Am. B. R. 715, holding that making a mortgage to secure an advance with which an insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay or defraud creditors; the lender who makes an advance for that purpose with full knowledge of the facts may be acting in perfect good faith. *Watson v. Adams* (C. C. A., 6th Cir.), 39 Am. B. R. 473, 242 Fed. 441; *Matter of Braus* (C. C. A., 2d Cir.), 40 Am. B. R. 608, 248 Fed. 56; *Potter v. American Ptg. & Lith. Co.* (Ia. Sup. Ct.), 40 Am. B. R. 854, 165 N. W. 1044; *Chapman v. Hunt* (C. C. A., 2d Cir.), 42 Am. B. R. 509, 254 Fed. 768, rev'g 41 Am. B. R. 452, 248 Fed. 160; *Richardson v. Germania Bank* (C. C. A., 2d Cir.), 45 Am. B. R. 351, 263 Fed. 320.

**Sale of accounts.**—*McGill v. Commercial Credit Co.* (D. C., Md.), 39 Am. B. R. 702, 243 Fed. 637.

<sup>205a</sup> *Watson v. Adams* (C. C. A., 6th Cir.), 39 Am. B. R. 473, 242 Fed. 441.

**When fraudulent intent presumed.**—Under the laws of Minnesota a creditor may avoid a transfer made with intent to hinder, delay, or defraud creditors. Such intent of the debtor is essential to the fraudulent character of the transfer. A voluntary conveyance is presumptively fraudulent as to existing creditors, but not conclusively so. Where the debtor is solvent, and retains sufficient property to amply satisfy the claims of existing creditors, in the absence of an actual intent to hinder, delay, or defraud creditors, such a transfer is valid. *Underleak v. Scott* (Minn. Sup. Ct.), 28 Am. B. R. 926, 134 S. W. 731.

<sup>206</sup> *Dean v. Davis*, 242 U. S. —, 38 Am. B. R. 664, 667, 37 Sup. Ct. 30.

<sup>207</sup> **Mortgages taken as security for loans.**—The following cases were classified in the margin to the case of *Davis v. Dean*, 242 U. S. 438, 38 Am. B. R. 664, 668, 37 Sup. Ct. 30. Cases holding that a mortgage is a fraudulent conveyance where taken as security for a loan which the lender knows is to be used to prefer avowed creditors, in fraud of the act: *Parker v. Sherman* (C. C. A., 2d Cir.), 32 Am. B. R. 393, 129 C. C. A. 437, 212 Fed. 917; *Re Soforenko* (D. C., Mass.), 32 Am. B. R. 32, 210 Fed. 562; *Johnson v. Dismukes* (C. C. A., 5th Cir.), 29 Am. B. R. 636, 122 C. C. A. 552, 204 Fed. 382; *Lumpkin v. Foley* (C. C. A., 5th Cir.), 29 Am. B. R. 673, 122 C. C. A. 542, 204 Fed. 372; *Re Lynden Mercantile Co.* (D. C., Wash.), 19 Am. B. R. 444, 156 Fed. 713; *Roberts v. Johnson* (C. C. A., 4th Cir.), 18 Am. B. R. 132, 81 C. C. A. 47, 151 Fed. 567; *Re Pease* (D. C., Mich.), 12 Am. B. R. 66, 129 Fed. 446. See also *Walters v. Zimmerman*, *s. c.* on appeal (D. C., Ohio), 30 Am. B. R. 776, 208 Fed. 62, (C. C. A., 6th Cir.), 136 C. C. A. 409, 220 Fed. 806.

Cases upholding the mortgage security because the lender did not know that the insolvent borrower intended to make improper payments to favored creditors—thus indicating that the mortgage would be fraudulent if such additional fact were shown: *Grinstead v. Union Sav. & T. Co.* (C. C. A., 9th Cir.), 27 Am. B. R. 123, 111 C. C. A. 398, 190 Fed. 546; *Powell v. Gate City Bank* (C. C. A., 8th Cir.), 24 Am. B. R. 316, 102 C. C. A. 55, 178 Fed. 609; *Re Kullberg* (D. C., Minn.), 23 Am. B. R. 753, 176 Fed. 585; *Ohio Valley Bank Co. v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 919, 24 L. R. A. (N. S.) 184, 89 C. C. A. 605, 163 Fed. 155; *Stedman v. Bank of Monroe* (C. C. A., 8th Cir.), 9 Am. B. R. 4, 54 C. C. A. 269, 117 Fed. 237; *Re Soudan Mfg. Co.* (C. C. A., 7th Cir.), 8 Am. B. R. 45, 51 C. C. A. 476, 113 Fed. 804.

In accord with this view are also the decisions which hold that a general assignment

that the proceeds of the loan were to be used by the insolvent mortgagor to make preferential payments to certain creditors on the eve of bankruptcy is invalid.<sup>208</sup> Where a transfer is made by a debtor who is in embarrassed circumstances although not insolvent, a jury in some cases may be warranted in finding the fact of intent to delay and defraud.<sup>209</sup> A transfer made to secure a loan will not be set aside as fraudulent because the transferee knew that the proceeds of the loan were to be used in payment of an existing debt.<sup>210</sup> A transfer made in good faith to pay or to secure an honest antecedent debt by an insolvent within four months of the filing of a petition in bankruptcy by or against him constitutes no evidence of an intent to delay or defraud creditors, notwithstanding the fact that its necessary effect is to hinder and delay them, and to deprive them of the opportunity they might otherwise have had to collect their claims in full.<sup>211</sup> Thus where a bankrupt conveys property in trust to secure a person who has indemnified a surety company on a bond discharging a lien of attachment the transfer is valid, where there is no evidence of a preference or a fraud upon the creditors.<sup>212</sup> A transfer by an alleged bankrupt to secure funds to be used by a third person on specified contracts, is not rendered fraudulent by the fact that such third person, with the consent of the bankrupt, diverted a part of the funds to another purpose.<sup>212a</sup> And where a mortgage was given by an insolvent debtor within the four months' period to secure a pre-existing debt owing to the mortgagee, who was in ignorance of the mortgagor's insolvency, an intent to hinder, delay or defraud other creditors must be shown in order to avoid the mortgage.<sup>213</sup> But a mortgage made to secure a much greater amount than that really

for the benefit of creditors, though without preferences, is void under section 67-e because its necessary effect is to hinder, delay or defraud creditors in their rights and remedies under the bankruptcy act. *Re Gutwillig* (D. C. Ia.), 1 Am. B. R. 78, 90 Fed. 475, *affd* 1 Am. B. R. 388, 34 C. C. A. 377, 63 U. S. App. 191, 92 Fed. 337; *Davis v. Bohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 34 C. C. A. 372, 92 Fed. 325; *Rumsey & S. Co. v. Novelty Mach. Mfg. Co.* (D. C., Mo.), 3 Am. B. R. 704, 99 Fed. 699. See *Randolph v. Scruggs*, 190 U. S. 533, 538, 10 Am. B. R. 1, 47 L. Ed. 1165, 1169, 23 Sup. Ct. 710; *George M. West Co. v. Lea Bros.*, 174 U. S. 590, 596, 2 Am. B. R. 463, 43 L. Ed. 1098, 1100, 19 Sup. Ct. 836.

It is difficult to reconcile the following cases or dicta in them with the great weight of authority and the decisions of this court: *Re Baar* (C. C. A., 2d Cir.), 32 Am. B. R. 465, 130 C. C. A. 292, 213 Fed. 528; *Re Hersey* (D. C., Iowa), 22 Am. B. R. 563, 171 Fed. 1004; *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 17 L. R. A. (N. S.) 1040, 87 C. C. A. 213, 160 Fed. 57, 15 Ann. Cas. 58, *Re Bloch* (C. C. A., 2d Cir.), 15 Am. B. R. 748, 74 C. C. A. 250, 142 Fed. 674; *Githens v. Shiffer* (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505.

<sup>208.</sup> *Matter of Soforenko* (D. C., Mass.), 32 Am. B. R. 32, 210 Fed. 562; *Smith v. Coury* (D. C., Me.), 41 Am. B. R. 219, 247 Fed. 168.

<sup>209.</sup> *Advances to prevent bankruptcy until after four months.*—In a suit by a trustee in bankruptcy to recover book accounts assigned by the bankrupt to the defendant because of advances, evidence held to show that the defendant made the advances for the purpose of keeping the bankrupt from going into bankruptcy before the expiration of four months from the time of other illegal preferences to the defendant. This is a fraud upon the law, and property assigned by the bankrupt for such purpose may be recovered by the trustee. *Rubenstein v. Lottow* (Mass. Sup. Ct.), 35 Am. B. R. 243, 220 Mass. 156.

<sup>210.</sup> *Holbrook v. International Co.* (Sup. Jud. Ct., Mass.), 33 Am. B. R. 808, 107 N. E. 656.

<sup>211.</sup> *Van Iderstine v. National Discount Co.*, 227 U. S. 575, 582, 29 Am. B. R. 478, 57 L. Ed. 652, 33 Sup. Ct. 343; *Matter of Soforenko* (D. C., Mass.), 32 Am. B. R. 32, 210 Fed. 562. Compare *Matter of Anderson* (D. C., E. I.) 41 Am. B. R. 731, 252 Fed. 272.

<sup>212.</sup> *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 519, 152 Fed. 943, modifying 16 Am. B. R. 583, 145 Fed. 202, *affd*, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436; *Meservy v. Roby* (C. C. A., 8th Cir.), 28 Am. B. R. 529, 198 Fed. 844, holding that where bankrupt's real estate was heavily incumbered by different mortgages and bankrupt conveyed a part of such real estate to a mortgagee holding a mortgage in a large amount, past due, in consideration of his discharging the liens upon all the property and the payment of a small sum in cash, in order to avoid such transfer under subsection e, actual fraud in fact, as distinguished from constructive fraud, must be shown.

<sup>212a.</sup> *Preferences made for purpose of continuing business.*—A preferential payment made by an insolvent in the hope and for the purpose of thereby continuing his business is not really fraudulent though it is under certain circumstances voidable by the trustee. *Matter of Soforenko* (D. C., Mass.), 32 Am. B. R. 32, 210 Fed. 562.

<sup>213.</sup> *Matter of Federal Biscuit Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 612, 214 Fed. 221.

<sup>213a.</sup> *Angle v. Bankers' Surety Co.* (C. C. A., 2d Cir.), 41 Am. B. R. 90, 244 Fed. 401.

<sup>213.</sup> *Coder v. Arts*, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436; *In re Kullberg* (D. C., Minn.), 23 Am. B. R. 768, 176 Fed. 585.

<sup>214.</sup> *McMahon v. Pithan* (Sup. Ct., Iowa), 33 Am. B. R. 125, 147 N. W. 920.

<sup>215.</sup> *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 160 Fed. 57; *Matter of McConnell v. Williams* (Ref., Cal.), 32 Am. B. R. 539; *Ryan v. Cavanagh* (D. C., Iowa), 39 Am. B. R. 44, 238 Fed. 604. Compare *Wartell v. Moore* (C. C. A., 6th Cir.), 44 Am. B. R. 624, 261 Fed. 762.

due, with the specific intent and purpose on the part of both mortgagor and mortgagee to hinder, delay and defraud other creditors of the mortgagor, is invalid in equity not only as to the fictitious debts secured, but as to the genuine indebtedness.<sup>214</sup> When all the parties consent, the application of the partnership property to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy, and while the partners and the partnership are insolvent, does not evidence any intent to hinder, delay, or defraud the creditors.<sup>215</sup> But where the partnership assets are used by one partner to pay his individual debt without the consent of his copartner the trustee in bankruptcy may sue and recover such property.<sup>216</sup> Directors and stockholders who, with knowledge of the insolvent condition of the corporation within four months before the bankruptcy of the corporation, sell their stock to it and take in payment therefor notes of the corporation secured by a deed of trust cannot assert a preference under such deed.<sup>217</sup> The organization of a corporation or partnership by one who does not know whether he is solvent or insolvent, and the transfer thereto of his property, is not, of itself, to be regarded as hindering or delaying creditors.<sup>217a</sup>

(III) *Fraudulent intent implied from circumstances.*—Conveyances of real estate made by bankrupts to their wives, four months prior to the filing of a petition in bankruptcy, and without a present consideration, are void, since it may be implied from the circumstances of the transaction that they were made with intent to hinder and defraud creditors.<sup>218</sup> However the rule is different where the property transferred was the exempt property of the husband.<sup>219</sup> But a transfer in payment of a creditor of the bankrupt's wife is not *ipso facto* fraudulent; the intent to defraud must be proven.<sup>220</sup> Although there is a presumption against the *bona fides* of a conveyance made by a failing husband to his wife, it is merely a presumption of fact, negating the idea of a valid consideration, and the burden is upon the wife to support her right by clear and convincing proof;<sup>220a</sup> there is no presumption of law against the validity of such a transfer which will stand against established facts to the contrary.<sup>221</sup> An agreement to withhold a mortgage from record is not of itself conclusive upon the question of fraud, but is a circumstance constituting more or less cogent evidence of a want of good faith.<sup>222</sup> A transfer in good faith

<sup>214</sup> Ryan v. Cavanagh (D. C., Iowa), 39 Am. B. R. 44, 238 Fed. 604, wherein it was held that in an action by a trustee to recover property belonging to a partnership which was transferred by one partner without the consent of the other, the burden of proof was on the defendants to establish such consent.

<sup>217</sup> Moore & Co. v. Gilmore (C. C. A., 4th Cir.), 32 Am. B. R. 136, 216 Fed. 90.

<sup>217a</sup> Matter of Braus (C. C. A., 2d Cir.), 40 Am. B. R. 668, 248 Fed. 55; Matter of Stringer (C. C. A., 2d Cir.), 41 Am. B. R. 510, 253 Fed. 382.

<sup>218</sup> Henkel v. Seider (D. C., N. Y.), 20 Am. B. R. 773, 163 Fed. 553; Fouché v. Shearer (D. C., Ga.), 22 Am. B. R. 828, 172 Fed. 562; Woodford v. Rice (D. C., Okl.), 30 Am. B. R. 455, 207 Fed. 473; Jackson v. Jetter (Sup. Ct., Iowa), 32 Am. B. R. 667, 142 N. W. 431; Phillips v. Huffaker (Cal. Ct. of App.), 41 Am. B. R. 133, 170 Pac. 431; McCrory v. Donald (Miss. Sup. Ct.), 43 Am. B. R. 181, 80 So. 843.

<sup>219</sup> Jackson v. Jetter (Sup. Ct., Iowa), 32 Am. B. R. 667, 142 N. W. 431.

<sup>220</sup> In re Kayser (C. C. A., 3d Cir.), 24 Am. B. R. 174, 177 Fed. 383.

Transfer by bankrupt to wife of property purchased with her funds.—Where bankrupt's wife purchased and improved certain real prop-

erty with her own means, as an investment for her own benefit, but the deed, by a mistake of the scrivener, was made out to bankrupt, a trust was thereby created in favor of the wife, who paid the purchase money, and when bankrupt subsequently transferred to her the legal title, he did no more than a court of equity in a proper proceeding would have compelled him to do. Silling v. Todd (Sup. Ct., Va.), 27 Am. B. R. 127, 72 S. E. 682. Compare Phillips v. Kleinman (Sup. Ct., Pa.), 27 Am. B. R. 195, 81 Atl. 648.

<sup>220a</sup> Adams v. Osley (D. C., Ga.), 42 Am. B. R. 665, 255 Fed. 117; Eberline v. Prager (Mich. Sup. Ct.), 45 Am. B. R. 250, 176 N. W. 423.

<sup>221</sup> Weld v. McKay (C. C. A., 7th Cir.), 34 Am. B. R. 52, 218 Fed. 807; Swan v. Bailey (Okla. Sup. Ct.), 42 Am. B. R. 214, 174 Pac. 1065.

<sup>222</sup> Rogers v. Page (C. C. A., 6th Cir.), 15 Am. B. R. 502, 140 Fed. 596, 72 C. C. A. 164. See In re Shaw (D. C., Me.), 17 Am. B. R. 196, 146 Fed. 243; In re Hickerson (D. C., Idaho), 20 Am. B. R. 682, 162 Fed. 345, holding that an agreement to withhold a chattel mortgage from record is evidence of fraudulent intent; In re Duggan (C. O.,

to pay an honest antecedent debt is not of itself sufficient to establish actual fraud in fact, or an intent on the debtor's part, or on the part of the creditor, to hinder, delay, or defraud other creditors, within the meaning of this subsection.<sup>223</sup> A transfer by a corporation within the four months' period to a creditor of officers of such corporation in payment of an obligation incurred by them for the benefit of the corporation, is fraudulent where the parties had knowledge of the financial condition of the corporation and of the improper use of the corporate funds.<sup>224</sup> And the same is true where a hopelessly insolvent corporation sells most of its assets and with the proceeds therefrom pays a portion of its creditors in full.<sup>224a</sup>

(IV) *Sales of goods on account; bulk sales.*—An agreement whereby goods were consigned to a person for sale and account, the consignee to return the goods which were unsold, is not necessarily invalid; as to the goods unsold the agreement is one of bailment and if made in good faith the consignor may assert and sustain his title to the goods.<sup>225</sup> If the contract requires the consignee "to buy and pay for" all the goods remaining in his hands at the expiration of a certain period, and the consignee subsequently becomes bankrupt, an attempted transfer of the goods to the consignor just before bankruptcy without consideration is fraudulent.<sup>226</sup> Sales of goods in bulk otherwise than in the ordinary course of trade, are presumptively fraudulent under the statutes of many States; under such statutes the fact that full value was paid is immaterial, if it be shown that the vendee knew of the vendor's intent to defraud his creditors.<sup>227</sup> So where a debtor mortgages his entire stock of

A., 5th Cir.), 25 Am. B. R. 479, 183 Fed. 405, affg. 25 Am. B. R. 105, 182 Fed. 252; *Matter of National Boat & Engine Co.* (D. C., Me.), 33 Am. B. R. 154, 216 Fed. 208.

*Scheme to remove property beyond the reach of creditors.*—Where the bankrupt made four conveyances simultaneously as part of a scheme to put his real estate beyond the reach of his creditors in view of his imminent and inevitable bankruptcy and the grantees knew or should have known of such intent and kept the conveyances from record, with the intent to assist in its accomplishment, such conveyances should be set aside. *Cowan v. Burchfield* (D. C., Ala.), 25 Am. B. R. 293, 180 Fed. 614.

<sup>223.</sup> *Meservey v. Roby* (C. C. A., 8th Cir.), 28 Am. B. R. 529, 198 Fed. 844; *Watson v. Adams* (C. C. A., 6th Cir.), 39 Am. B. R. 473, 243 Fed. 441.

<sup>224.</sup> *Matter of Rockaway Mfg. Co.* (D. C., N. Y.), 34 Am. B. R. 627, 226 Fed. 520; *McCullan v. Buckingham Hotel Co.* (Ct. of App., Mo.), 41 Am. B. R. 104, 199 S. W. 417.

*Transfer in purchase of own stock.*—*Henderson v. Garner* (Ala. Sup. Ct.), 39 Am. B. R. 792, 75 So. 387.

<sup>224a.</sup> *Smith v. Powers* (D. C., N. Y.), 43 Am. B. R. 303, 255 Fed. 532.

<sup>225.</sup> *Ludvig v. American Woolen Co.*, 231 U. S. 522, 31 Am. B. R. 481, 58 L. Ed. 345, 34 Sup. Ct. 161, affg. 188 Fed. 30, 110 C. C. A. 180, which revd. 23 Am. B. R. 314, 176 Fed. 445.

<sup>226.</sup> *Parlett v. Blake* (C. C. A., 8th Cir.), 26 Am. B. R. 25, 188 Fed. 200.

<sup>227.</sup> *In re Calvi* (D. C., N. Y.), 26 Am. B. R. 206, 185 Fed. 642; *Bentley v. Young* (D. C., N. Y.), 31 Am. B. R. 506, 210 Fed. 202; *Brown v. Kossove* (C. C. A., 8th Cir.), 43 Am. B. R. 408, 255 Fed. 806; *Matter of Clayton* (D. C., N. J.), 43 Am. B. R. 687, 259 Fed. 911. See Am. B. R. Dig., § 634.

*Sales in bulk.*—In the case of *Matter of Farrell Co.* (Ref., N. Y.), 9 Am. B. R. 341, it was held, where the provisions of the New York statute, L. 1902, chap. 528, entitled "An act to regulate the sale of merchandise in bulk," are willfully and deliberately ignored by an alleged bankrupt, upon such a sale made by him within the four months' period, the transfer is void under subsection 6 of the above section. *Matter of Robertshaw Mfg. Co.* (D. C., Pa.), 13 Am. B. R. 409, 133 Fed. 556; *Shelton v. Price* (D. C., Ala.), 23 Am. B. R. 759, 176 Fed. 585; *Carpenter v. Karnow* (D. C., Mass.), 28 Am. B. R. 21, 193 Fed. 762; *Parker v. Sherman* (D. C., Vt.), 29 Am. B. R. 862, 201 Fed. 155; *Matter of Thompson* (D. C., Wash.), 40 Am. B. R. 82, 242 Fed. 602. Evidence insufficient to show fraudulent intent of vendee. *Sabin v. Horenstein* (C. C. A., 9th Cir.), 44 Am. B. R. 422, 260 Fed. 754.

*Validity of sale of entire retail stock.*—Where bankrupt, a few days prior to the filing of the petition, transferred by bill of sale his entire stock of merchandise in a retail store to his sister, who failed to make the inquiries or give notice to his creditors as required by the New Jersey "Sales in Bulk" Act, the sale was voidable under said



goods and uses the money to pay a portion of his creditors it will be presumed that he intended to hinder, delay, and defraud his other creditors.<sup>228</sup>

(V) *Burden of proof.*—The rule is that one who alleges fraud takes upon himself the burden of proving it.<sup>229</sup> Circumstances of the transaction may be shown; if sufficient to show that the entire intent was to delay, hinder or defraud, the transaction should be set aside; if it is attempted to prove the intent by evidence apart from the face of the instrument attacked, the burden of proof is usually imposed upon the party attacking.<sup>230</sup> Other illustrative cases under the present law are cited in the foot-note<sup>231</sup> and under subsequent paragraphs.

f. *Purchasers in good faith and for present fair consideration.*—This saves valid transfers,<sup>232</sup> as subsection *d* does valid liens. A purchaser is not in good faith who makes no effort to determine whether an insolvent may make a transfer which will not be in violation of the act;<sup>233</sup> nor is he in good faith if he has knowledge of the insolvent's insolvency, or where facts are shown which place upon the purchaser the duty of making inquiries as to the insolvent's financial condition, and he fails to make them, as where the sale consists of the transfer of the entire stock of merchandise owned by a retail merchant.<sup>234</sup>

Act, and it appearing that the transfer was contrived and consummated in fraud of bankrupt's creditors, it came within the inhibition of subsection e and was void as to such creditors. In *re* Lipman (D. C., N. J.), 29 Am. B. R. 130, 201 Fed. 109.

Where the question is one of fact as to the purchasers' good faith, and they as witnesses have failed to satisfy the trial court thereof and their stories in the printed record are unpersuasive, the verdict will not be disturbed. *Bentley v. Young* (C. C. A., 2d Cir.), 34 Am. B. R. 365, 223 Fed. 536, affg. 31 Am. B. R. 506, 210 Fed. 202.

*Creditors' bill by trustee.*—A trustee in bankruptcy may maintain an action in the nature of a creditors' bill against the persons who have purchased and disposed of the entire assets of his bankrupt's estate in violation of the provisions of section 2061, Rev. St. 1913, commonly called the "Bulk Sales Law." *Niklaus v. Lessenhop* (Neb. Sup. Ct.), 37 Am. B. R. 401, 157 N. W. 1019.

<sup>228.</sup> In *re* Walden Bros. Clothing Co. (D. C., Ga.), 29 Am. B. R. 80, 199 Fed. 315. But in this case on appeal the court held (C. C. A., 5th Cir.), 29 Am. B. R. 673, that where a transfer of a bankrupt's entire stock of goods, which was made for a present fair consideration, is sought to be impugned on the ground that it was made to hinder, delay and defraud creditors, so far as the purchaser is concerned, actual fraud as distinguished from constructive fraud, must be shown.

<sup>229.</sup> In *re* Kayser (C. C. A., 3d Cir.), 24 Am. B. R. 174, 177 Fed. 383; *Jackson v. Sedgwick* (D. C., N. Y.), 26 Am. B. R. 836, 189 Fed. 508; *Potter v. American Printing & Litho. Co.* (Ia. Sup. Ct.), 40 Am. B. R. 854, 165 N. W. 1044.

<sup>230.</sup> In *re* Elleston (D. C., W. Va.), 23 Am. B. R. 530, 174 Fed. 859; In *re* Kayser (C. C. A., 3d Cir.), 24 Am. B. R. 174, 177 Fed. 383; *Crawford v. Broussard* (C. C. A., 5th Cir.), 44 Am. B. R. 187, 260 Fed. 122.

<sup>231.</sup> *Carter v. Goodykoonts* (D. C., Ind.), 2 Am. B. R. 224, 94 Fed. 106; *Johnson v. Wald* (C. C. A., 5th Cir.), 2 Am. B. R. 84, 98 Fed. 640; In *re* Steininger (C. C. A., 5th Cir.), 6 Am. B. R. 68, 107 Fed. 609; In *re* Hugill Mercantile Co. (D. C., Ohio), 3 Am. B. R. 686, 100 Fed. 616; In *re* Kellogg (Ref., N. Y.), 6 Am. B. R. 389, affd. 7 Am. B. R. 270, 112 Fed. 52; In *re* Shepherd (Ref., Ill.), 6 Am. B. R. 725; *Calkens v. Lichtig* (C. C. A., 6th Cir.), 42 Am. B. R. 306, 251 Fed. 844; *Crawford v. Broussard* (C. C. A., 5th Cir.), 44 Am. B. R. 187, 260 Fed.

122; *Matter of Sola* (C. C. A., 1st Cir.), 44 Am. B. R. 372, 261 Fed. 822.

<sup>232.</sup> Compare *Tiffany v. Lucas*, 15 Wall. 410; *Sedgwick v. Wormser*, Fed. Cas. 12,626; *Curran v. Munger*, Fed. Cas. 3,487.

<sup>233.</sup> In *re* Moody (D. C., Iowa), 14 Am. B. R. 272, 134 Fed. 628, holding that a transfer of all the bankrupt's property to a person with knowledge of the bankrupt's financial condition is not in good faith; In *re* Knopf (D. C., S. Car.), 16 Am. B. R. 432, 144 Fed. 245; *Dikken v. Page* (C. C. A., 8th Cir.), 17 Am. B. R. 228, 147 Fed. 438; *Dreyer v. Kicklighter* (D. C., Ga.), 36 Am. B. R. 199, 228 Fed. 744; *Murray v. Ray* (C. C. A., 9th Cir.), 42 Am. B. R. 315, 251 Fed. 866.

*Burden of proof.*—In an action by one claiming to be the owner of property transferred by a bankrupt to recover the proceeds of the sale of the property made by the trustee, the burden is upon the plaintiff to aver and prove that he was a purchaser in good faith and for a present fair consideration. *Crawford v. Broussard* (C. C. A., 5th Cir.), 43 Am. B. R. 603, 260 Fed. 122; rehearing denied, 44 Am. B. R. 187, 260 Fed. 122; *Watson v. Adams* (C. C. A., 6th Cir.), 39 Am. B. R. 473, 242 Fed. 441.

<sup>234.</sup> *Parker v. Sherman* (C. C. A., 2d Cir.), 32 Am. B. R. 393, 212 Fed. 917; *Godwin v. Tuttle* (Sup. Ct. Ore.), 33 Am. B. R. 93, 141 Pac. 1190; *Matter of Rosenberg* (Ref., N. Y.), 22 Am. B. R. 900.

*Sale in bulk sustained in* *Shelton v. Price* (D. C., Ala.), 23 Am. B. R. 431, 174 Fed. 891; see In *re* Walden Bros. Clothing Co. (D. C., Ga.), 29 Am. B. R. 80, 199 Fed. 315 (affd. 29 Am. B. R. 673), holding that where bankrupt mortgaged its entire stock of merchandise, and then used the money received from the mortgage to pay three creditors, leaving a number of its creditors wholly unprotected, it will be presumed (under Ga. Code, § 3224) that the mortgage was given by bankrupt with intent to hinder and delay such unprotected creditors, the circumstances being such as to have put the mortgagee upon inquiry which, if made, would have informed him of bankrupt's intention, and therefore the mortgage is void. See also In *re* Thweatt (D. C., Ga.), 29 Am. B. R. 84, 199 Fed. 819, affd. sub nom. *Johnson v. Dis-mukes* (C. C. A., 5th Cir.), 29 Am. B. R. 686, 204 Fed. 382. And see under "Sales of goods on account; bulk sales," ante.

A payment of a note dated prior to the four months' period, which is immediately followed by bankruptcy, is not in good faith and for a present fair consideration.<sup>235</sup> The fact that a mortgagee knew that the proceeds of a mortgage was to be used in the payment of mortgagor's creditors does not affect the good faith of the transaction, in the absence of proof that he had cause to believe that the mortgagor was insolvent.<sup>236</sup> If the consideration is fair and passes to the bankrupt and goes into his estate, the transfer is valid, unless there is clear and convincing proof of fraud.<sup>237</sup> The general rule is that a present consideration does not necessarily consist of money. It may consist in the substitution of one security for another or the giving up of value which could have been secured at the time, for a postponement.<sup>237a</sup> If the bankrupt was solvent when he transferred the property, and there were no grounds for believing that an indebtedness would arise which would embarrass him, the transfer may be sustained as being in good faith, even if made to his wife, it appearing that the property had been acquired in part by money of the wife advanced to the husband in trust.<sup>238</sup> A new corporation organized by the bondholders of an insolvent corporation to take over the assets of such corporation with no provision made for the payment of its debts, does not take such assets in good faith, or "for a present fair consideration."<sup>239</sup> If valid as to the "present consideration" and void as to the remainder of the value of the property transferred because in fraud of creditors, the recovery will be limited to the part that is void and the remainder may be retained.<sup>240</sup> If part of the consideration is present and made in good faith, such a mortgage will be good to that extent.<sup>241</sup> But where there is an entire absence of good faith, the fresh consideration does not save the mortgage; it is void even as to that.<sup>242</sup> Marriage is a proper and valuable consideration for the transfer of property under this section.<sup>243a</sup>

<sup>235</sup>. *Spencer v. Nekemoto* (D. C., Hawaii), 24 Am. B. R. 517.

<sup>236</sup>. In *re Kullberg* (D. C., Minn.), 23 Am. B. R. 753, 176 Fed. 585.

<sup>237</sup>. *Parker v. Sherman* (C. C. A., 2d Cir.), 32 Am. B. R. 393, 212 Fed. 917; *Matter of Bear* (C. C. A., 2d Cir.), 32 Am. B. R. 465, 213 Fed. 628; *Vollmer v. Plage* (D. C., N. Y.), 26 Am. B. R. 590, 186 Fed. 598; *Matter of Coplag-Lindenhurst Co.* (D. C., N. Y.), 39 Am. B. R. 412, 240 Fed. 431; *Robertson v. Schlotschauer* (C. C. A., 7th Cir.), 40 Am. B. R. 237, 243 Fed. 324; *Potter v. American Ptg. & Litho. Co.* (Ia. Sup. Ct.), 40 Am. B. R. 854, 165 N. W. 1044; *McNamara v. Farnsworth* (Wash. Sup. Ct.), 43 Am. B. R. 554, 180 Pac. 466.

A chattel mortgage given upon the payment of cash, which cash goes into the hands of the bankrupt and is used for the purposes of his estate and of which his creditors have the benefit, is a valid mortgage under § 67-e of the bankruptcy law even if made within four months of the filing of the petition, if no actual fraud be shown. In *re Mahland* (D. C., N. Y.), 26 Am. B. R. 81, 184 Fed. 743; *Lake View State Bank v. Jones* (C. C. A., 7th Cir.), 40 Am. B. R. 148, 242 Fed. 821. As to assignment of book accounts made by parol as security for purchase price of goods delivered prior to four months period, see in *re Stiger* (D. C., N. J.), 29 Am. B. R. 253, 202 Fed. 791.

<sup>237a</sup>. *Hagan v. McNeil* (C. C. A., 4th Cir.), 41 Am. B. R. 792, 253 Fed. 710.

<sup>238</sup>. *Butcher v. Cantor* (D. C., N. Y.), 26 Am. B. R. 424, 185 Fed. 945; *Young v. Evans* (C. C. A., 5th Cir.), 41 Am. B. R. 379, 251 Fed. 282; *Swan v. Bailey* (Okla. Sup. Ct.), 42 Am. B. R. 214, 174 Pac. 1065.

<sup>239</sup>. Reorganization of corporation to take assets of insolvent corporation; present consideration.—Where a corporation, organized to

operate stone quarries, had become insolvent, and, within four months, prior to its adjudication in bankruptcy, a bondholders' committee organized a new corporation for the purpose of transferring to it by bill of sale all the assets of the quarry company, and such bill of sale within such four months' period was given with the intent to hinder, delay or defraud the creditors of the quarry company, and the new corporation did not buy the property in good faith or give "present appropriate consideration therefor," such transfer is null and void under § 67-e of the bankruptcy act. In *re Medina Quarry Co.* (D. C., N. Y.), 24 Am. B. R. 769, 179 Fed. 929.

<sup>240</sup>. *Jackson v. Sedgwick* (D. C., N. Y.), 26 Am. B. R. 836, 189 Fed. 508; *Vollmer v. Plage* (D. C., N. Y.), 26 Am. B. R. 590, 186 Fed. 598; In *re Mahland* (D. C., N. Y.), 26 Am. B. R. 81, 184 Fed. 743.

<sup>241</sup>. In *re Wolf* (D. C., Iowa), 3 Am. B. R. 558, 98 Fed. 84; *City Nat. Bank v. Bruce* (C. C. A., 4th Cir.), 6 Am. B. R. 311, 109 Fed. 69, affg. In *re Alverson* (Ref., S. Car.), 5 Am. B. R. 855; *Stedman v. Bank of Monroe* (C. C. A., 8th Cir.), 9 Am. B. R. 4, 117 Fed. 287; In *re Davidson* (D. C., Ia.), 5 Am. B. R. 528, 109 Fed. 882; In *re Durham* (D. C., Md.), 8 Am. B. R. 115, 114 Fed. 750; In *re Sawyer* (D. C., Mass.), 12 Am. B. R. 269, 130 Fed. 384, where a chattel mortgage given in security for the payment of notes to a certain amount was sustained as to the amount actually loaned at the time the mortgage was executed: In *re Dismal Swamp Contracting Co.* (D. C., Va.), 14 Am. B. R. 175, 135 Fed. 415; *Angle v. Bankers' Trust Co.* (D. C., N. Y.), 32 Am. B. R. 71, 210 Fed. 269.

<sup>242</sup>. In *re Hugill* (D. C., Ohio), 3 Am. B. R. 686, 100 Fed. 616. See also a case somewhat analogous, In *re Barrett* (Ref., N. Y.), 6 Am.

**g. Transfers and incumbrances under State laws.**—The last sentence of the subsection is in line with the policy of the law. It adopts all State laws which interdict fraudulent transfers and liens, provided the acts complained of are within four months of the bankruptcy. Section 70-e is broader and applies the period of limitation fixed by the State law. This sentence is of little importance.

**h. Suits to recover property.**—(1) **IN GENERAL.**—Though all fraudulent transfers or incumbrances are here declared null and void and, by § 70-a (4) the title to property affected thereby vests in the trustees, yet a suit to recover will often be necessary. This is invariably so, where possession is not in the bankrupt. If in his possession, it may be reached summarily.<sup>243</sup> Not so where a third party is interested, save with his consent.<sup>244</sup> The setting aside of a mortgage in which the wife of the bankrupt joined, to release her dower, revives the wife's right of dower.<sup>245</sup> A payment of a premium to an insurance company upon an annuity policy, whereby a bankrupt becomes entitled to an annuity payable during life, may be recovered by the trustee of the annuitant; such a contract is wholly executory and the trustee may elect to cancel it, and recover the consideration for the benefit of creditors.<sup>246</sup> What has been said as to suits to set aside voidable preferences is largely applicable here.<sup>248</sup>

(2) **AMENDMENT OF 1903.**—The words added here are the same as those added to § 60-b and § 70-a. Clearly, they refer to any suit which may be brought under the subsection, and not merely to a suit based on a State law. The meaning and purpose of the amendment have already been discussed. The amendatory act has conferred jurisdiction upon district courts concurrent with State courts to set aside transfers made by a bankrupt within the four months' period, which are alleged to be null and void as to creditors by a State law.<sup>249</sup> If the property, against which the lien is asserted, is in the possession of a State court, the question of the validity of the lien should

B. R. 43. Compare also *In re Soudans Mfg. Co.* (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 804.

<sup>242a</sup> *Robertson v. Schlotzhauer* (C. C. A., 7th Cir.), 40 Am. B. R. 237, 243 Fed. 324.

<sup>243</sup> See *In re Deuell* (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 633, and many cases where the remedy of contempt has been resorted to.

<sup>244</sup> *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175, 20 Sup. Ct. 1000; *Matter of Mansur* (Ref., Mass.), 36 Am. B. R. 67.

**Consent of defendant.**—An action, wherein it is alleged that the defendant claimed to be the owner of an account due the bankrupt and that such claim was based on a conspiracy between the bankrupt and the defendant, is in the nature of a suit to quiet title to personal property, and cannot be brought in the federal courts without the consent of the defendant. *Simpson v. Western Hard-*

*ware & Metal Co.* (D. C., Wash.), 35 Am. B. R. 851, 227 Fed. 304.

<sup>245</sup> *Matter of Lingafelter* (C. C. A., 6th Cir.), 24 Am. B. R. 656.

<sup>246</sup> *Smith v. Mutual Life Ins. Co.* (C. C. Mass.), 24 Am. B. R. 514, 178 Fed. 510.

<sup>248</sup> See under Section Sixty of this work.

<sup>249</sup> *Johnston v. Forsyth Mercantile Co.* (D. C., Ga.), 11 Am. B. R. 669, 127 Fed. 845. See *McNulty v. Feingold* (D. C., Pa.), 19 Am. B. R. 338, 129 Fed. 1,001, holding that a trustee in bankruptcy may maintain a suit in equity in a district court for an accounting of money collected by defendants on accounts fraudulently assigned to them by bankrupts, although the face value of such accounts is known to the trustee. As to actions by trustees to set aside fraudulent conveyances, see *Schmitt v. Dahl* (Sup. Ct., Minn.), 11 Am. B. R. 226, 188 Minn. 506; *Kohout v. Chaloupka* (Sup. Ct., Neb.), 11 Am. B. R. 265, 69 Neb. 677; *Loganville Bank-*

be tried in the State court.<sup>250</sup> For the time when the amendments became operative, see "Supplementary Section to Amendatory Act," *post*.

i. **Miscellaneous invalid transfers or incumbrances.**—(1) **IN GENERAL.**—The books are already well filled with precedents. All turn on their own facts.<sup>251</sup> It is impossible to deduce hard and fast rules. The more important cases are classified in the succeeding paragraphs.

(2) **MORTGAGES TO SECURE ANTECEDENT DEBTS.**—These are void.<sup>252</sup> Where the mortgagor remains in possession with power to sell in the usual course of business, under a mortgage that contains no provision that the proceeds of sales shall be applied upon the debt secured, the legal effect of the mortgage is to hinder and delay creditors; and if given within the four months' period is null and void.<sup>253</sup> Although the mortgage is given to secure a present loan,

ing Co. v. Forrester (Ga. Ct. of App.), 36 Am. B. R. 279, 97 S. E. 694; Simpson v. Western Hardware & Metal Co. (D. C., Wash.), 35 Am. B. R. 851, 227 Fed. 304; Rubenstein v. Lottow (Mass. Sup. Ct.), 35 Am. B. R. 243, 220 Mass. 156.

250. Pietri v. Wells (La. Sup. Ct.), 36 Am. B. R. 105, 69 So. 847.

251. For instance, in *re* Little River Lumber Co. (D. C., Ark.), 1 Am. B. R. 493, 92 Fed. 585, and in *re* Head (D. C., Ark.), 7 Am. B. R. 556, 114 Fed. 489; in *re* Faulhaber Stable Co. (C. C. A., 2d Cir.), 22 Am. B. R. 361, 170 Fed. 68. See also for decisions on this general subject, *Harvey v. Smith* (Sup. Jud. Ct., Mass.), 7 Am. B. R. 497, and in *re* Standard Laundry Co. (C. C. A., 9th Cir.), 9 Am. B. R. 538, 116 Fed. 476; *Henderson v. Garner* (Ala. Sup. Ct.), 39 Am. B. R. 792, 75 So. 387; *Matter of Hawkins* (D. C., Ga.), 40 Am. B. R. 271, 243 Fed. 792.

252. In *re* Ronk (D. C., Ind.), 7 Am. B. R. 21, 111 Fed. 154; *Pollock v. Jones* (C. C. A., 4th Cir.), 10 Am. B. R. 616, 124 Fed. 163, *affg.* 9 Am. B. R. 262, 118 Fed. 673; *Farmers' Bank v. Carr & Co.* (C. C. A., 4th Cir.), 11 Am. B. R. 733, 127 Fed. 690; in *re* Hill (D. C., Cal.), 15 Am. B. R. 499, 140 Fed. 984; *Matter of Hutchinson Co.* (Ref., Mich.), 14 Am. B. R. 513; *Morgan v. First Nat. Bank* (C. C. A., 4th Cir.), 16 Am. B. R. 639, 145 Fed. 466. Compare in *re* Wolf (D. C., Iowa), 3 Am. B. R. 568, 98 Fed. 84, and *Sabin v. Camp* (D. C., Oreg.), 3 Am. B. R. 578, 98 Fed. 974.

**Mortgage, when invalid.**—But a transfer or mortgage made by an adjudged bankrupt, to secure a pre-existing debt, within four months of the filing of the petition, is not void, under section 67-a, unless it was either made with the intent on his part to hinder, delay or defraud his creditors, or some of them, or is held void as against his creditors by the laws of the jurisdiction in which the property is situated. *Coder v. Arts* (C. C. A., 8th Cir.), 19 Am. B. R. 513, 152 Fed. 943, modifying 16 Am. B. R. 563, *affd.* 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436.

**Chattel mortgage by corporation organized to take over business of bankrupt; lack of present consideration.**—Where a creditor, with knowledge that a bankrupt had made various transfers of his property to his wife,

received stock in a corporation formed to take over bankrupt's business and which was at all times insolvent, and subsequently turned back the stock, taking in part payment therefor a chattel mortgage upon assets of the corporation, such mortgage was invalid, the evidence failing to establish that the creditor had ever purchased the stock for a present consideration or advanced money thereon as claimed. In *re* Levine (D. C., N. Y.), 28 Am. B. R. 481, 196 Fed. 589.

253. *Egan State Bank v. Rice* (C. C. A., 8th Cir.), 9 Am. B. R. 437, 119 Fed. 107; *Zartman v. National Bank*, 16 Am. B. R. 152, 109 N. Y. App. Div. 406, 96 N. Y. Supp. 633; *Skilton v. Codrington*, 15 Am. B. R. 810, 185 N. Y. 80, 77 N. E. 790; in *re* Marine Construction & Dry Dock Co. (D. C., N. Y.), 14 Am. B. R. 466, 135 Fed. 921; *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 177, 133 Fed. 863; in *re* Standard Telephone & Electric Co. (D. C., Wis.), 19 Am. B. R. 491, 157 Fed. 106; in *re* Herman (D. C., Iowa), 31 Am. B. R. 243, 207 Fed. 594; *Pierre Banking & Trust Co. v. Winkler* (S. Dak. Sup. Ct.), 40 Am. B. R. 622, 165 N. W. 2.

**Mortgage to secure prior advances.**—Where bankrupt gave to a bank a mortgage to secure prior advances which had been made under an agreement to give such security and it plainly appeared that bankrupt, who was then knowingly, hopelessly insolvent, had determined, days before he gave the mortgage, to abscond and leave his creditors unpaid, except as secured, the mortgage constituted a transfer to hinder, delay and defraud creditors, and, there being no "present" consideration, it was void, notwithstanding that the mortgagee might have acted in good faith. In *re* Thomas (D. C., N. Y.), 29 Am. B. R. 945, 199 Fed. 214.

**Mortgage on shifting stock of merchandise.**—A chattel mortgage given by a bankrupt on a stock consisting of wines, liquors and cigars, etc., which, with the knowledge of the mortgagee, were bought and sold and dealt in from day to day in the usual course of trade, all of the proceeds being retained by the bankrupt and no part being turned over to the mortgagee, is invalid. In *re* Noethen (C. C. A., 2d Cir.), 29 Am. B. R. 234, 201 Fed. 97, *affg.* 27 Am. B. R. 910, 195 Fed. 573.

if the money borrowed is to be used in part payment of antecedent debts, the mortgage has been held to be void.<sup>254</sup>

(3) **CHATTEL MORTGAGES.**—Here the cases are quite numerous and in each instance turn upon the requirements of the State law.<sup>255</sup> Any chattel mortgage which was ineffectual as against creditors under the law of the State of the transaction, is ineffectual as against the bankrupt's trustee.<sup>256</sup>

<sup>254</sup> In re Pease (D. C., Mich.), 12 Am. B. R. 66, 129 Fed. 446; In re Butler (D. C., Ga.), 9 Am. B. R. 539, 120 Fed. 100; In re Soudans Mfg. Co. (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 804; In re Hersey (D. C., Iowa), 22 Am. B. R. 763, 171 Fed. 999; Matter of Schacht Motor Car Co. (Ref., Cal.), 31 Am. B. R. 624. Compare Smith v. Coury (D. C., Me.), 41 Am. B. R. 219, 247 Fed. 168; Matter of Lake Chelan Land Co. (C. C. A., 9th Cir.), 44 Am. B. R. 14, 267 Fed. 497.

Mortgage to secure advances to pay pre-existing debt.—A mortgage, executed by an insolvent debtor within four months of bankruptcy, covering all his property, to secure notes representing a loan with which the mortgagee had taken upon notes discounted by a bank and on which the debtor was threatened with arrest for forgery, held, on all the evidence, to constitute a fraudulent transfer, void under section 67-e of the bankruptcy act. Dean v. Davis, 242 U. S. 438, 38 Am. B. R. 664, 37 Sup. Ct. 230, and cases cited in marginal note.

<sup>255</sup> In re Adams (Ref., Mich.), 2 Am. B. R. 415; In re Leigh (Ref., Col.), 2 Am. B. R. 606; Stroud v. McDaniel (C. C. A., 4th Cir.), 5 Am. B. R. 695, 106 Fed. 493; In re Shirley (C. C. A., 6th Cir.), 7 Am. B. R. 299, 112 Fed. 301; In re Platts (D. C., S. Dak.), 6 Am. B. R. 568, 110 Fed. 126; In re Ronk (D. C., Ind.), 7 Am. B. R. 31, 111 Fed. 154; In re Pekin Plow Co. (C. C. A., 8th Cir.), 7 Am. B. R. 369, 112 Fed. 308; In re Soudans Mfg. Co. (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 804; Dodge v. Norlin (C. C. A., 8th Cir.), 13 Am. B. R. 177, 133 Fed. 363; Bank of Dillon v. Murchison (C. C. A., 4th Cir.), 31 Am. B. R. 740, 213 Fed. 147. As to binding effect of State law and decisions, compare In re Hull (D. C., Vt.), 8 Am. B. R. 302, 115 Fed. 858, with In re Josephson (D. C., Ga.), 8 Am. B. R. 423, 111 Fed. 404. The latter case is thought the more reliable. Matter of Petersen (D. C., Nev.), 40 Am. B. R. 653, 252 Fed. 846, 849; Matter of Taylor Corporation (C. C. A., 2d Cir.), 40 Am. B. R. 659, 248 Fed. 223.

The validity of a mortgage is a local question, and the decisions of the State courts will control. In re Hickerson (D. C., Idaho), 20 Am. B. R. 682, 688, 162 Fed. 345; In re Harnaden (D. C., N. Mex.), 29 Am. B. R. 507, 200 Fed. 175; Scandinavian-American Bank v. Sabin (C. C. A., 9th Cir.), 36 Am. B. R. 151, 227 Fed. 579.

A bill of sale executed by a corporation while it is insolvent, to secure a loan is invalid under this section. In re Arkonia Fabric Mfg. Co. (D. C., Pa.), 18 Am. B. R. 470, 151 Fed. 914.

**Possession and sale of property by mortgagor.**—A provision in a chattel mortgage, that the mortgagors may remain in possession of a stock of merchandise and sell it out in the usual course, paying a per cent. of the sales each week to the mortgagee, does

not render the mortgage void *per se*. Good faith is the controlling principle in testing the validity of such a conveyance, and this must be in each case decided upon the evidence. Cauthorn v. Burley State Bank (Sup. Ct., Idaho), 33 Am. B. R. 794, 144 Pac. 1606.

<sup>256</sup> In re First National Bank of Canton (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62; In re Birck & Co. (C. C. A., 7th Cir.), 15 Am. B. R. 694, 142 Fed. 438, holding that under the Illinois statute a chattel mortgage is void as against the mortgagor's trustee, where such mortgage was given to secure notes containing no mention upon their face that they were secured by an instrument in the form of a chattel mortgage. In re Shaw (D. C., Me.), 17 Am. B. R. 196, 146 Fed. 243; In re Chadwick (D. C., Ohio), 15 Am. B. R. 528, 140 Fed. 674; Matter of Petersen (D. C., Nev.), 40 Am. B. R. 653, 252 Fed. 846, 849; Park v. South Bend Chilled Plow Co. (Tex. Ct. of Civ. App.), 41 Am. B. R. 23, 199 S. W. 843.

**Sale of mortgaged property without accounting for proceeds.**—Where bankrupt who had given a chattel mortgage on a stock of goods to a bankrupt was, with the knowledge of the mortgagee, permitted to sell the goods and, having deposited the proceeds in the bank, to use them for his own benefit and in the purchase of new merchandise, with no understanding that the proceeds should be reinvested and the mortgage lien attach to the goods, so purchased, and, although many times the mortgage indebtedness, in goods, were sold and the proceeds so deposited, only a small payment was made to the bank and no account rendered of the disposition of the proceeds, the transaction, under the law of South Dakota, constituted a legal fraud which voided the mortgage as against bankrupt's creditors. In re Geiver (D. C., S. Dak.), 28 Am. B. R. 413, 193 Fed. 128.

**Validity of chattel mortgage as to creditors extending credit.**—A trustee in bankruptcy takes the property of the bankrupt subject to all the rights, claims and equities that have been impressed upon it in the hands of the bankrupt, and the validity of such rights, claims and equities is to be determined, in the absence of Federal statute, by the local law as evidenced by the decisions of the State courts. A chattel mortgage was given September 30th, 1909, but not recorded until March 9th, 1910. In August, 1910, the mortgagor was adjudged a bankrupt. It appeared that certain persons became creditors between the date of execution and of recording the mortgage. Held, that the trustee in bankruptcy took subject to the rights, claims and equities existing against the bankrupt's property, the validity of which was to be determined by the local (Missouri)

If a bankrupt purchases property subject to a chattel mortgage, his trustee cannot attack the mortgage because not filed as required by statute; the bankrupt received the property subject to the lien, and his trustee cannot avail himself of the remedies afforded the creditors of the original mortgagor.<sup>257</sup> Cases where the validity of conditional sales has been attacked are also cited here.<sup>258</sup> So also where a pledge of collateral has been called in question.<sup>259</sup>

(4) VOLUNTARY SETTLEMENTS.—These are avoided in terms by the English law. We have no similar provision, but judicial construction has made our rule substantially the same. If made by an insolvent husband to his wife they are held void.<sup>260</sup> No matter how devious the method, if the wife gets the property from an insolvent husband without consideration, intent will be presumed and the transfer be set aside.<sup>261</sup> Similarly, transfers

statute; that, in Missouri, an unrecorded chattel mortgage is void as to creditors extending credit to the mortgagor between the time of giving the mortgage and the date of recording, and that the superior equity of such creditors follows the property into the hands of the trustee in bankruptcy. *In re Wade* (D. C., Mo.), 26 Am. B. R. 169, 185 Fed. 664.

Right of trustee to take advantage of invalidity.—Prior to bankruptcy, the bankrupt had given to his father-in-law a chattel mortgage covering tools, furniture, personal property, etc., of every kind. He was at the time running a small store and his stock of merchandise, covered by the mortgage, was sold from time to time as his own and the proceeds used primarily for the support of the bankrupt's family, though occasional payments were made upon the mortgage but no account of sales was kept, and the mortgagee made no objection to the disposition made of the proceeds. Held, that the mortgage was invalid as to any of the property, as against the general creditors, and that the trustee in bankruptcy might take advantage of such invalidity. *In re Hartman* (D. C., N. Y.), 26 Am. B. R. 76, 189 Fed. 196.

Mortgage on shifting stock of merchandise.—A New York chattel mortgage given to secure a part of the purchase price of a stock of goods, which permits the mortgagor to sell the goods in the ordinary course of business although providing that the stock shall be kept up to its present standard as to quality and quantity and purporting to give a lien on all goods purchased to replenish the stock is void as to the mortgagor's creditors, in the absence of a provision for turning over the proceeds of sales to the mortgagee or for using such proceeds to replenish the stock or for a renewal of the lien by giving renewal or new mortgages on new stock purchased. *Matter of Purcell* (D. C., N. Y.), 32 Am. B. R. 824, 215 Fed. 191.

Under the decisions of Oregon, when it appears either upon the face of a chattel mortgage or by parol evidence *alunde*, that a mortgagee of personal property has given the mortgagor unlimited power and authority to dispose of the property in the usual course of trade, the mortgage is void as to attaching creditors, even though there was not actual fraudulent intent on the part of either of the parties to the instrument, and hence it is also void as to the trustee in bankruptcy of the mortgagor. *Scandinavian-American Bank v. Sabin* (C. C. A., 9th Cir.), 36 Am. B. R. 151, 227 Fed. 579.

<sup>257</sup> *In re Columbia Fireproof Door & Trim Co.* (D. C., N. Y.), 21 Am. B. R. 714, 143 Fed. 199.

<sup>258</sup> *In re Klingaman* (D. C., Iowa), 4 Am. B. R. 254, 101 Fed. 691; *In re Howland* (D. C., N. Y.), 6 Am. B. R. 495, 109 Fed. 890; *In re*

*Tatem* (D. C., N. Car.), 6 Am. B. R. 426, 110 Fed. 519; *In re Sewall* (D. C., Ky.), 7 Am. B. R. 133, 111 Fed. 791; *In re Garcewich* (C. C. A., 2d Cir.), 8 Am. B. R. 149, 115 Fed. 87.

<sup>259</sup> *Chattanooga Nat. Bank v. Rome Iron Co.* (D. C., Ga.), 4 Am. B. R. 441, 102 Fed. 755; *In re Cobb* (D. C., N. Car.), 3 Am. B. R. 129, 96 Fed. 821; *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779; *Clark v. Iselin*, 21 Wall. 300; *Adams v. Nat. Bank*, 2 Fed. 174; *Davis v. R. R. Co.*, Fed. Cas. 3,648; *In re Grinnell*, Fed. Cas. 5,829.

<sup>260</sup> *In re Skinner* (D. C., Ia.), 3 Am. B. R. 163, 97 Fed. 190; *In re Grahs* (Ref., Ohio), 1 Am. B. R. 435; *Kehr v. Smith*, 20 Wall. 31; *Sedgwick v. Place*, Fed. Cas. 12,622; *Pratt v. Curtis*, Fed. Cas. 11,875; *Antrim v. Kelly*, Fed. Cas. 494. Compare *Conron v. Cauchols* (C. C. A., 2d Cir.), 39 Am. B. R. 780, 242 Fed. 909.

<sup>261</sup> *In re Smith* (D. C., Ga.), 3 Am. B. R. 95, 100 Fed. 795; *In re Eldred*, Fed. Cas. 4,328. Compare *In re Teter* (D. C., Va.), 23 Am. B. R. 223, 173 Fed. 798, *affd.* 24 Am. B. R. 242, 179 Fed. 665; *Phillips v. Kleinman* (Pa. Com. Pleas. Alleg. Co.), 23 Am. B. R. 266.

Assignment of life insurance policy; chattel mortgage to wife to secure note.—A bankrupt had two policies of life insurance in which his wife was named as beneficiary subject to the usual right of the insured to change the beneficiary. Assignments of both of the policies to the company as security for loans were signed by the wife. Thereafter a note was given to the wife secured by a mortgage, for the amount of the loan with interest. The mortgaged property was sold free from liens. Held, that the note to the wife and the mortgage to secure it were without consideration, and that the proceeds of the sale of the property belong to the estate in bankruptcy. *Matter of Farrand* (D. C., Me.), 38 Am. B. R. 101, 235 Fed. 809.

<sup>262</sup> *In re Johann*, Fed. Cas. 7,381. Compare *Adams v. Collier*, 122 U. S. 382, 30 L. Ed. 1207, 7 Sup. Ct. 1206.

<sup>263</sup> *In re Porterfield* (D. C., W. Va.), 15 Am. B. R. 11, 138 Fed. 192; *In re Grandy* (D. C., S. Car.), 17 Am. B. R. 206, 146 Fed. 318.

<sup>264a</sup> *Baldwin v. Kingston* (D. C., N. J.), 40 Am. B. R. 641, 247 Fed. 163, *affd.* 44 Am. B. R. 12, 257 Fed. 554.

<sup>264b</sup> *Robertson v. Schlotschauer* (C. C. A., 7th Cir.), 40 Am. B. R. 237, 243 Fed. 824.

<sup>264</sup> Gifts by husband to wife; recovery by trustee.—Small sum of moneys voluntarily given by a husband to his wife from time to time when he was entirely solvent, should not be taken from her to pay persons who became creditors as a result of a business enterprise into which he subsequently engaged; but sums so given the wife, when the husband is not in a financial condition to do so, may be recovered by the trustee in bankruptcy. *Milkman v.*

to other relatives are suspicious and require proof.<sup>262</sup> But if a transfer be made in good faith to a wife, in consideration of her release of her inchoate dower right, it is valid,<sup>263</sup> and the same is true of a transfer to the wife in lieu of support,<sup>263a</sup> or pursuant to an antenuptial agreement.<sup>263b</sup> A husband may give his earnings or other property to his wife, without affecting the rights of his creditors, provided he is at the time in solvent circumstances, and there is no purpose to avoid his obligations.<sup>264</sup>

(5) **GENERAL ASSIGNMENTS.**—Voluntary general assignments, whether with or without preferences, are legal frauds, and therefore voidable. The cases are already numerous,<sup>265</sup> and establish a doctrine not always recognized under the former laws. The legal effect of a general assignment is considered elsewhere.<sup>266</sup>

j. **Practice.**—If the property may be recovered summarily, a petition, duly verified, will usually be enough to secure the order to show cause. It should show facts bringing it within the terms of some of the subsections of this section.<sup>267</sup> If the bankrupt or his agent who is in possession refuses to deliver the property, contempt proceedings may be brought. In cases where a suit is necessary it must be brought in the proper tribunal,<sup>267a</sup> and must be for either the property or its value. The trustee should not, however, bring such a suit without obtaining a direction to that effect by the referee in charge.<sup>268</sup> He must also allege and prove that the property is required to pay claims against the bankrupt's estate.<sup>268a</sup> In a suit to recover specific property an injunction against further transfer is a right incidental to the suit.<sup>268b</sup>

## VI. LIENS THROUGH LEGAL PROCEEDINGS.

a. **In general.**—Subsections c and f both relate to liens obtained through legal proceedings. Subsection c relates to liens obtained in suits or pro-

Arthe (C. C. A., 2d Cir.), 34 Am. B. R. 536, 223 Fed. 507, revg. 32 Am. B. R. 519, 213 Fed. 642.

<sup>265</sup> West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098, 19 Sup. Ct. 836; Davis v. Bohle (C. C. A., 8th Cir.), 1 Am. B. R. 412, 92 Fed. 325, affg. In re Sievers (D. C., Mo.), 1 Am. B. R. 117, 91 Fed. 366; In re Gutwillig (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475; affd., a. c., 1 Am. B. R. 288, 92 Fed. 327; In re Gray, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, 62 N. Y. Supp. 618; Globe Ins. Co. v. Cleveland Ins. Co., Fed. Cas. 5,486; Boese v. King, 108 U. S. 379, 27 L. Ed. 790, 2 Sup. Ct. 765; Detroit Trust Co. v. Pontiac Sav. Bank (C. C. A., 6th Cir.), 27 Am. B. R. 821, 196 Fed. 29; affd. 237 U. S. 186, 34 Am. B. R. 759, 35 Sup. Ct. 509; Matter of Braus (D. C., N. Y.), 38 Am. B. R. 112, 237 Fed. 139; Matter of Vorck (D. C., Mont.), 38 Am. B. R. 203, 235 Fed. 655. Compare Matter of Creech Bros. Lumber Co. (C. C. A., 9th Cir.), 39 Am. B. R. 487, 240 Fed. 8.

A general assignment, even though without preferences, is now, if made within four months of the filing of the petition, a constructive fraud on the bankruptcy act. Cohen v. American Surety Co., 20 Am. B. R. 66, 72, 192 N. Y. 227, 84 N. E. 947; Eichholz v. Polack (N. Y. App. Div.), 25 Am. B. R. 243, 140 N. Y. App. Div. 551, 125 N. Y. Supp. 1108.

<sup>266</sup> See under Sections Three and Twenty-three of this work.

<sup>267</sup> **Allegations in pleadings.**—For instance, in the case of McNulty v. Wiesen (D. C., Pa.), 12 Am. B. R. 341, 180 Fed. 1,012, it was held that an allegation in an answer that the purchase of book accounts was made without intent on the part of the defendants to delay, hinder and defraud the bankrupt's creditors, or any of them, is not impertinent, for the reason that under subsection e the defendants are required to show that they were purchasers in

good faith and for a present fair consideration. See also Johnston v. Forsyth Mercantile Co. (D. C., Ga.), 11 Am. B. R. 639, 127 Fed. 84.

<sup>267a</sup> See, generally, under Sections Two and Twenty-three of this work. Trice v. Coolidge Banking Co. (D. C., Ga.), 39 Am. B. R. 843, 242 Fed. 175.

A receiver cannot sue to recover property which has been fraudulently transferred by the bankrupt. Frost v. Latham & Co. (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 836.

**Equity jurisdiction.**—To establish a liability under section 67-e of the bankruptcy act actual fraud must be shown and therefore suits under that provision are peculiarly within the cognizance of, and should be entertained on, the equity side of the court. Simpson v. Western Hardware & Metal Co. (D. C., Wash.), 35 Am. B. R. 851, 227 Fed. 304; Henderson v. Garner (Ala. Sup. Ct.), 39 Am. B. R. 792, 75 So. 387.

<sup>268</sup> See also, generally, under Sections Three, Twenty-three and Sixty of this work.

**Intervention by trustee.**—The trustee may be brought before the court by amendment to the original bill although it was filed before bankruptcy. Rennells v. Potter (Mich., Sup. Ct.), 40 Am. B. R. 480, 164 S. W. 475.

<sup>268a</sup> Hibachman v. Bevis (Wash. Sup. Ct.), 42 Am. B. R. 154, 174 Pac. 5. Compare Riggs v. Price (Mo. Sup. Ct.), 43 Am. B. R. 413, 210 S. W. 420.

**Amount of recovery.**—In an action by a trustee in bankruptcy to recover property fraudulently transferred, the amount of the recovery by the trustee will be limited to the amount of claims against the bankrupt with interest and costs, including any unpaid costs in the bankruptcy proceedings. Smith v. Seibel (D. C., Ia.), 44 Am. B. R. 499, 258 Fed. 454.

<sup>268b</sup> Hall v. Glen (D. C., Cal.), 39 Am. B. R. 54, 247 Fed. 997.

ceedings at law or in equity against the bankrupt, begun within the four months' period. Such liens are nullified, or if the nullification would work an injury to the bankrupt estate, they may be preserved for the benefit of the estate, and the trustee may be subrogated to the rights of the holder of the lien, and be empowered to perfect and enforce the same. Subsection *f* nullifies all liens obtained through legal proceedings "against a person who is insolvent," which are perfected within the four months' period.<sup>269</sup> The property subject thereto passes upon the bankruptcy of such person to his trustee. The court may also preserve such liens for the benefit of the estate. *Bona fide* purchasers are protected under this subsection. The provisions of this subsection are not limited to the annulment of liens on property that passes to the trustee; it is general and sweeping and applies to all liens acquired through legal proceedings during the four months' period, on all property of the bankrupt, including exempt property.<sup>270</sup> The section does not, however, defeat rights in the exempt property acquired by contract or by waiver of the exemption.<sup>270a</sup>

b. *Comparative legislation.*—The wide gulf between the former and the present law here needs little comment. Then, as has been said, only attachment liens were dissolved. Now all liens through legal proceedings share the same fate. Thus, the subsections under discussion are in harmony with the so-called "passive" act of bankruptcy<sup>271</sup> and, with it, establish a new class of constructive frauds resulting from what we have been wont to think justifiable foresight. This is the high-water mark of bankruptcy jurisprudence both in England and the United States. The change is so marked that the constitutionality of the clause has been attacked, though unsuccessfully.<sup>272</sup>

c. *Confusion concerning subs. c. and subs. f.*—A question much discussed early in the administration of the law was whether subsection *f* applied to voluntary bankruptcies. Some cases held that it did not.<sup>273</sup> The great weight

<sup>269.</sup> *Matter of Southern Arizona Smelting Co.* (C. C. A., 9th Cir.), 38 Am. B. R. 827, 231 Fed. 87.

*Void or voidable.*—The lien of a judgment entered against an insolvent debtor within four months of bankruptcy is absolutely void, not merely voidable. *Greenberger v. Schwartz* (Pa. Sup. Ct.), 42 Am. B. R. 239, 104 Atl. 574.

<sup>270.</sup> *In re Forbes* (C. C. A., 9th Cir.), 26 Am. B. R. 355, 136 Fed. 79. It is apparent that the effect of § 67-f of the Act of 1898 is not to avoid attachments, levies or liens therein referred to against all the world, but merely as against the trustee in bankruptcy and those claiming under him, so that the property may pass to and be distributed by him among the creditors of the bankrupt, and such is the view entertained by several well-considered cases. *Casady & Co. v. Hartsell*, 34 Am. B. R. 236, 151 N. W. 97; *Peoples' Nat'l Bank v. Maxson* (Sup. Ct., Iowa), 33 Am. B. R. 765, 150 N. W. 601; *Matter of American Candy Mfg. Co.* (D. C., N. Y.), 41 Am. B. R. 461, 248 Fed. 145; *Archenhold Co. v. Schaefer* (Tex. Ct. of Cir. App.), 42 Am. B. R. 232, 205 S. W. 139; *Compare Jewett Bros. v. Huffman* (N. Dak. Sup. Ct.), 13 Am. B. R. 738, 14 N. Dak. 110; *Matter of Downing* (D. C., Ky.), 15 Am. B. R. 432, 139 Fed. 590; *First Nat. Bank v. Lee* (N. Dak. Sup. Ct.), 34 Am. B. R. 555, 141 N. W. 716.

The Supreme Court in the case of *Chicago, Burlington & Quincy Ry. Co. v. Hall*, 229 U. S. 511, 30 Am. B. R. 619, 57 L. Ed. 1306, 33 Sup. Ct. 885, has settled such doubt as may have existed in respect to this matter. The court says: "On this question there is a difference of opinion, some State and Federal courts holding that the bankruptcy act was intended to protect the creditor's trust fund, and not the

bankrupt's own property, and that therefore liens against the exempt property were not annulled even though obtained by legal proceedings within four months of filing the petition. *Re Driggs* (D. C., N. Y.), 22 Am. B. R. 621, 171 Fed. 897; *Re Durham* (D. C., Ark.), 4 Am. B. R. 780, 104 Fed. 231. On the other hand, *Re Tune* (D. C., Ala.), 8 Am. B. R. 235, 115 Fed. 906; *Re Forbes* (C. C. A., 9th Cir.), 26 Am. B. R. 355, 136 C. C. A. 191, 136 Fed. 79, holds that § 67-f annuls all such liens, both as against the property which the trustee takes and that which may be set aside to the bankrupt as exempt. This view, we think, is supported both by the language of the section and the general policy of the act, which was intended not only to secure equality among creditors, but for the benefit of the debtor in discharging him from his liabilities and enabling him to start afresh with the property set apart to him as exempt. Both of these objects would be defeated if judgments like this present were not annulled, for otherwise the two Iowa plaintiffs would not only obtain a preference over other creditors, but would take property which it was the purpose of the bankruptcy act to secure to the debtor." See discussion under Section Six of this work, sub-title "Exemptions out of incumbered property."

*Failure of trustee to claim property.*—The lien of a judgment acquired within four months of bankruptcy is rendered void by section 67-f of the bankruptcy act, although the trustee does not claim the property against which the lien is asserted. *Peoples' Nat'l Bank v. Maxson* (Sup. Ct., Iowa), 33 Am. B. R. 765, 150 N. W. 601.

*Contractual liens not affected.*—The language of section 67 of the bankruptcy act, which pro-



of authority, however, is that both subsections may refer to either voluntary or involuntary cases.<sup>274</sup> The courts were at first also much confused by two subsections with apparently the same purpose, yet, while inconsistent in part, at the same time overlapping. This confusion is not now important. Subsection *f* seems to cover in general terms almost every lien specifically declared voidable in subsection *c*, as well as many more. Besides, it occurs later in the law and, having been inserted while the bill was in conference committee of the two Houses of Congress, thus represents, as it were, the last word of the framers of the statute.<sup>275</sup> It, therefore, is now usually relied on; subsection *c* is important only in those rare instances where subsection *f* does not apply.

d. When subs. *c* applies.—The element of insolvency at the time of the lien not always being essential under subsection *c*, as under subsection *f*, cases where this matter is in doubt will often, if possible, be brought within the former. This distinction is not important where the facts bring the alleged lien within subdivisions *c* (1) or *c* (2). Still, liens may be obtained through legal proceedings which amount to a fraud on the act irrespective of insolvency. In that event, while such cases will be rare, subsection *c*, and not its companion, applies. The distinction between "void" and "voidable," in the respective subsections, is not important. Several of the clauses making up subsection *c* have been considered elsewhere.<sup>276</sup> The phrase "in fraud of the provisions of the act" comes from the law of 1867.<sup>277</sup> It means, in brief, any act intended to disturb or resulting in a disturbance of that equilibrium between creditors of the same class which is the basic principle

vides that "levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at a time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is alleged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt," relates merely to levies, judgments, attachments, and liens which are acquired through legal proceedings, and does not affect contractual or quasi contractual liens. Scrupulous care, indeed, is evidenced throughout the act to save all such rights and liens which are obtained in good faith from the bankrupt. *Gray v. Arnot* (N. Dak. Sup. Ct.), 35 Am. B. R. 704, 154 N. W. 268.

The framers of the Bankruptcy Act in employing the words "levies, etc." in section 67(f) had reference to writs of execution, *f. fa.* garnishment, etc. *Bird v. City of Richmond* (C. C. A., 4th Cir.), 39 Am. B. R. 1, 240 Fed. 545.

<sup>276a.</sup> *Matter of Goldberg* (D. C., Pa.), 42 Am. B. R. 299, 254 Fed. 440; *First Nat. Bank of Sayre v. Bartlett*, 21 Am. B. R. 88, 35 Pa. Super. Ct. 593. See discussion under Section Six of this work, subtitle "Exemptions out of encumbered property."

<sup>271.</sup> *Bankr. Act*, § 3-a (3).

<sup>272.</sup> *In re Rhoads* (D. C., Pa.), 3 Am. B. R. 380, 98 Fed. 399.

<sup>273.</sup> *Voluntary bankruptcies*.—In the case of *In re DeLue* (D. C., Mass.), 1 Am. B. R. 387, 91 Fed. 510, it was held that where an attachment of the property of a voluntary bankrupt had been made by virtue of a precept issued within four months prior to the filing of the petition or in a suit that was commenced a year before the filing of the petition the lien of attachment was not destroyed by an adjudication of the petitioner in bankruptcy on the ground that the case falls within section 67-c,

and the provisions of section 672, being limited to voluntary bankruptcy, have no application. This case was followed by *In re Easley* (D. C., Va.), 1 Am. B. R. 715, 93 Fed. 419, where property had been levied upon by an execution issued upon a judgment prior to the statutory four months, and also by the case of *In re O'Connor*, 95 Fed. 943.

<sup>274.</sup> *In re Friedman* (Ref., N. Y.), 1 Am. B. R. 510; *Peck, etc., Co. v. Mitchell*, 95 Fed. 258; *In re Fellerath* (D. C., Ohio), 2 Am. B. R. 40, 95 Fed. 121; *In re Rhoads* (D. C., Pa.), 3 Am. B. R. 380, 98 Fed. 399; *In re Dobson* (D. C., Ill.), 3 Am. B. R. 420, 8 Fed. 86; *In re Leaser* (D. C., N. Y.), 3 Am. B. R. 515, 100 Fed. 433; *In re Kemp* (D. C., Col.), 4 Am. B. R. 242, 101 Fed. 689; *Brown v. Case* (Sup. Jud. Ct., Mass.), 6 Am. B. R. 744, 61 N. E. 279; *In re Benedict*, 8 Am. B. R. 463, 37 N. Y. Misc. 230, 75 N. Y. Supp. 165; *Mohr v. Mattox* (Sup. Ct., Ga.), 12 Am. B. R. 330, 120 Ga. 962; *McKenney v. Cheney* (Sup. Ct., Ga.), 11 Am. B. R. 54, 45 S. E. 433, in which case the court expressly dissented from the holding of Judge Thomas in the case of *In re O'Connor*, 95 Fed. 943, and held that a proper construction of subsection *f* requires the holding that it is applicable to both cases of voluntary and involuntary bankruptcy. *Mencke v. Rosenberg*, 9 Am. B. R. 323, 202 Pa. St. 131. And see *Matter of Southern Arizona Smelting Co.* (C. C. A., 9th Cir.), 36 Am. B. R. 827, 221 Fed. 87, where the court concludes that the language and purpose of the two subsections clearly indicate that it was intended that they should apply to both voluntary and involuntary proceedings.

Liens obtained by judgment notes which gave the holder the power of attorney to enter on judgment were considered to be annulled and rendered void by the adjudication, where the notes had been given before the statutory period, or the entry of the judgment had been made within that time. *In re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935. So, in the case of *In re Higgins* (D. C., Ky.), 3 Am. B. R. 364, 97 Fed. 775, an attachment issued within four months, though the case in which the

of all bankruptcy laws. Illustrative cases under the former law will be found in the foot-note.<sup>278</sup> The concluding clause of subsection *c* is doubtless expressive of the law. It extends to liens through legal proceedings<sup>279</sup> the rule of subrogation stated in subsection *b*. The fact that to be voidable under subsection *c* a lien must arise in a proceeding begun within the four months' period should also be noted.

**e. Insolvency essential.**—Here the distinction between liens through legal proceedings and other liens has already been pointed out. None of the former are dissolved by bankruptcy unless the lien was insolvent at the time they were perfected.<sup>280</sup> If the debtor was insolvent at the time the liens through legal proceedings were obtained, a court of bankruptcy has power to effect an avoidance of such liens in summary proceedings; but the insolvency of the debtor at the time such liens were acquired is an indispensable condition of the existence and of the exercise of the power.<sup>281</sup> If the lien consists of an attachment levied within four months of the adjudication, the solvency of the bankrupt at the time the levy was made does not save the lien; the adjudication is conclusive as to the insolvency of the debtor.<sup>282</sup>

**f. Four months prior to the filing of the petition.**—Liens through legal proceedings acquired more than four months before the bankruptcy are not affected.<sup>283</sup> This section has no application to judgments, levies, attachments, or other liens obtained after the filing of a voluntary petition in bankruptcy;<sup>284</sup> nor does it affect the claim of a sheriff for fees for services rendered

attachment was issued was begun long before, was annulled. See also *in re Vaughan* (D. C., N. Y.), 3 Am. B. R. 362, 97 Fed. 500, in which many cases are collected.

<sup>278.</sup> See *in re Tune* (D. C., Ala.), 8 Am. B. R. 286, 115 Fed. 906.

Wherever there is any inconsistency between the provisions of paragraphs *e* and *f*, the latter controls and supersedes the former under the well-known rule of statutory construction, as the last statement of the legislative will. *In re Rhoads* (D. C., Pa.), 8 Am. B. R. 380, 98 Fed. 390.

<sup>279.</sup> For instance, "Within four months prior to filing the petition," "Reasonable cause to believe that the defendant was insolvent," "In contemplation of bankruptcy," "Obtained or permitted" and "Insolvency" have been considered in the discussion under Section Sixty of this work.

<sup>277.</sup> Act of 1867, § 35, R. S., § 5128.

<sup>278.</sup> *Wagner v. Hall*, 16 Wall. 584; *Buchanan v. Smith*, 16 Wall. 277; *Toof v. Martin*, 13 Wall. 40.

<sup>279.</sup> *In re Moore* (D. C., Vt.), 6 Am. B. R. 175, 107 Fed. 234; *In re Higgins* (D. C., Ky.), 3 Am. B. R. 364, 97 Fed. 775.

<sup>280.</sup> *Simpson v. Van Etten* (D. C., Pa.), 6 Am. B. R. 204, 108 Fed. 199; *Keystone Brewing Co. v. Schermer* (Pa. Sup. Ct.), 31 Am. B. R. 279, 88 Atl. 657; *Mowbray Pearson Co. v. Pershall* (Wash. Sup. Ct.), 87 Am. B. R. 622, 159 Pac. 632; *Farmers' Nat. Bank v. Slaton* (Ky. Ct. of App.), 41 Am. B. R. 650, 208 S. W. 505.

<sup>281.</sup> *Stone Ordean Wells Co. v. Mark* (C. C. A., 8th Cir.), 35 Am. B. R. 663, 227 Fed. 975 (citing text) and holding also that the burden is on him who claims a lien is void under section 67-f to plead and prove the insolvency of the person against whom it was obtained at the time it was secured. *Martin v. Oliver* (C. C. A., 8th Cir.), 43 Am. B. R. 739, 260 Fed. 89, citing *Collier on Bankruptcy* (10th Ed.) 963.

<sup>282.</sup> Insolvency when attachment was levied immaterial.—Subdivision "c" of section 67, declaring in effect that a lien acquired by attachment shall be dissolved by the adjudication

if it appear that such lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, is repugnant to the provisions of subdivision "f" of said section, whereby all attachments levied against a person insolvent at any time within the four months' period are deemed null and void in case adjudication is had, and the latter provisions will prevail, so that an attachment levied within four months prior to the filing of the petition is rendered null and void by bankrupt's adjudication, and, the question of bankrupt's insolvency within that period being determined by the adjudication, his insolvency at the time the attachment was levied is immaterial. *Cook v. Robinson* (C. C. A., 9th Cir.), 28 Am. B. R. 182, 194 Fed. 785. See also *in re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935, 87 C. C. A. 634; *Matter of Southern Arizona Smelting Co.* (C. C. A., 9th Cir.), 36 Am. B. R. 827, 231 Fed. 87. *Contra Farmers' Nat. Bank v. Slaton* (Ky. Ct. of App.), 41 Am. B. R. 650, 208 S. W. 505.

<sup>283.</sup> *In re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 94 Fed. 476; *Fairlamb v. Smedley Const. Co.*, 36 Pa. Super Ct. 17, 22 Am. B. R. 824, 36 Pa. Super Ct. 17; *Matter of Schow* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514; *Broach v. Mullis* (D. C., Ga.), 35 Am. B. R. 841, 228 Fed. 551; *Gray v. Bank of Hartford* (Ark. Sup. Ct.), 43 Am. B. R. 166, 208 S. W. 302. See Am. Bankr. Dig. § 431.

**Suit by general creditors to set aside fraudulent conveyance.**—General creditors, who more than four months prior to bankruptcy, file a bill to cancel a fraudulent conveyance of their debtor, acquire a specific lien on the property conveyed, and gain thereby a priority in the distribution of the fund recovered. *Boyd v. Arnold* (Ark. Sup. Ct.), 32 Am. B. R. 856, 146 S. W. 118.

**Judgment against husband and wife.**—Where a judgment was entered against a husband and wife more than four months before the husband was adjudicated a bankrupt it is a valid lien against property held by the entirety and is

prior to bankruptcy on an execution levied within the four months' period.<sup>285</sup> Where the valid lien has been secured more than four months prior to the bankruptcy, proceedings to enforce the same do not conflict with the bankruptcy law, and may be instituted and prosecuted to the end.<sup>286</sup> When the question is one of hours, only whole days are counted.<sup>287</sup> But it is the accrual of the lien, not the entry of a judgment not amounting to a lien, from which the time runs.<sup>288</sup> Where the lien was created or existed prior to the four months' period, a judgment obtained within such period for the enforcement thereof in legal proceedings instituted for such purpose is not invalid or ineffective.<sup>289</sup> If the lien exists from the date of the summons, the lien does not accrue as against the defendant's trustee if the summons was served within the four months' period.<sup>290</sup> The fact that a lien has been dormant for a long period, as where the sale under an execution issued more than four months before bankruptcy was postponed, with the consent of the creditor, for a number of times, does not necessarily render it unenforceable against the trustee.<sup>291</sup> The effect where the lien is inchoate before the four months' period and does not become fixed until followed by a judgment within the period is considered, *post*.

**g. Miscellaneous invalid liens through legal proceedings.—**(1) **BY JUDGMENT AND EXECUTION.**—An important distinction must be noted here. A mere judgment is often not a lien. Until it becomes such, as by issue of execution or docketing in a register's office, it is not affected by this subsection,<sup>292</sup> and this in spite of the use of the word "judgment" in the first

not affected by the husband's discharge in bankruptcy and may be enforced against such property after the death of the wife. *Frey v. McGaw* (Md. Ct. of App.), 35 Am. B. R. 822.

<sup>284.</sup> *In re Engle* (D. C., Pa.), 5 Am. B. R. 372, 105 Fed. 893.

<sup>285.</sup> *Matter of Schmidt & Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 593, 165 Fed. 1,006.

<sup>286.</sup> *In re Koslowski* (D. C., Pa.), 18 Am. B. R. 723, 153 Fed. 823; *In re Crafts-Riordan Shoe Co.* (D. C. Mass.), 26 Am. B. R. 449, 185 Fed. 931; *Matter of McCausland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

**Receiver in supplementary proceedings.**—The title which a State receiver in supplementary proceedings acquires to the personal property of a judgment debtor relates back to the time of the institution of the proceedings, and the title of a trustee in bankruptcy appointed within four months after the appointment of the receiver is subject to the title of the receiver where the proceedings was commenced more than four months prior to the appointment of the trustee. *Arnold v. Greene Gold-Silver Co.* (N. Y. Sup. Ct., Spec. T.), 24 Am. B. R. 846, 68 Misc. 449, 125 N. Y. Supp. 29.

Where receivers, appointed in a creditor's suit commenced in a State court, have reduced to possession property of one subsequently adjudged bankrupt more than four months prior to the filing of the petition in bankruptcy, a court of bankruptcy may not take from their grasp the administration of the property so situated. *Blair v. Brailey* (C. C. A., 5th Cir.), 34 Am. B. R. 12, 221 Fed. 1.

Where a mortgage on real property is foreclosed the lien against the property is not derived from the judgment of foreclosure, but from the original mortgage. *Broach v. Mullis* (D. C., Ga.), 35 Am. B. R. 841, 328 Fed. 551.

<sup>287.</sup> *Jones v. Stevens* (Sup. Ct., Me.), 5 Am. B. R. 571, 48 Atl. 170. See also under Section Thirty-one.

<sup>288.</sup> Compare *Parmenter Mfg. Co. v. Strover* (C. C. A., 1st Cir.), 3 Am. B. R. 220, 97 Fed. 330. See also *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67.

<sup>289.</sup> *Spadlin v. Kramer* (Ga. Sup. Ct.), 38 Am. B. R. 821, 91 S. E. 409; *Gray v. Bank of Hartford* (Ark. Sup. Ct.), 43 Am. B. R. 166, 208 S. W. 302.

<sup>290.</sup> *Fairlam v. Smedley Const. Co.*, 22 Am. B. R. 824, 35 Pa. Super. Ct. 17.

<sup>291.</sup> *Matter of Zeis* (C. C. A., 2d Cir.), 40 Am. B. R. 104, 245 Fed. 737, rev'g 36 Am. B. R. 581, 229 Fed. 472; *Matter of Fraser* (D. C., N. Y.), 44 Am. B. R. 572, 261 Fed. 558. Compare *Matter of Rayford Truck & Tractor Co.* (D. C., Pa.), 41 Am. B. R. 616, 250 Fed. 634.

<sup>292.</sup> *In re Kenney* (C. C. A., 2d Cir.), 5 Am. B. R. 355, 105 Fed. 897; *Levor v. Seiter*, 5 Am. B. R. 576, 34 N. Y. Misc. 382, 69 N. Y. Supp. 987. Compare *In re Kavanaugh* (D. C., Ky.), 3 Am. B. R. 832, 99 Fed. 928; *Doyle v. Heath* (Sup. Ct., R. I.), 4 Am. B. R. 705, 22 R. I. 213; *In re Darwin* (C. C. A., 6th Cir.), 8 Am. B. R. 703, 117 Fed. 407; *Matter*

clause.<sup>293</sup> The law of each State determines when a judgment becomes a lien.<sup>294</sup> Under the former law, judgments, even when followed by execution and levy, were not affected by bankruptcy.<sup>295</sup> Now, if in fact liens and the element of insolvency appears, such judgment-liens are annulled by bankruptcy if the petition is filed within four months.<sup>296</sup> But this is not so where the money collected has already been paid to the judgment creditor.<sup>297</sup> Where property is sold under an execution on a judgment obtained within the four months' period, the proceeds being applied in payment of the debt, this subsection does not apply, as it does not operate to restore and then vacate a judgment or lien which no longer exists.<sup>298</sup> The liens of all judgments, executions and levies, obtained within four months prior to the filing of the petition, are annulled upon adjudication;<sup>298a</sup> such annulment dates from the entry of the judgment and affects all proceedings based thereon.<sup>299</sup> The annulment of the lien of the judgment invalidates the sale made by virtue of a levy thereunder, and the trustee may recover the property sold, unless the purchaser shows that he is a *bona fide* purchaser for value without notice or reasonable cause for inquiry as to the insolvency of the bankrupt.<sup>300</sup> The term "all levies" is comprehensive enough to include a seizure of the property of an insolvent under replevin process.<sup>301</sup> There is a "levy" when a

of Schow (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514; Coppard v. Gardner (Tex. Ct. of Civ. App.), 40 Am. B. R. 777, 199 S. W. 650.

A judgment obtained more than four months before the adjudication creates no lien, and a levy within the four months is within section 67-f of the act, and gives no priority, and does not relate back to the judgment to the extent of creating a lien by virtue of the fact that the judgment was rendered more than four months before the adjudication. *Matter of S. Ah Mi* (D. C., Hawaii), 18 Am. B. R. 138; see *Keystone Brewing Co. v. Schermer* (Pa. Sup. Ct.), 31 Am. B. R. 279, 88 Atl. 657.

<sup>293.</sup> In re Pease (Ref., N. Y.), 4 Am. B. R. 547; In re Beaver Coal Co. (D. C., Or.), 6 Am. B. R. 404, 110 Fed. 630; *affd. s. c.*, 7 Am. B. R. 542, 113 Fed. 889; In re Lesser (C. C. A., 2d Cir.), 5 Am. B. R. 326, 108 Fed. 201; *s. c.*, in Supreme Court, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67. *Contra*: *St. Cyr v. Daignault* (D. C., Vt.), 4 Am. B. R. 638, 103 Fed. 854. Compare also *Mauran v. Crown Carpet Lining Co.* (Sup. Ct., R. I.), 6 Am. B. R. 734, 23 R. I. 324, 50 Atl. 331.

<sup>294.</sup> In re Blair (D. C., Mass.), 6 Am. B. R. 206, 108 Fed. 509; In re Darwin (C. C. A., 6th Cir.), 8 Am. B. R. 703, 117 Fed. 407; *Matter of Schow* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514.

Under the law of Illinois, the delivery to the sheriff of executions upon judgments operates, without levy, to create liens on the property of the judgment-debtor within the county, which liens are paramount to rights in such property, possessed by a vendor under

a contract of conditional sale. *Rock Island Plow Co. v. Reardon*, 222 U. S. 354, 27 Am. B. R. 492, 56 L. E. 231, 33 Sup. Ct. 164.

<sup>295.</sup> In re Gold, etc., Co., Fed. Cas. 5,515; In re Winn, Fed. Cas. 17,876.

<sup>296.</sup> Compare In re Richards (D. C., Wis.), 2 Am. B. R. 518, 95 Fed. 258. See also In re Storm (D. C., N. Y.), 4 Am. B. R. 601, 103 Fed. 618; In re Stout (D. C., Mo.), 6 Am. B. R. 505, 109 Fed. 794; In re Benedict, 8 Am. B. R. 463, 37 N. Y. Misc. 230, 75 N. Y. Supp. 165; *Ricks v. Smith* (Ga. Ct. of App.), 40 Am. B. R. 25, 93 S. E. 116.

<sup>297.</sup> *Levor v. Seiter*, 8 Am. B. R. 459, 69 N. Y. App. Div. 33, 74 N. Y. Supp. 499, modifying *s. c.*, 5 Am. B. R. 576, 34 N. Y. Misc. 382, 69 N. Y. Supp. 987; *Matter of Pollman* (Ref., N. Y.), 16 Am. B. R. 144; In re Bailey (D. C., Oreg.), 16 Am. B. R. 289, 144 Fed. 214; In re Resnet (D. C., Pa.), 21 Am. B. R. 740, 167 Fed. 574.

Deposit with a third party for payment to the judgment creditor does not necessarily amount to payment to the judgment creditor so as to prevent title to the deposit from passing to the trustee in bankruptcy. *Lesser v. New York Title Ins. Co.* (N. Y. Sup. Ct.), 41 Am. B. R. 473.

<sup>298.</sup> In re Weitzel (D. C., N. Y.), 27 Am. B. R. 370, 191 Fed. 463; In re Bailey (D. C., Ore.), 16 Am. B. R. 289, 144 Fed. 214.

<sup>298a.</sup> Judgment against tenants by entirety.—*Ades v. Caplan* (Md. Ct. of App.), 41 Am. B. R. 391, 103 Atl. 94.

<sup>299.</sup> *Clark v. Larremore*, 188 U. S. 486, 9 Am. B. R. 476, 47 L. Ed. 555, 23 Sup. Ct. 363; *Matter of Fraser* (D. C., N. Y.), 44 Am. B. R. 572, 261 Fed. 558, citing *Collier on Bankruptcy* (11th ed.) 1080, 1081.

seizure of the property is effected by receivers appointed in a creditor's suit.<sup>302</sup> It has been held that the provisions of § 67-f will not be extended so as to affect a judgment obtained without the filing of a petition.<sup>303</sup> A judgment, in an action to foreclose a mortgage upon the property of an alleged bankrupt, entered within the four months' period, being merely a decree by a court of competent jurisdiction, cannot be affected by bankruptcy proceedings.<sup>304</sup> But under circumstances involving the interests of the bankrupt's estate and the rights of other creditors, a sale under the decree may be stayed and the property be sold by the trustee, the superior lien of the mortgage creditor being preserved.<sup>307</sup> A judgment or decree enforcing a pre-existing lien is not necessarily within the prohibition of subsection f, since such subsection is confined to judgments which themselves create liens.<sup>305</sup> But if a judgment

A judgment obtained and levy made by a conditional vendor within four months prior to the filing of a petition against the vendee and while he was insolvent, are null and void and the property attached is released from the same. *Matter of O'Brien, Jr.* (D. C., N. J.), 32 Am. B. R. 347, 215 Fed. 129.

Judgment within four months of bankruptcy.—Where within four months prior to the filing of a petition in bankruptcy against a corporation, followed by an adjudication that it was a bankrupt, and while it was insolvent, a creditor obtained a judgment against it, and in the bankruptcy proceedings there was no order for the preservation of the lien of the judgment for the benefit of the estate, such lien was, by section 67-f of the bankruptcy act rendered "null and void." Accordingly, it could not be levied on property of the bankrupt's estate which was sold by the trustee under order of the bankruptcy court. *Finney v. Knapp Co.* (Ga. Sup. Ct.), 37 Am. B. R. 37, 89 S. E. 413.

300. *Dreyer v. Kichlighter* (D. C., Ga.), 36 Am. B. R. 199, 228 Fed. 744; *Coppard v. Gardner* (Tex. Ct. of Civ. App.), 40 Am. B. R. 777, 199 S. W. 650.

301. *In re Hymes, etc., Co.* (D. C., Mo.), 12 Am. B. R. 477, 130 Fed. 977; *In re Haynes* (D. C., Vt.), 10 Am. B. R. 715, 123 Fed. 1001; *Matter of Weinger & Co.* (D. C., N. Y.), 11 Am. B. R. 424, 126 Fed. 875; *Matter of Rudnick & Co.* (D. C., N. Y.), 18 Am. B. R. 750, 158 Fed. 223, holding that a seizure in replevin may be vacated under section 67-f.

302. *Blair v. Brailey* (C. C. A., 5th Cir.), 34 Am. B. R. 12, 221 Fed. 1.

305. *Kinmouth v. Braeutigan* (Sup. Ct., N. J.), 4 Am. B. R. 344, 46 Atl. 769.

306. *Matter of McKane* (D. C., N. Y.), 18 Am. B. R. 594, 158 Fed. 647; *Reed v. Equitable Trust Co.*, 8 Am. B. R. 242, 115 Ga. 780.

307. *In re Vastbinder* (D. C., Pa.), 13 Am. B. R. 148, 132 Fed. 718.

When sale in suit to foreclose mortgage enjoined.—Alleged bankrupts gave a mortgage upon their stock of merchandise, which mortgage contained no provision whereby the lien thereof should attach to substitution or accessions to the stock or to after-acquired property and gave no authority or power to the mortgagors to sell the merchandise. Thereafter three-fourths of the merchandise which comprised the stock when the mortgage was given, was sold in the usual course of trade by the alleged bankrupts, and other merchandise was added to the balance of the stock and intermingled and confused with it. Within four months of the filing of the petition and while the alleged bankrupts were insolvent, in a suit to foreclose the mortgage brought in the State court, it was decreed by the court that the entire stock be sold to satisfy the claim of the mortgagees. *Held*, that in order to give effect to section 67-f which declares null and void all liens obtained through legal proceedings against a person who is insolvent, at any time within the four months' period, the sale directed by the State court should be enjoined, but, if an adjudication of bankruptcy took place, the lien of the mortgage would be upheld to whatever extent it was valid. *In re Oxley & White* (D. C., Wash.), 25 Am. B. R. 656, 182 Fed. 1019.

308. *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 87; *Rader v. Star Mill & Elevator Co.* (C. C. A., 8th Cir.), 43 Am. B. R. 754, 258 Fed. 121. Compare *Matter of Chambers* (D. C., Iowa), 43 Am. B. R. 22, 254 Fed. 506.

Lien of pre-existing judgment, where a judgment had been recovered and docketed more than four months prior to the filing of a petition in bankruptcy by the judgment debtors, it was held that the lien thus impressed upon the real estate of the debtors could be enforced within such period either

is rendered upon an unsecured claim within the four months' period it becomes null and void under such subsection upon the debtor being adjudicated a bankrupt, in which case the invalidity of the judgment relates back to the time the judgment was rendered, and nullifies such judgment and all subsequent proceedings thereon.<sup>309</sup> The lien of a judgment and execution, recovered within the four months' period, imposing a fine for illegal liquor selling, falls within this subsection, and is void, and the execution should be stayed pending bankruptcy proceedings.<sup>310</sup> The lien of the judgment is annulled regardless of the intent of the parties to the proceedings in which it was obtained; "reasonable cause to believe" that a preference would ensue, need not be shown; the subsection is entirely separate from § 60-b and is unaffected by amendment of 1910 to that section.<sup>311</sup>

(2) GARNISHMENT PROCEEDINGS.—Garnishment proceedings instituted under a State statute against the bankrupt, based upon a judgment obtained within the four months' period are nullified.<sup>312</sup> A lien acquired by a writ of

by a sale of the land under execution or by an action in equity to obtain a decree adjudging transfers made by the judgment debtors to have been void. *Hiller v. Le Roy*, 12 Am. B. R. 733, 179 N. Y. 369, 72 N. E. 237; *Compare Mencke v. Rosenberg*, 9 Am. B. R. 323, 202 Pa. St. 131, in which case it was held that under the Pennsylvania statute, if a *testatum f. fa.* is issued within the period of four months prior to the filing of the petition, a lien is created which is invalidated by subsection f.

309. *Clark v. Larremore*, 188 U. S. 486, 9 Am. B. R. 476, 47 L. Ed. 555, 23 Sup. Ct. 363; *Mohr v. Mattox* (Sup. Ct., Ga.), 12 Am. B. R. 330, 120 Ga. 962; *McKenney v. Cheney* (Sup. Ct., Ga.), 11 Am. B. R. 54, 45 S. E. 433; *Kinnmouth v. Braeutigan* (Ct. Ch., N. J.), 10 Am. B. R. 83, 52 Atl. 226; *In re Breslauer* (D. C., N. Y.), 10 Am. B. R. 33, 121 Fed. 910; *In re Martin* (Ref., Tex.), 27 Am. B. R. 151; *In re Ottenwess v. Huxall* (C. C. A., 6th Cir.), 27 Am. B. R. 579, 193 Fed. 851.

310. Judgment for fine for illegal liquor traffic.—In the case of *In re Green* (D. C., Pa.), 24 Am. B. R. 665, 179 Fed. 870, the court, in speaking of a judgment for a fine imposed for illegal liquor selling under the Pennsylvania statute, said: "It does not seem to us necessary to determine whether or not the judgment in favor of the commonwealth is provable, or whether or not the claim would be affected by the discharge of the bankrupt. It is sufficient to note that the commonwealth of Pennsylvania has recovered a lien upon the bankrupt's estate within four months prior to the filing of the petition in bankruptcy. I am satisfied that section 67-f of the Bankruptcy Act makes no exceptions in favor of any lien creditor whose lien has been obtained through legal proceedings against the bankrupt within four months prior to the filing of the petition, other than such person who may have obtained title by virtue of such proceedings and has been a bona fide purchaser for value without notice or reasonable cause for in-

quiry. It is not pretended that the commonwealth of Pennsylvania has obtained title by virtue of the legal proceedings. At most the commonwealth has a lien by judgment and as well by execution, and the order restraining the commonwealth of Pennsylvania from proceeding thereon should not have been rescinded. The purpose of the Bankruptcy Act would be destroyed in this proceeding, if the commonwealth of Pennsylvania should realize the full amount due her upon the judgment at the expense of other creditors of the bankrupt, and particularly so if the claim of the commonwealth will not be discharged, while the claims of other creditors would be."

311. *In re Petersen* (C. C. A., 7th Cir.), 29 Am. B. R. 26, 200 Fed. 739, holding that where a trustee in bankruptcy seeks to enforce the enforcement of a judgment recovered against a bankrupt within the four months' period and while he was insolvent, upon the ground that such judgment constitutes a cloud on the bankrupt's property and interferes with its sale, it is not necessary for him to charge in his petition, that the judgment creditor at the time of the entry of his judgment, had reasonable cause to believe that the enforcement of such judgment would effect a preference.

312. *Hall v. Chicago, B. & Q. R. Co.* (Sup. Ct., Neb.), 25 Am. B. R. 53, 128 N. W. 646; *Southern Pac. Co. v. I. X. L. Furniture, etc., House* (Utah Sup. Ct.), 32 Am. B. R. 327, 140 Pac. 665.

Garnishment.—For liens growing out of garnishment proceedings, see *In re McCartney* (D. C., Wis.), 6 Am. B. R. 367, 109 Fed. 621; *In re Beals* (D. C., Ind.), 8 Am. B. R. 689, 116 Fed. 530; *Jefferson Transfer Co. v. Hull* (Wis. Sup. Ct.), 40 Am. B. R. 844, 168 N. W. 1; *Brenen v. Dahlstrom, etc., Door Co.* (N. Y. Sup. Ct.), 44 Am. B. R. 386, 189 App. Div. (N. Y.) 685; *Mechanics, etc., Ins. Co. v. McVay* (Ark. Sup. Ct.), 45 Am. B. R. 227, 219 Fed. 34; *In re Bannford* (C. C. A., 6th Cir.), 28 Am. B. R. 78, 194 Fed. 658, in which case it was also held that where, as under the law of Michigan, a garnishee judgment against a bank in which the principal defendant had a deposit, does not exonerate the principal defendant from liability to the judgment creditor and can not do so until paid by the bank, it does not operate as a novation, so as to entitle the

garnishment acquired within the prescribed period is ineffectual, and the trustee may sue to recover the money garnisheed, and the right to recover will not be affected by his failure to intervene in the action in which the judgment was obtained upon which the writ was issued.<sup>312</sup> An order of a court of bankruptcy relating to the moneys collected under the garnishee order is not an unauthorized interference with the process of the State court.<sup>314</sup> Money collected under the garnishee order, issued against the salary of the bankrupt, during the four months period belongs to the trustee, but that collected prior to such period should be paid to the judgment debtor.<sup>315</sup>

(3) BY ATTACHMENT.—Here the cases under the former law are quite generally applicable.<sup>316</sup> An attachment lien is within the terms of subsection *e* as well as subsection *f*,<sup>317</sup> and is dissolved by the filing of a petition in bankruptcy by or against the debtor, within four months after its date, if the debtor is adjudged a bankrupt,<sup>318</sup> or by the confirmation of an offer of composition made by the bankrupt prior to any adjudication.<sup>319</sup> The effect of this subdivision in dissolving attachments is not confined to those issuing from the Federal courts,

judgment creditor to the funds in the bank as against the principal defendant's trustee in bankruptcy.

**Stay of execution against future salary.**—Where six days before bankrupt's adjudication a creditor had obtained a judgment against him upon a debt provable in bankruptcy and from which a discharge would be a release, and after adjudication levied execution against the salary of the bankrupt to the extent of 10 per cent., as authorized by section 1391 of the New York Code of Civil Procedure, *held*, that since a discharge, if granted, would relate back to the adjudication and release bankrupt from all liability on such debts as were provable and existed at that time, an order was properly granted, which enjoined the enforcement of the garnishee execution but impounded the 10 per cent. until the question of bankrupt's discharge should be determined. *In re Harrington* (D. C., N. Y.), 29 Am. B. R. 666, 200 Fed. 1010.

Where service of the summons of garnishment was made more than four months prior to the adjudication in bankruptcy, the property in the hands of the garnishee is not discharged from the lien thereof. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the federal statute, which is plainly confined to judgments creating liens. *Citizens' National Bank v. Daisher*, 34 Am. B. R. 136, 84 S. E. 482.

<sup>313.</sup> *Wilson v. Van Buren Co. Farmers' Mut. Fire Ins. Co.* (Mich. Sup. Ct.), 34 Am. B. R. 678, 151 N. W. 752.

<sup>314.</sup> *Matter of Obergfall* (C. C. A., 2d Cir.), 38 Am. B. R. 645, 239 Fed. 850.

<sup>315.</sup> *Matter of Beck* (D. C., N. Y.), 38 Am. B. R. 797, 238 Fed. 653.

<sup>316.</sup> See *American Digest* (Century ed.). "Bankruptcy," §§ 296-305.

<sup>317.</sup> *In re Higgins* (D. C., Ky.), 3 Am. B. R. 364, 97 Fed. 775; *In re Kemp* (D. C., Col.), 4 Am. B. R. 242, 101 Fed. 689; *Wood v. Carr* (Ct. App., Ky.), 10 Am. B. R. 577, 73 S. W. 762; *Matter of Southern Arizona Smelting Co.* (C. C. A., 9th Cir.), 36 Am. B. R. 827, 231 Fed. 87; *De Freice v. Bryant* (D. C., Ky.), 37 Am. B. R. 275, 232 Fed. 233; *Matter of Pilar Hermanos* (D. C., Porto Rico), 37 Am. B. R. 405; *Gray v. Arnot* (N. Dak. Sup. Ct.), 35 Am. B. R. 704, 154 N. W. 268. See *Am. Bankr. Dig.*, § 462.

An attachment, levied against stock of another corporation in the possession of the treasurer of a bankrupt corporation, within four months of bankruptcy, is dissolved and released by the bankruptcy under section 67d of the Bankruptcy Act, and the trustee, representing the creditors and the court, can be divested of title only by a sale under order of the court, or by a disclaimer filed with its consent. *Matter of Gilsonite Mines Co.* (D. C., Pa.), 37 Am. B. R. 473.

<sup>318.</sup> *Matter of Federal Biscuit Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 612, 214 Fed. 221; *Lehman, Stern & Co. v. Martin & Co.* (La. Sup. Ct.), 32 Am. B. R. 681, 61 So. 212; *Ford v. Henderson* (Ore. Sup. Ct.), 43 Am. B. R. 405, 179 Fed. 558.

<sup>319.</sup> *Matter of Lilienthal* (C. C. A., 9th Cir.), 43 Am. B. R. 665, 256 Fed. 819.

but applies to the process of State courts.<sup>320</sup> The fact that a lien by attachment was obtained in a foreign country can make no difference in the meaning of the phrase "in fraud of the provisions of this act."<sup>321</sup> An attachment lien is released by an adjudication in bankruptcy, unless the court of bankruptcy shall order the lien preserved for the benefit of the bankrupt estate.<sup>322</sup> The effect of the nullification of the attachment is to transfer the title of the goods attached in the hands of the officer of the State court to the trustee of the bankrupt debtor. If a question arises as to the title to the goods, the trustee need not intervene in the action brought for the determination of title.<sup>323</sup> While this subsection discharges the lien of an attachment, it does not vacate the writ.<sup>324</sup> If the bond is one which in legal contemplation takes the place of the attachment lien, and gives the person in whose favor the bond is executed the right to recover on the bond without affecting the property, the annulment of the lien of the attachment does not destroy the bond. But if the bond is substituted for the property attached, the destruction of the attachment necessarily annuls liability on the bond.<sup>325</sup> The provisions of a State insolvency law, preferring a claim for costs incurred in an attachment,

320. *Matter of Federal Biscuit Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 612, 214 Fed. 221; *Ford v. Henderson* (Ore. Sup. Ct.), 42 Am. B. R. 108, 178 Pac. 381.

321. *Matter of Pollmann* (D. C., N. Y.), 19 Am. B. R. 474, 156 Fed. 221, holding that a lien by attachment obtained in Germany is in fraud of the act within the meaning of section 67-c (3).

Where an attachment under the Porto Rican law was levied more than four months before bankruptcy, but was not perfected by judgment in the main suit until within four months of the bankruptcy, a rule to show cause, why a stay of the sale under the attachment should not be dissolved, should be discharged, and the bankruptcy should proceed in the usual manner, all rights of the attachment creditors being respected by the referee. *Matter of Pilar Hermanos* (D. C., P. R.), 37 Am. B. R. 405; *Yumet & Co. v. Delgado* (C. C. A., 1st Cir.), 40 Am. B. R. 293, 243 Fed. 519.

322. *In re Walsh Bros.* (D. C., Ia.), 20 Am. B. R. 472, 159 Fed. 560, s. c., 28 Am. B. R. 243, 195 Fed. 576; *Crook-Horner Co. v. Gilpin* (Md. Ct. of App.), 23 Am. B. R. 350, 75 Atl. 1049, holding that both the attachments and the bond fail at the bankrupt's adjudication, and the State court cannot enter judgment for the purpose of allowing a proceeding to be maintained against the surety on the bond; *Matter of Alabama Coal & Coke Co.* (D. C., Ky.), 31 Am. B. R. 387, 210 Fed. 941.

323. *Gray v. Arnot* (N. Dak. Sup. Ct.), 35 Am. B. R. 704, 154 N. W. 268, holding that where an action is brought by the vendor of goods to recover the purchase price thereof, and an attachment is issued and levied on such goods in said proceeding, and within four months of the bringing of such action a petition in bankruptcy has been filed, the trustee in bankruptcy has no right or power to intervene in the action in order to gain

the possession of the goods. The action being for money merely, and the lien of the attachment having been nullified by the filing of the petition in bankruptcy, such trustee cannot, by filing a petition in intervention, transform the action into one for the recovery of goods, or for the trial of the right of title thereto.

324. *King v. Block Amusement Co.* 20 Am. B. R. 784, 126 N. Y. App. Div. 48, 111 N. Y. Supp. 102, holding that a warrant of attachment issued within four months of the filing of a petition in bankruptcy of defendant and discharged by an undertaking for which the surety takes no security, will not be vacated after the adjudication in bankruptcy so as to discharge the surety; *affd.* 193 N. Y. 608, 86 N. E. 1126; *Dyke v. Farmersville Mill & Light Co.* (Tex. Ct. of App.), 34 Am. B. R. 720, 175 S. W. 478; *Matter of Federal Biscuit Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 612, 214 Fed. 221.

325. *Casady & Co. v. Hartzell*, 34 Am. B. R. 236, 151 N. W. 97; *Schunack v. Art Metal Novelty Co.*, 26 Am. B. R. 731, 84 Conn. 331; *Windisch-Muhlhauser Brewing Co. v. Simms*, 26 Am. B. R. 714, 129 La. 134, 55 So. 739; *Payne v. Able*, 7 Bush. 344; *Hamilton v. Bryant*, 114 Mass. 543; *House v. Schnadig*, 235 Ill. 301; *Keyes v. Shannon*, 8 Rob. 172; *Klipstein v. Allen-Miles Co.* (C. C. A., 5th Cir.), 14 Am. B. R. 15, 136 Fed. 385; *King v. Block Amusement Co.*, 20 Am. B. R. 784, 126 N. Y. App. Div. 48, 111 N. Y. Supp. 102, *affd.* 193 N. Y. 608, 86 N. E. 1123; *McCombs v. Allen*, 82 N. Y. 114. But in the case of *Crook-Horner Co. v. Gilpin*, 112 Md. 1, 23 Am. B. R. 350, 75 Atl. 1,049, 28 L. R. A. (N. S.) 233, 136 Am. St. Rep. 376, it was held that both the attachment and the bond fall at the bankrupt's adjudication; *Credit Ass'n of Cal. v. Griffin* (Cal. Ct. of App.), 39 Am. B. R. 271, 163 Pac. 695.

326. *In re Copper King* (D. C., Cal.), 16 Am. B. R. 148, 143 Fed. 649.



are suspended by this section.<sup>328</sup> Where, under a State statute, a vendor's lien can only be enforced against property in the possession of the court, and since such possession is not acquired by the services of a summons of garnishment, a lien created by the attachment of property in the possession of a garnishee within four months of bankruptcy, is dissolved by the express provisions of § 67-f.<sup>328</sup> Even if the judgment antedates the law, and the attachment is within the four months' period, it is dissolved.<sup>329</sup> Where a petition in bankruptcy was filed more than four months after the bankrupt's property had been attached on suits then pending such attachments constituted liens that were not invalidated by the subsequent adjudication of bankruptcy, and were paramount to the rights of a trustee in bankruptcy, or of a receiver of the bankrupt's property appointed after such adjudication.<sup>330</sup> The lien of a foreign attachment, levied upon the property of a bankrupt anterior to the four months' period, is not divested by the bankruptcy act.<sup>331</sup> It has been held that where the lien is by attachment on *mesne* process made before such four months' period and followed by a judgment and levy within it, the attachment is not dissolved by subsection f.<sup>332</sup> Prior to *Metcalf v. Barker*,<sup>333</sup> the weight of authority was to the contrary; indeed, it was thought that attachments so made were in the

<sup>328</sup> *Lehman, Stern & Co. v. Gumbel & Co.*, 236 U. S. 448, 34 Am. B. R. 174, 35 Sup. Ct. 307, affg. 32 Am. B. R. 681, 61 So. 212.

<sup>329</sup> *Peck v. Lumber Co. v. Mitchell*, 95 Fed. 258. Contra: *In re De Lue* (D. C., Mass.), 1 Am. B. R. 387, 91 Fed. 510.

<sup>330</sup> *Batchelder & Co. v. Wedge* (Sup. Ct., Vt.), 19 Am. B. R. 268, 80 Vt. 353; *Yumet & Co. v. Delgado* (C. C. A., 1st Cir.), 40 Am. B. R. 293, 243 Fed. 519.

<sup>331</sup> *In re United States Graphite Co.* (D. C., Pa.), 20 Am. B. R. 573, 161 Fed. 583.

<sup>332</sup> *In re Blair* (D. C., Mass.), 6 Am. B. R. 206, 108 Fed. 529; *Pepperdine v. Bank of Seymour* (Ct. App., Mo.), 10 Am. B. R. 570, 100 Mo. App. 387; *Pelton v. Sheridan* (Ore. Sup. Ct.), 33 Am. B. R. 472, 144 Pac. 410; *Matter of Rodriguez* (D. C., Porto Rico), 40 Am. B. R. 485, 10 P. R. Fed. 162; *Yumet & Co. v. Delgado* (C. C. A., 1st Cir.), 40 Am. B. R. 293, 243 Fed. 519; *Gray v. Bank of Hartford* (Ark. Sup. Ct.), 43 Am. B. R. 166, 208 S. W. 302.

**Attachment before four months' period.**—Since the provisions of the bankruptcy act regarding valid liens include all liens valid by the laws of the States, and the laws of Massachusetts give a lien to a plaintiff attaching under *mesne* process, though he has obtained no judgment, a lien by such attachment in Massachusetts is not avoided by the provisions of section 67-f of the bankruptcy act, if the attachment is made more than four months before bankruptcy, though the judgment or decree enforcing the lien is obtained within the four months' period. *In re Crafts-Riordan Shoe Co.* (D. C., Mass.), 26 Am. B. R. 449, 185 Fed. 931.

<sup>333</sup> 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67.

<sup>334</sup> *In re Lesser* (D. C., N. Y.), 5 Am. B. R. 326, 108 Fed. 201; *In re Johnson* (D. C., Vt.), 6 Am. B. R. 202, 108 Fed. 373. Compare also *In re Lesser* (D. C., N. Y.), 3 Am. B. R. 815, 100 Fed. 433; affd. 5 Am. B. R. 320, 108 Fed. 201; and both revd. in *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67.

<sup>335</sup> *In re Snell* (D. C., Cal.), 11 Am. B. R. 35, 125 Fed. 154; *Yumet & Co. v. Delgado* (C. C. A., 1st Cir.), 40 Am. B. R. 293, 243 Fed. 519.

<sup>336</sup> *Botts v. Hammond* (C. C. A., 4th Cir.), 3 Am. B. R. 775, 99 Fed. 916; *In re Burlington Malting Co.* (D. C., Wis.), 6 Am. B. R. 369, 109 Fed. 777; *In re Schenkein* (D. C., N. Y.), 7 Am. B. R. 162, 113 Fed. 421; *Watschke v. Thompson* (Sup. Ct., Minn.), 7 Am. B. R. 504, 85 Minn. 105; *Powers Dry Goods Co. v. Nelson* (Sup. Ct., N. D.), 7 Am. B. R. 506, 507, 10 N. Dak. 580; *Schmilovitz v. Bernstein*, 47 Atl. 884, 22 R. I. 330; *Matter of Downing* (D. C., Ky.), 15 Am. B. R. 423, 139 Fed. 590.

<sup>337</sup> Thus, compare *In re Lesser* (D. C., N. Y.), 3 Am. B. R. 815, 100 Fed. 433; affd. 5 Am. B. R. 326, 108 Fed. 201, and revd. in *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67, and *In re Adams* (Ref., N. Y.), 1 Am. B. R. 94, with *Taylor v. Taylor* (Ch., N. J.), 4 Am. B. R. 211, 45 Atl. 440, and *Doyle v. Heath* (Sup. Ct., R. I.), 4 Am. B. R. 705, 22 R. I. 213.

**Income of trust fund.**—As to effect of adjudication in bankruptcy upon proceedings

same category as those actually within four months of bankruptcy.<sup>334</sup> However, while *Metcalf v. Barker* is not exactly in point, its conclusion seems to apply to all cases involving inchoate liens antedating the four months' period, so that where a valid attachment is obtained more than four months prior to the commencement of the bankruptcy proceedings, the attachment creditor should be permitted to prosecute the action to judgment and satisfy the same by an execution sale.<sup>335</sup> Other cases, more or less affected by this decision, are referred to in the foot-note.<sup>336</sup>

(4) BY CREDITOR'S BILL.—Until January, 1903, a clash of authority similar to that just noted existed here. It was well settled that the beginning of a creditor's suit to reach equitable assets gave such a creditor at least an inchoate lien; and the authorities were quite equally divided as to whether, when the suit antedated the four months' period, such a lien was dissolved.<sup>337</sup> *Metcalf v. Barker*, *supra*, has settled the question. If the creditor's suit was begun before the period, no matter if the judgment was entered within it, the lien is not affected by § 67-f and the bankruptcy court has no power to enjoin further proceedings in such suit.<sup>338</sup> The general rule is that a court, not even a court of bankruptcy, may interfere with another court's control over property which rightfully has been subjected to its jurisdiction.<sup>339</sup>

instituted under N. Y. Code Civ. Proc., § 1391, to apply income of trust fund to payment of judgment for necessities, see *In re Tiffany* (D. C., N. Y.), 13 Am. B. R. 310, 133 Fed. 799.

Right of trustee to levy by garnishment upon annuity under N. Y. Code.—Bankrupt, a widow, upon rejecting an annuity created by the will of her husband in lieu of dower, settled her dower and other claims against the estate upon the execution of an agreement whereby she was to receive \$300 per quarter as long as she remained a widow and unmarried, and \$150 per quarter during her life in case of remarriage. Held, that the income was an annuity, assignable by bankrupt and subject to levy by creditors; that bankrupt's trustee had the right to sell the annuity or to collect ten per cent. thereof, from time to time, under section 1391 of the New York Code of Civil Procedure, which provides for the levying of a continuing execution against income from trust funds or profits to become due to a judgment debtor to the amount of \$12 or more per week and for the collection of ten per cent. of such income under the continuing execution. *In re Burfis* (D. C., N. Y.), 26 Am. B. R. 680, 188 Fed. 527.

338. Compare *In re Porterfield* (D. C., W. Va.), 15 Am. B. R. 11, 138 Fed. 192. But see *Dunn Salmon Co. v. Pillmore*, 19 Am. B. R. 172, 55 N. Y. Misc. 546, 106 N. Y. Supp. 88.

339. Jurisdiction of a court taking possession of property prior to bankruptcy.—Where receivers, appointed in a creditors' suit commenced in a State court, have taken possession of the property of a person who

subsequently became bankrupt, and have instituted proceedings for the sale thereof more than six months before the institution of proceedings in bankruptcy, the State court is entitled to prosecute its suit to the end, to the exclusion of the bankruptcy court, and need not surrender any property to the bankruptcy court, unless there is a surplus after the satisfaction of the claims presented. *Blair v. Brailey* (C. C. A., 5th Cir.), 34 Am. B. R. 12, 221 Fed. 1.

340. Thus see *Hardt v. Schuykill, etc., Co.*, 8 Am. B. R. 479, 69 N. Y. App. Div. 90, 74 N. Y. Supp. 549.

341. In Section Twenty-three.

342. *Matter of Alabama Coal & Coke Co.* (D. C., Ky.), 31 Am. B. R. 387, 210 Fed. 941; *Matter of Malone's Estate* (D. C., Idaho), 36 Am. B. R. 364, 228 Fed. 566; *Matter of Wirth & Co., Inc.* (D. C., Mass.), 45 Am. B. R. 145.

343. *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 34 Am. B. R. 182, 59 L. Ed. 583, 35 Sup. Ct. 377; *First Nat. Bank v. Staake*, 202 U. S. 141, 15 Am. B. R. 639, 50 L. Ed. 967, 26 Sup. Ct. 580, affg. 13 Am. B. R. 281, 133 Fed. 717; *Matter of Fitzhugh Hall Amusement Co.* (D. C., N. Y.), 36 Am. B. R. 289, 228 Fed. 169, affd. 36 Am. B. R. 493, 230 Fed. 811.

Section 70-e distinguished.—Section 87-f differs from section 70-e in that the latter does not contain any provision to the effect that property, or its value, recovered by the trustee in a suit which that section authorizes him to bring shall pass to the trustee as part of the estate of the bankrupt. *Am. Trust & Savings Bank v. Duncan* (C. C. A., 5th Cir.), 43 Am. B. R. 7, 254 Fed. 870.

**h. Practice on suits to annul liens.**—The distinction here between subsection *f* and subsection *c* is not important. Though the former makes the liens it condemns void, and declares that "the lien shall be deemed wholly discharged," when the lien has resulted in possession adverse to the trustee, a suit is usually necessary though application for possession addressed to the State court will sometimes be enough.<sup>340</sup> The forum for such suits has already been considered.<sup>341</sup> The amendments of 1903 make it optional with the trustee to sue in the Federal district court or in the State court. The practice depends on the law and rules applicable to the court in which the suit is brought. Before beginning such a suit, the trustee customarily applies to the referee for permission.

**i. Preserving liens.**—Here the statute is sufficiently explicit. If the creditor has a void or voidable lien, the court may order it preserved for the benefit of the estate. Thus, in those States where the filing of a creditor's bill does not create a lien that survives the bankruptcy, the court may order the trustee to intervene and ask to be substituted as plaintiff. Likewise, "the court may order such conveyance as shall be necessary to carry the purposes of this section into effect." Subsection *f* makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released and shall pass to the trustee of the estate of the bankrupt; or second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate.<sup>342</sup> Where the benefit of an attachment issued by a State is claimed by the trustees in bankruptcy, and the court of bankruptcy orders the same to be preserved for the benefit of the estate, so much of the value of the property attached as was represented by the attachment passes to the trustee for the benefit of the entire body of creditors; the statute recognizes the lien of the attachment, but distributes the lien of the attachment among the whole body of creditors.<sup>343</sup> Creditors entitled to priority under State statutes relative to attachment, are not entitled to priority where the lien of attachment is preserved for the benefit of the bankrupt estate.<sup>344</sup> If the lien by attachment acquired within the four months' period is preserved, the property passes to the trustee to be administered and applied for the benefit of all the creditors, although under a State statute the attaching creditors had special privileges not accruing to the other creditors.<sup>345</sup> Where it is desirable to preserve an attachment or execution lien

<sup>344</sup> The right of antecedent creditors under a State statute to be preferred is not protected by § 64-b, subd. 5 which provides that debts to have priority must be those owing to a person who, by the laws of the States and the United States, is entitled to priority. *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583, 35 Sup. Ct. 377, affg. 27 Am. B. R. 545, 193 Fed. 841, and 29 Am. B. R. 935, 201 Fed. 31.

<sup>345</sup> *Martin v. Globe Bank & Trust Co.* (C.

A., 6th Cir.), 27 Am. B. R. 545, 193 Fed. 841, affd. 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583, 35 Sup. Ct. 377.

<sup>346</sup> *In re Walsh Bros.* (D. C., Iowa), 28 Am. B. R. 243, 195 Fed. 576; *Davis v. Compton* (C. C. A., 3d Cir.), 20 Am. B. R. 53, 158 Fed. 735, 85 C. C. A. 633; *Matter of Alabama Coal & Coke Co.* (D. C., Ky.), 31 Am. B. R. 387, 210 Fed. 941; *Matter of Jules & Frederic Co.* (D. C., Mass.), 36 Am. B. R. 233.

<sup>347</sup> *First Nat. Bank v. Staake*, 202 U. S.

upon the bankrupt's property for the benefit of the estate, steps must be taken to that end before the lien is discharged; the subrogation of the trustee as plaintiff in the attachment proceedings after the discharge of the attachment lien by operation of law, does not revive the lien.<sup>346</sup> An order to preserve an attachment is not necessary where such attachment is the only lien.<sup>347</sup> As stated in the third edition of this work: "The first provision contemplates the attachment of property to which the bankrupt has the complete legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dissolved as a preferential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy."

j. *Saving clause.*—The proviso at the end of subsection *f* corresponds to subsection *d*, which has reference to liens other than through legal proceedings, as well as to a clause in the body of subsection *e*, saving *bona fide* transactions from the penalties attending fraudulent transfers. It is also expressive of the law, and was seemingly inserted for reasons of caution only.<sup>348</sup> That neither the plaintiff nor the sheriff holding under a void attachment is a *bona fide* purchaser for value has already been held.<sup>349</sup>

141, 15 Am. B. R. 639, 50 L. Ed. 967, 26 Sup. Ct. 580; Goodnough Mercantile & Stock Co. v. Galloway (D. C., Oreg.), 22 Am. B. R. 803, 171 Fed. 940; Rock Island Plow Co. v. Reardon. 222 U. S. 354, 27 Am. B. R. 492, 56 L. Ed. 231, 32 Sup. Ct. 164.

348. Text quoted in *Matter of Alabama*

Coal & Coke Co. (D. C., Ky.), 31 Am. B. R. 387, 210 Fed. 941.

349. In re Kaupisch Creamery Co. (D. C., Oreg.), 5 Am. B. R. 790, 107 Fed. 93; Jones v. Stevens (Sup. Ct., Me.), 5 Am. B. R. 571, 48 Atl. 170; Ford v. Henderson (Ore. Sup. Ct.), 43 Am. B. R. 405, 179 Pac. 558.

## SECTION SIXTY-EIGHT.

### SET-OFFS AND COUNTERCLAIMS.

§ 68. *Set-offs and Counterclaims.*—*a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

*b* A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Analogous provisions: In U. S.: Act of 1867, § 20, R. S., § 5073; Act of 1841, § 5; Act of 1800, § 42.

In Eng.: Act of 1883, § 38.

In Can.: Act of 1919, § 28.

Cross-references: To the law: Claims of partnership against individual estates, and vice versa, § 5-g.

Liability of co-debtors of bankrupt, § 16.

Proof and allowance of claims; proof of claim by surety, § 57-i.

Set-off of new credit recovery of property preferentially transferred, § 60-c.

### SYNOPSIS OF SECTION

#### SET-OFFS AND COUNTERCLAIMS.

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### I. SET-OFFS IN BANKRUPTCY.

a. **Comparative legislation.**—All bankruptcy laws contain clauses similar to these. They are doubtless merely expressive of recognized principles.<sup>1</sup> The English rule differs from ours only in stopping the set-off at the moment of notice of the commission of an act of bankruptcy.<sup>2</sup> The Canadian act applies the law of set-off to all claims against the estate and actions by the trustee, except as affected by the provisions respecting frauds and fraudulent preferences.<sup>2a</sup> Our law of 1800 went no further than does subsection *a* of the present statute—declaring the principle and leaving the exceptions to the courts.<sup>3</sup> So also of that of 1841.<sup>4</sup> The original act of 1867<sup>5</sup> was identical with that now in force, save that it did not refuse allowance to set-offs growing out of debts or credits “with a view . . . and with knowledge” within the four months’ period; the genesis of the words just quoted, which are found in the law of 1898, appears in the amendment of 1874, which, however, was applicable only to involuntary cases.<sup>6</sup> Considered historically, the purpose and development of the section are clear. In their application to give sets of facts, however, the law of set-off as applied to bankruptcy is somewhat hazy, and precedents are not always reliable.

b. **Cross-references.**—The most important is § 60-c which provides that new credits may be set-off. Indeed, the courts have had little to do with set-offs under the act of 1898, save collaterally to the animated controversy over the surrender of so-called innocent preferences.<sup>7</sup>

c. **Section is not self-executing; general principles.**—The provision as to set-off is permissive and not mandatory, and does not enlarge the doctrine, and may not be invoked in cases where the general principles of set-off would not justify it.<sup>8</sup> The determination is within the discretionary control of the bankruptcy court, to be exercised in accord with general principles of equity.<sup>9</sup> It has been held, however, that a State court, in an action by a trustee in bankruptcy, has jurisdiction to allow a set-off.<sup>2a</sup>

1. **Doctrines of set-off not enlarged.**—Thus, in *Sawyer v. Hoag*, 17 Wall. 610, 9 N. B. R. 145. It was said by the United States Supreme Court, with reference to Revised Statutes, section 5,073 Act of 1867, sec. 20, the section analogous to the one now under consideration: “This section was not intended to enlarge the doctrine of set-off, or to enable the party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. The debts must be mutual; must be in the same right.” *Morris v. Windsor Trust Co.* (N. Y. Ct. of App.), 33 Am. B. R. 283, 106 N. E. 763.

2. Eng. Act of 1883, § 38.

2a. Can. Bankr. Act of 1919, § 28.

3. Act of 1800, § 42.

4. Act of 1841, § 5.

5. Act of 1867, § 20.

6. R. S. § 5073.

7. See discussion under Section Sixty of this work, subtitle, “Set-off of a subsequent credit.”

8. *Cumberland Glass Mfg. Co. v. DeWitt*, 237 U. S. 447, 34 Am. B. R. 723, 59 L. Ed. 1042, 35

Sup. Ct. 636; *Matter of Kyte* (D. C., Pa.), 26 Am. B. R. 337, 182 Fed. 166.

9. In the case of *Cumberland Glass Mfg. Co. v. DeWitt*, 237 U. S. 447, 34 Am. B. R. 723, 59 L. Ed. 1042 35 Sup. Ct. 636, the court said: “The matter is placed within the control of the bankruptcy court, which exercises its discretion in these cases upon the general principles of equity.” *Hitchcock v. Rollo*, 3 Bias. 267, Fed. Cas. No. 6,535. The section was taken almost literally from § 20 of the Act of 1867. In *re Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731, in considering that section of the Act of 1867, this court said: “This section was not intended to enlarge the doctrine of set-off or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.” While the operation of this privilege of set-off has the effect to pay one creditor more than another, it is a provision based upon the general recognized right of mutual debtors, which has been enacted as

The section is not automatic. It does not give rise to a positive right existing independent of judicial action or determination. Its benefit is to be had upon the action of the District Court when it is properly invoked, and that court has the primary duty of determining for itself whether there are "mutual debts or credits" that should be set off one against the other according to the true intent and meaning of the bankruptcy act.<sup>10</sup> The section under consideration does not create the right of set-off, but recognizes its existence and provides a method by which it could be enforced even after bankruptcy.<sup>11</sup>

**d. Mutual debts or mutual credits.**—These words or equivalents are found in the set-off clauses in all bankruptcy laws. Indeed, the words, "mutual creditors" seem to be peculiar to such laws.<sup>12</sup> High authority has declared that "mutual credits" are something different from "mutual debts."<sup>13</sup> To the lay mind, the distinction is one without a difference for a mutual credit, as, for instance, the delivery of collateral to collect and apply in the end becomes a debt and is set off as such.<sup>14</sup> Indeed, in effect, at least under the present law, there can be practically no difference. In ultimate analysis a mutual credit is not unlike an unliquidated debt, and such debts are now provable.<sup>15</sup> There are, however, some exceptions to the rule of mutual credits. Thus, if the credit will not terminate in a debt,<sup>16</sup> or if a creditor intrusted by his debtor with goods has not the right to sell them until after the bankruptcy,<sup>17</sup> or if such goods are delivered to the creditor for a specific purpose,<sup>18</sup> a mutual credit does not arise, and there can be no set-off. These distinctions are, however, not important. The claim to set-off is usually made on mutual debts, the creditor owing the bankrupt a sum of money and the bankrupt, and, therefore, his estate, being liable to the creditor for a larger sum. In such a

part of the bankruptcy act, and when relied upon should be enforced by the court. *New York County Nat. Bank v. Massey*, 192 U. S. 138, 11 Am. B. R. 42, 48 L. Ed. 380, 24 Sup. Ct. 199. It hence appears that the object of this section was to give the district court the right to apply the established principles of set-off to mutual credits, when its action was invoked for the purpose." See also *Whaley v. King* (Tenn. Sup. Ct.), 42 Am. B. R. 483, 206 S. W. 31.

<sup>9a</sup> *Gill v. Farmers & Merchants' Bank* (Mo. Ct. of App.), 41 Am. B. R. 806, 195 S. W. 538.

<sup>10</sup> *Cumberland Glass Mfg. Co. v. DeWitt*, 237 U. S. 447, 34 Am. B. R. 723, 59 L. Ed. 1042, 85 Sup. Ct. 336; *Matter of American Paper Co.* (C. C. A., 3d Cir.), 41 Am. B. R. 141, 246 Fed. 790.

<sup>11</sup> *Studley v. Boylston Nat. Bank*, 229 U. S. 523, 30 Am. B. R. 161, 57 L. Ed. 1313, 33 Sup. Ct. 806; *Fourth Nat. Bank of Wichita v. Smith* (C. C. A., 8th Cir.), 38 Am. B. R. 771; *Lehigh Valley Coal Sales Co. v. Maguire* (C. C. A., 7th Cir.), 42 Am. B. R. 319, 251 Fed. 581.

<sup>12</sup> *In re Dow* (Ex parte Whiting), Fed. Cas. 17,573. Compare also *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769, where the Supreme Court laid down the rule that the term "mutual credit" includes only such where a debt might have been within the contemplation of the parties.

The term "mutual credits" in the bankruptcy act has a more comprehensive meaning than the term "mutual debts" in the statutes of set-off. The term "credit" is synonymous with trust, and the trust need not be of money on both sides, but if one party intrusts the other with goods or value, it will be a case of mutual credit. *In re Catlin*, Fed. Cas. 2,519.

Must be between same parties.—A defendant

claiming set-off must in general, in point of fact, own and control it, so that his suing creditor is, as to that claim, his debtor; and he is bound to prove the same facts in relation to the set-off as though he had brought his action upon it. *Moulton v. Perkins* (Me. Sup. Ct.), 40 Am. B. R. 34, 100 Atl. 1020.

<sup>13</sup> *Rose v. Hart*, 8 Taunt. 499; a. c., in *Smith Leading Cases*, Vol. 2, p. 330, holding that where cloth was deposited with a fuller to dress, by a party who afterward became a bankrupt, there was a case of mutual credit to the value of the services for dressing the cloth, but not for a general balance due from the bankrupt. And in this case the general rule was laid down that the credits intended by the act were only such as must, in their very nature, terminate in cross debts.

<sup>14</sup> *In re Dow* (Ex parte Whiting), Fed. Cas. 17,573; *Myers v. Davis*, 22 N. Y. 489; *Aldrich v. Campbell*, 70 Mass. 284; *Medomak Bank v. Curtis*, 24 Me. 36.

<sup>15</sup> See Bankr. Act, § 63-b.

<sup>16</sup> *Rose v. Hart*, 8 Taunt. 499; *Groom v. West*, 8 Ad. & E. 758.

<sup>17</sup> *In re Dow* (Ex parte Whiting), Fed. Cas. 17,573.

<sup>18</sup> *Libby v. Hopkins*, 104 U. S. 503; *Alsager v. Currie*, 12 Mees. & W. 751; *Lehigh Valley Coal Sales Co. v. Maguire* (C. C. A., 7th Cir.), 42 Am. B. R. 319, 251 Fed. 581.

**Money held by creditor in fiduciary capacity.**—Money received by a creditor from property delivered to him by the debtor to indemnify him against loss on a suretyship bond is not a mutual credit as against a debt of the bankrupt to such creditor. *Alvord v. Ryan* (C. C. A., 8th Cir.), 32 Am. B. R. 1, 212 Fed. 83.

case, a balance is struck and the claim is allowed for the balance, provided the facts do not fall within subsection *b*.<sup>19</sup> But mere payments on account before bankruptcy are not mutual debits or credits within the meaning of this section,<sup>20</sup> nor may an assigned claim be set-off in an action against the creditor.<sup>20a</sup>

**c. Time when set-off may be made.**—The time when the right of set-off may be exercised is not restricted to the adjudication but may be valid, if otherwise unassailable, at any time within four months prior to bankruptcy.<sup>21</sup> The set-off may be made by a bank at any time before a petition is filed, and even with full knowledge that the depositor was insolvent.<sup>22</sup> The fact that at the time of a set-off the obligation was not due does not prevent the creditor from making the set-off.<sup>23</sup> There is nothing in this section which prevents the parties from voluntarily doing before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted.<sup>24</sup>

19. *Progressive Wallpaper Corp. (D. C., N. Y.)*, 39 Am. B. R. 557, 240 Fed. 807; *Walther v. Williams Mercantile Co. (C. C. A., 6th Cir.)*, 22 Am. B. R. 328, 169 Fed. 270, holding that where an agreement, giving the business and possession of the goods of a mercantile company to bankrupts to operate for a year provided that upon its termination the mercantile company should pay any inventory excess to the extent of \$500, and that the bankrupts should be liable for any deficiency, and at the termination of the agreement the stock was appraised at \$1,323.24 in excess of the original inventory value, and the bankrupt owed the company on the contract and incidental thereto the sum of \$769.93, such items constitute "mutual debts" within the meaning of section 68 and are subject to set-off.

**Damages for breach of contract by bankrupt may not be set off against claim for services and materials furnished by trustee.**—Damages growing out of the failure of the receivers or trustees in bankruptcy to continue a contract of the bankrupt are properly claims against the bankrupt, but not against the receivers or trustees, as such, and where the trustees of a bankrupt sued upon a claim for services and materials, furnished by bankrupt and by themselves, as receivers and trustees in bankruptcy, a counterclaim, based upon bankrupt's failure to perform a contract subsequent to bankruptcy, may not be set up by defendant as against the trustees, although such a claim would, under section 68-a of the bankruptcy act, constitute a proper set-off against any claim of the bankrupt set up by the trustees. *Brown v. Hannagan (N. Y. App Div.)*, 27 Am. B. R. 294, 96 N. E. 714, citing *Collier on Bankruptcy (8th Ed.)*, p. 792.

**Money due partner against joint liability of bankrupt firm.**—Executors of the wife of a member of a bankrupt partnership, upon the presentation of a claim for money loaned to the firm, may credit or set-off under section 68 of the Bankruptcy Act money due the member of the firm under the will of his wife, even though the indebtedness of the bankrupt is a joint liability. *Matter of*

*Neadertal and Flappinger (Ref., N. Y.)*, 33 Am. B. R. 153.

**20. Payments on account.**—Payments in money intended to be applied upon an existing open account constituting a preference do not create a case of mutual debits and credits between the bankrupt and the creditor. In *re Christensen (Ref., Ia.)*, 4 Am. B. R. 202; In *re Ryan (D. C., Ill.)*, 5 Am. B. R. 396, 105 Fed. 760, the judge said: "I am of the opinion that the mutual debits and credits contemplated by section 68-a, Bankr. Act, do not include cash payments on account within four months of the filing of the petition against the bankrupt, and that the referee's finding herein that creditors should be permitted to have an accounting of all transactions between them and the bankrupt, both prior to and during such four months, and to have their claims allowed for the balance shown by such accounting, is not sustainable."

20a *Moulton v. Perkins (Me. Sup. Ct.)*, 40 Am. B. R. 34, 100 Atl. 1020.

21. *Studley v. Boylston Nat. Bank*, 229 U. S. 523, 30 Am. B. R. 161, 57 L. Ed. 1313, 33 Sup. Ct. 806; *Putnam v. U. S. Trust Co. (Mass. Sup. Ct.)*, 36 Am. B. R. 658, 111 N. E. 969.

22. *Fourth Nat. Bank of Wichita v. Smith (C. C. A., 8th Cir.)*, 38 Am. B. R. 771; *Dunlap v. Seattle Nat. Bank (Wash. Sup. Ct.)*, 38 Am. B. R. 937, 161 Pac. 364.

23. *Fourth Nat. Bank of Wichita v. Smith (C. C. A., 8th Cir.)*, 38 Am. B. R. 771.

24. *Studley v. Boylston Nat. Bank*, 229 U. S. 523, 30 Am. B. R. 161, 57 L. Ed. 1313, 33 Sup. Ct. 806.

25. *Toof v. City National Bank (C. C. A., 6th Cir.)*, 30 Am. B. R. 79, 206 Fed. 250.

**Valuation of stock.**—Where bankrupt stockbrokers had enough stock to fill their orders, but it had been pledged, the customer is entitled to a set-off equal to the purchase-price if the order was never executed, or to the value of the stock when sold, if later converted, and the value of the stock may be fixed as of the date of bankruptcy, in the absence of evidence to the



f. Time when right to set-off is determined.—Strictly, the time when the right to set-off is determined is the time the petition is filed.<sup>25</sup> But it makes no difference whether the debts are payable *in futuro* or *in praesenti*.<sup>26</sup> "Debt" means any debt, demand, or claim provable in bankruptcy.<sup>27</sup> To determine, therefore, whether the holder of a claim is entitled to the benefit of § 68, it is necessary only to inquire whether his claim is one provable in bankruptcy.<sup>28</sup> Thus, unliquidated claims may be set off against liquidated,<sup>29</sup> and, it is thought, under the present law, even liabilities sounding in tort against those purely *ex contractu*. But this doctrine as to time is subject to the exception stated in subsection b (2), considered *post*; a further exception in cases of mutual credits has already been noted.

g. Nature of liability.—(1) IN GENERAL.—It is not necessary that the debts or credits be of the same character. Thus the mutual debts need not arise out of the same transaction,<sup>30</sup> or be for money owed the one to the other. The basic test is mutuality, not similarity, of obligation. Illustrative cases under the former law are cited in the foot-note.<sup>31</sup> Advancements made by a bankrupt to his daughter, during his insolvency, may be set off against a claim made by her against his estate in bankruptcy.<sup>32</sup> Where a treasurer of a cor-

contrary. *Matter of Pierson, Jr. & Co.* (D. C., N. Y.), 35 Am. B. R. 213, 225 Fed. 889.

When right to set-off is determined; deposit by bankrupt after filing of petition as set-off to his indebtedness to bank.—The time when the right to set-off is determined under section 68 of the bankruptcy act is the date of the filing of the petition in bankruptcy, and where a bankrupt deposited money in a bank, after an involuntary petition in bankruptcy had been filed against him, and at a time when neither he nor the bank knew of the pendency of the petition, the bank is not entitled to retain the sum so deposited on the ground that it constitutes a set-off to a larger amount for which the bankrupt is indebted to them. In *re Michaelis & Lindeman* (D. C., N. Y.), 27 Am. B. R. 299, 196 Fed. 718. See also *Bramham v. Lanier Bros.* (Tenn. Sup. Ct.), 41 Am. B. R. 215, 200 S. W. 830; *Matter of United Grocery Co.* (D. C., Fla.), 41 Am. B. R. 824, 253 Fed. 267.

26. In *re City Bank*, Fed. Cas. 2,742; *Drake v. Rollo*, Fed. Cas. 4,066; *Collins v. Jones*, 10 B. & C. 777; *Taylor v. Nichols*, 23 Am. B. R. 306, 134 N. Y. App. Div. 783, 119 N. Y. Supp. 919, holding that where both a note surrendered to the maker and the claim of the maker against the bankrupt had matured prior to the transfer of the assets to his trustee in bankruptcy, there was a right of set-off. *Mandel v. Koerner* (Mun. Ct., N. Y. C.), 33 Am. B. R. 40, 149 N. Y. Supp. 455, quoting text with approval.

27. Bankr. Act, § 1 (11).

Meaning of "debt."—It is well settled that this provision of the act applies to any debt provable in bankruptcy, even though not then due. *Steinhardt v. Nat. Park Bank*, 19 Am. B. R. 72, 120 N. Y. App. Div. 255, 105 N. Y. Supp. 28, revg. 18 Am. B. R. 86; In *re Semmer Glass Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 25, 135 Fed. 77. The word "debt" as used in section 68-a includes any debt provable in bankruptcy. And a debt is provable whether due or not at the

time of bankruptcy. *Germania Sav. Bk. & Trust Co. v. Loeb* (C. C. A., 6th Cir.), 26 Am. B. R. 238, 243, 188 Fed. 287, citing *Collier on Bankruptcy* (8th Ed.), p. 793; In *re Percy Ford Co.* (D. C., Mass.), 28 Am. B. R. 919, 190 Fed. 334; *Matter of Pottier & Stymus* (C. C. A., 2d Cir.), 44 Am. B. R. 469, 262 Fed. 955.

28. In *re Semmer Glass Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 25, 135 Fed. 77; *Mandel v. Koerner* (Mun. Ct., N. Y. C.), 33 Am. B. R. 40, 149 N. Y. Supp. 455.

A contingent liability of the bankrupt as indorser of notes of a creditor cannot be set-off against a claim of the creditor. *Matter of American Paper Co.* (C. C. A., 3d Cir.), 41 Am. B. R. 141, 246 Fed. 790, affg. 40 Am. B. R. 121, 243 Fed. 753.

29. Compare *Bell v. Carey*, 8 C. B. 887, and even under the narrower doctrine of the English laws, *Jack v. Kipping*, 9 Q. B. D. 113. See also generally under Section Sixty-nine.

Set-off of unliquidated claims.—A bankrupt corporation which, prior to bankruptcy, was engaged in the business of manufacturing cloth for the defendant, had given the defendant a note for losses caused the defendant because the manufacturing was not, at all times, perfectly done. Later the bankrupt and the defendant entered into an agreement whereby the defendant paid the bankrupt only eighty per centum of the manufacturing charge, reserving the other twenty per centum of each bill against counter-charges for imperfect work. The bankrupt, on finding itself unable to continue the business, arranged with the defendant to take over the mill on a rental basis in order that the defendant might run out its own stock, after which the mill was closed. In an action by the trustee to recover the rent and so much of the twenty per centum as was not needed for countercharges it was held that under section 68a of the Bankruptcy Act the defendant might set off the claim on the note. *Clifford v. Oak Valley Mills* (D. C., Mass.), 36 Am. B. R. 867, 229 Fed. 851.

30. In *re Christensen* (D. C., Ia.), 4 Am. B. R. 99, 101 Fed. 802. Consult also In *re Brewster* (Ref., N. Y.), 7 Am. B. R. 496; *Matter of Colwell Lead Co.* (C. C. A., 7th Cir.), 39 Am. B. R. 224, 240 Fed. 400.

31. In *re Petrie*, Fed. Cas. 11,040; *Ex parte Howard Nat. Bank*, Fed. Cas. 6,764; *Ex parte Pollard*, Fed. Cas. 11,252.

32. *Matter of Brewster* (Ref., N. Y.), 7 Am. B. R. 486.

poration, which had gone into voluntary dissolution, was indebted to the corporation for money received by him, unaccounted for, the amount due may be set off against any sum due him as a stockholder of the corporation, upon the liquidation.<sup>33</sup> It seems that the rule with respect to set-offs is the same even though the claim of the creditor against the bankrupt is fully secured.<sup>34</sup> Collections made by a delivery company for a department store may be applied on current bills due by the store for delivery charges.<sup>34a</sup>

(2) SET-OFF BY BANK.—A question somewhat discussed is the right of a bank to set off its deposit debt against the unpaid note of a bankrupt depositor. This right has been denied in one case, because the bookkeeping entries were not actually made before the bankruptcy, and the set-off, therefore, amounted to a preference.<sup>35</sup> But every set-off is, in a sense, a preference, and the ancient rule permitting a banker so to charge a deposit against notes is undoubtedly the rule under the present, as under the former law.<sup>36</sup> So that it is now well settled that where deposits are made by a depositor in good faith, in the regular course of business, and not for the purpose of enabling the bank to secure a preference,<sup>36a</sup> the bank has a right to set-off a deposit against a claim held by it against the depositor who subsequently becomes bankrupt.<sup>37</sup> As

33. *Marcus Shipping Assn. v. Barnes* (Iowa Sup. Ct.), 34 Am. B. R. 682, 151 N. W. 525.

34. *Steinhardt v. Nat. Park Bank*, 19 Am. B. R. 72, 120 N. Y. App. Div. 255, 105 N. Y. Supp. 23, revg. 18 Am. B. R. 86, holding that, in an action by a trustee to recover moneys of the bankrupt on deposit with a bank at the time the petition was filed the defendant is entitled to set off the amount of certain demand notes of the bankrupt which it then held but for which it held securities greater in value than the amount of the notes, though, by reason of their depreciation seventeen months thereafter when sold, the securities did not bring enough to pay the notes.

Right to set-off proceeds of surplus collateral against unsecured note.—Where a creditor, holding an unsecured note for which he had filed proof of claim as such, making no mention of any security available, thereafter sold collateral which he held to secure another note, and realized a sum in excess of the amount of the secured note, he was entitled to set off the amount of the surplus against his unsecured debt, there being no estoppel because of a failure to claim such surplus in his proof of claim. In re *Searles* (D. C., N. Y.), 29 Am. B. R. 635, 200 Fed. 693.

34a. *Matter of Bacon Co.* (D. C., Mass.), 44 Am. B. R. 196, 261 Fed. 109.

35. In re *Tacoma, etc., Co.*, 3 N. B. N. Rep. 9.

36. In re *Kalter*, 2 N. B. N. 264, and see In re *Myer* (D. C., N. Y.), 5 Am. B. R. 596, 106 Fed. 828.

36a. *Matter of Fairburn Oil & Fertilizer Co.* (D. C., Ga.), 39 Am. B. R. 211, 240 Fed. 635.

Moneys assigned to secure a claim but deposited in general account. *Lyttle v. Fifth National Bank* (D. C., N. Y.), 39 Am. B. R. 690.

37. *Fourth Nat. Bank of Wichita v. Smith* (C. C. A., 8th Cir.), 38 Am. B. R. 771; *Dunlap v.*

*Seattle Nat. Bank* (Wash. Sup. Ct.), 38 Am. B. R. 937, 161 Pac. 364; *Johnson v. Gratiot County State Bank* (Mich. Sup. Ct.), 38 Am. B. R. 518, 160 N. W. 544; *German American State Bank v. Larimer* (C. C. A., 8th Cir.), 37 Am. B. R. 556, 235 Fed. 501; *Wilson v. Citizens Trust Co.* (D. C., Ga.), 37 Am. B. R. 86, 233 Fed. 697; *American Bank & Trust Co. v. Coppard* (C. C. A., 5th Cir.), 35 Am. B. R. 742, 227 Fed. 597; *Chisholm v. First Nat. Bank of Le Roy* (Ill. Sup. Ct.), 35 Am. B. R. 598, 109 N. E. 657; *Am. Bank of Alaska v. Johnson* (C. C. A., 9th Cir.), 40 Am. B. R. 502, 245 Fed. 312; *Matter of Looschen Piano Case Co.* (D. C., N. J.), 43 Am. B. R. 733, 259 Fed. 931. See Am. Bankr. Dig. § 802.

A banker may set off the debt due to him on loans, overdrafts, or otherwise against deposits which are made with him. In re *George M. Hill Co.* (C. C. A., 7th Cir.), 12 Am. B. R. 221, 130 Fed. 315; In re *Bank of Madison*, Fed. Cas. 890, 9 N. B. R. 184; In re *Petrie*, Fed. Cas. 11,040, 7 N. B. R. 332; *Denman v. Boylston*, 5 Cuch. 194. Upon the bankruptcy of one of its depositors a bank is entitled to have the amount standing to his credit upon its books applied as an off-set upon its note against him, in the absence of collusion between them, and to have the balance of the note allowed as a claim against the bankrupt estate, provided the bank has not otherwise received a preference. In re *Scherzer* (D. C., Ia.), 12 Am. B. R. 451, 130 Fed. 631. Where an insolvent person has money on deposit in a bank subject to check, and also owes the bank upon a promissory note, upon such insolvent person being adjudged a bankrupt, the bank is entitled to have the amount of the bankrupt's deposit set off against the sum due on the promissory note, and to prove its claim against the bankrupt for the balance. *West v. Bank of LaHoma*, 16 Am. B. R. 733, 16 Okl. 508; *Whitaker v. State Bank* (Sup. Ct., Okl.), 25 Am. B. R. 876, 110 Pac. 776. So if the banker has received drafts for collection the proceeds of which afterward came into his hands he may offset them against debts due to him. In re *Farnsworth*, Fed. Cas. 4,673, 14 N. B. R. 148.

Deposits may be set off against overdrafts. *Tomlinson v. Bank of Lexington* (C. C. A., 4th Cir.), 16 Am. B. R. 632, 145 Fed. 824. Money deposited to a bankrupt's credit, at the time of filing his petition in bankruptcy, may be set off against a debt due from him to the bank. In re *Little* (D. C., Ia.), 6 Am. B. R. 681, 110 Fed. 621.

stated by the United States Supreme Court: "The money deposited in a bank becomes a part of its general funds, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have the deposit repaid in whole or in part by honoring the depositor's checks drawn thereon. Such deposit creates an ordinary debt, not a privilege or right of a fiduciary character. The amount of such a deposit may, therefore, be set off in bankruptcy against a claim against the depositor, allowing the bank to prove for the balance."<sup>28</sup> A bank

A bank, upon the insolvency of one of its depositors, is entitled to retain and apply the amount of his deposit in part payment of his note then due and held by the bank. Such debts are mutual and the set-off, if made in good faith and not as a mere trick or device for the benefit of the indorser, is not a "transfer of property" nor does it constitute a preference within the meaning of the bankruptcy act. *Booth v. Prete*, 22 Am. B. R. 579, 81 Conn. 636, 71 Atl. 938.

**Set-off of proceeds of check deposited for collection just prior to bankruptcy.**—Where a bank accepts a check for collection, and receives the proceeds on the following day without having paid out in the meantime anything on account of the deposit, it cannot apply the proceeds of the check toward a debt due by the depositor, where it appears that on the day the check was deposited for collection, but at a subsequent hour, a petition in bankruptcy was filed against the depositor. *Moore v. Third Nat. Bank of Phila.* (Super. Ct., Pa.), 24 Am. B. R. 568, 41 Pa. Super. Ct. 497.

**Effect of failure to offset.**—In *Traders' Bank v. Campbell*, 14 Wall. 87, 6 N. B. R. 353, it appeared that insolvents upon the eve of bankruptcy gave to their banker a check upon funds to their credit in that bank to apply upon the indebtedness due to the bank, although the banker and the bankrupts knew of the insolvency of the latter. The Supreme Court held the transaction to be a preference and voidable by the assignee in bankruptcy and that he had the right to recover the amount so paid, and further held that although possibly had the bankrupt stood upon its right of offset, that right might have been available to them, yet when they treated the money as the bankrupt's own property, taking his check and crediting the amount as a payment on the indebtedness, the transaction became a voidable preference.

**Instruction to jury; usual course of business.**—Where in an action by a trustee in bankruptcy to recover an alleged voidable preference it appears that the bankrupt within four months of bankruptcy and while insolvent sold his stock of merchandise and store fixtures and deposited the check therefor with the defendant bank to which it was indebted, the real question for the jury to decide is whether the deposit was in good faith in the usual course of business, and the bank is entitled to have the jury in-

structed that if they find that the deposit was received in the usual course of business, the bank may apply it as a set-off against the indebtedness of the bankrupt. *German American State Bank v. Larimer* (C. C. A., 8th Cir.), 37 Am. B. R. 556, 235 Fed. 501.

<sup>28</sup> *New York County National Bank v. Massey*, 192 U. S. 138, 11 Am. B. R. 42, 48 L. Ed. 360, 24 Sup. Ct. 199, revg. 8 Am. B. R. 516, 116 Fed. 342; *Studley v. Boylston Nat. Bank*, 229 U. S. 523, 30 Am. B. R. 161, 57 L. Ed. 1313, 33 Sup. Ct. 806; *Continental & Com. Trust & Sav. Bank v. Chicago Title & Trust Co.*, 229 U. S. 435, 30 Am. B. R. 624, 57 L. Ed. 1268, 33 Sup. Ct. 820; *Whitaker v. State Bank* (Sup. Ct., Okl.), 25 Am. B. R. 876, 110 Pac. 776. See also *Matter of Levi* (D. C., N. Y.), 9 Am. B. R. 176, 121 Fed. 196; *Matter of Semmer Glass Co.* (Ref., N. Y.), 11 Am. B. R. 665; *West v. Bank of Lahoma*, 16 Am. B. R. 733, 16 Okl. 508, 96 Pac. 59; *Matter of National Lumber Co.* (C. C. A., 3d Cir.), 32 Am. B. R. 389, 212 Fed. 928.

**Money paid by a bank in ignorance of a general assignment, having been returned by order of the court, may be set off against the assignee's notes.** In *re Meyer & Dickinson* (D. C., N. Y.), 5 Am. B. R. 503, 107 Fed. 86.

**Set-off and proof of balance.**—Where at the suggestion of the president of a bank in which a company, indebted to it upon certain notes, kept an account, it was agreed that he should O. K. checks drawn against said account, but he did not attempt in any way to interfere with the management of the business of the company or seek to control it, and was not aware of its insolvency at the time the agreement as to the checks was made, the bank, upon the adjudication of the company, may set off its deposits against the notes, and prove its claims for the balance. In *re Medaris-Vine Carriage Co.*, 15 Am. B. R. 897, 15 Ohio Fed. Dec. 223.

**Payment to bank from deposit account.**—Where bankrupt had a deposit account with defendant bank, payments of discounted notes, made at the maturity of such notes within the four months' period by bankrupt's check drawn on the deposit account and by the bank charging up the amounts due against the deposit account with bankrupt's acquiescence, did not constitute preferences, it appearing that the deposits had been made honestly, and with no intention of enabling the bank to secure an advantage over other

is entitled to set off certain demand notes of a bankrupt where an action is brought by the trustee to recover moneys on deposit.<sup>39</sup> The liability of a depositor as an indorser on a note held by the bank may be set off against a deposit, although the liability of the indorser did not become absolute until after the petition in bankruptcy was filed.<sup>40</sup> But a bank has no right to set-off the unmatured notes of a bankrupt against its deposit until after the bankruptcy proceedings have commenced.<sup>40a</sup> The amount of a note held by a bankrupt bank may be set off against the amount on deposit in the bank to the credit of the maker of the note.<sup>41</sup> But deposits made after the petition against the bankrupt was filed belong to the trustee; the right to off-set only applies to deposits in the bank when the petition was filed, although the bank had no notice of it.<sup>42</sup> A response by a bank to an order of a referee to show cause why it should not pay over to the trustee moneys deposited with it by the bankrupt three days before the filing of the petition in bankruptcy, that the money was deposited without solicitation or agreement and that at the time of the deposit the bankrupt owed the bank on an overdraft and on past-due notes a certain amount which it claims to off-set against its liability to the bankrupt and the trustee, states an adverse claim and a good plea to the jurisdiction of the referee and the district court summarily

creditors in the face of threatened insolvency. *Studley v. Boylston National Bank of Boston* (C. C. A., 1st Cir.), 29 Am. B. R. 649, 200 Fed. 249.

Where a bank after it had discounted a note for a depositor, with knowledge of the latter's insolvency, accumulated deposits and allowed other notes to be protested, until two days before the bankruptcy of the depositor, when the deposit being sufficient a check was drawn to the order of the bank for the amount of the note, a preference was effected. *Matter of National Lumber Co.* (C. C. A., 3d Cir.), 32 Am. B. R. 889, 212 Fed. 928.

39. *Steinhardt v. Nat. Park Bank*, 19 Am. B. R. 72, 120 N. Y. App. Div. 255, 105 N. Y. Supp. 23, revg. 18 Am. B. R. 86; *Irish v. Citizens' Trust Co.* (D. C., N. Y.), 21 Am. B. R. 39, 163 Fed. 880, holding that the right of a bank to set off overdue notes of a depositor against his general deposit is not a lien in the sense of the bankruptcy act, and may not be exercised as to notes not yet due.

**Set-off of deposit against notes.**—In the case of *Germania Sav. Bk. & Trust Co. v. Loeb* (C. C. A., 6th Cir.), 26 Am. B. R. 238, 188 Fed. 287, the bankrupt, prior to bankruptcy, had a deposit in claimant bank amounting to about \$5,000 and the bank held notes of the bankrupt amounting to \$20,000. Within four months of the bankruptcy, the bank, feeling itself insecure, caused a conference to be had between its attorney and the attorney for the bankrupt. Thereupon, the bankrupt's attorney, not realizing the financial condition of the bankrupt, proposed that the bankrupt continue to make deposits, but withdraw only up to the amounts deposited after the date of the conference, leaving the amount already deposited intact until the exact financial condition could be learned. Between the date of said conference and the bankruptcy about \$4,500 more were deposited which were not withdrawn. The bank claimed the right to

offset the \$5,000 and the \$4,500 deposits against the claim. The trustee claimed that the \$5,000 off set amounted to a preference and that the \$4,500 deposit was a deposit in trust, or special deposit as to which there could be no off set. It was held that the \$5,000 off set did not amount to a preference in the absence of fraud or collusion; that the evidence as to the conference between the attorneys did not indicate fraud or collusion; and that it was immaterial, under 68-a of the bankruptcy act, that the notes upon which the bank's claim was based had not matured. See also *In re Percy Ford Co.* (D. C., Mass.), 28 Am. B. R. 919, 199 Fed. 334.

40. **Set-off of note not yet due.**—*In re Semmer Glass Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 25, 135 Fed. 77. In an action by a trustee to recover a debt due the bankrupt estate, the defendant may plead as a set-off the amount of a note against the bankrupt, even though it had not matured at the date of adjudication, but the defendant is not entitled to any affirmative judgment thereon. *Frank v. Mercantile Nat. Bank*, 14 Am. B. R. 125, 182 N. Y. 264, 74 N. E. 841.

40a. *Fifth Nat. Bank v. Lytle* (C. C. A., 2d Cir.), 41 Am. B. R. 370, 250 Fed. 361.

**Liability of endorsers; set-off prior to bankruptcy.**—Where a bankrupt is continually liable to a bank as an endorser on immaterial paper the bank cannot claim that money it applied in payment of that liability prior to bankruptcy should operate as a set-off. *Heyman v. Third National Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685.

41. *In re Shults* (D. C., N. Y.), 13 Am. B. R. 84, 132 Fed. 573.

42. *Toof v. City National Bank* (C. C. A., 6th Cir.), 30 Am. B. R. 79, 206 Fed. 250; *Ried v. Barnett National Bank* (C. C. A., 5th Cir.), 41 Am. B. R. 419, 250 Fed. 983.

to determine the validity of that claim under § 23-b of the bankruptcy law.<sup>43</sup> The form in which the set-off is attained is immaterial.<sup>44</sup>

**h. Being in the same right.**—To be mutual, debts between parties must be owing to and be due in the same rights and capacities.<sup>45</sup> Thus, a debt due one as an executor cannot be set off against a debt due from him individually;<sup>46</sup> a tenant's unliquidated damages for the landlord's negligence in permitting water to come upon the premises may not be set off against the landlord's claim for rent;<sup>47</sup> a pledgee, after the debt for which the pledge was given is paid, holds the property pledged in trust for the pledgor and cannot off-set against such pledgee another debt belonging to him in his own right;<sup>48</sup> a creditor of a corporation cannot set-off his liability for unpaid subscriptions for its stock;<sup>49</sup> nor may the liability of a director of a corporation be set-off against a claim by said director as a creditor;<sup>50</sup> a claim based on individual promissory notes of a member of a bankrupt firm cannot be set off against a judgment recovered against the claimant on behalf of such firm by its trustee in a suit for unliquidated damages *ex contractu*,<sup>51</sup> and, where the ownership of the claim is merely nominal, it cannot be set off against a debt due from such owner.<sup>52</sup> But the trustee in bankruptcy may set off claims which have vested in him, even though they never vested in the bankrupt.<sup>53</sup> It has been held that a claim for unliquidated damages for false representations, inducing a contract for the sale and delivery of goods, may be set off against a claim arising upon the contract of sale.<sup>54</sup> A surety who, by paying the principal's debt, has become subrogated to the latter's rights may, of course, avail himself of a set-off in favor of the principal.<sup>54</sup> Such debts are in the same right.

43. In re Gill (C. C. A., 8th Cir.), 26 Am. B. R. 883, 190 Fed. 706.

44. Method of making set-off.—Whether a bank charges off the deposit of its customer and applies it on the indebtedness which it holds against the customer, or whether it draws a check in the name of the customer, covering his deposit and applies it as a credit on the indebtedness, or whether it does neither of these things, but relies upon section 68 of the bankruptcy act to do the same thing in effect, is immaterial. Wilson v. Citizens' Trust Co. (D. C., Ga.), 37 Am. B. R. 86, 233 Fed. 697.

45. In re Leshar & Son (D. C., Pa.), 25 Am. B. R. 218, 176 Fed. 650, citing Collier on Bankruptcy (7th ed.), p. 796; West v. Pryer, 2 Bing. N. C. 455; Ex parte Bailey, 1 M. D. 263; Morris v. Windsor Trust Co. (N. Y. Ct. of App.), 33 Am. B. R. 283, 106 N. E. 753; Planters' Oil Co. v. Gresham (Tex. Ct. of Civ. App.), 42 Am. B. R. 29, 202 S. W. 145; Lehigh Valley Coal Sales Co. v. Maguire, (C. C. A., 7th Cir.), 42 Am. B. R. 319, 251 Fed. 581; Atherton v. Beaman (D. C., Mass.), 42 Am. B. R. 631, 256 Fed. 871; Matter of Pottier & Stymsus Co. (C. C. A., 2d Cir.), 44 Am. B. R. 469, 262 Fed. 955.

46. Bishop v. Church, 3 Atl. 691.

47. In re Becher (D. C., Pa.), 15 Am. B. R. 228, 139 Fed. 366.

48. Morris v. Windsor Trust Co. (N. Y. Ct. of App.), 33 Am. B. R. 283, 106 N. E. 753.

49. In re Goodman Shoe Co. (D. C., Pa.), 3 Am. B. R. 200, 96 Fed. 949; Sawyer v. Hoag, 17 Wall. 610; Jenkins v. Armour, Fed. Cas. 7,260; In re Royce Dry Goods Co. (D. C., Mo.), 13 Am. B. R. 258, 123 Fed. 100; Babbitt v. Read (C. C., N. Y.), 23 Am. B. R. 254, 173 Fed. 712, holding that bondholders, who are also stockholders, are not entitled to set-off the amount of their bonds against a claim established against them in a suit to enforce the liability as stockholders. Matter of Howe Mfg. Co. (D. C., Ky.), 27 Am. B. R. 477, 193 Fed. 524, citing

Collier on Bankruptcy (8th ed.), p. 796; Matter of La Jolla Lumber & Mill Co. (D. C., Cal.), 40 Am. B. R. 273, 243 Fed. 1004; Molise v. Scheibel (C. C. A., 8th Cir.), 40 Am. B. R. 311, 245 Fed. 546; Matter of Mfgs. Box & Lumber Co. (D. C., N. J.), 41 Am. B. R. 763, 251 Fed. 957; Whaley v. King (Tenn. Sup. Ct.), 42 Am. B. R. 488, 206 S. W. 31; Boatmen's Bank v. Laws (C. C. A., 8th Cir.), 43 Am. B. R. 683, 257 Fed. 299; Matter of Caledonia Coal Co. (D. C., Mich.), 43 Am. B. R. 93, 254 Fed. 742. See also, Clark v. Johnson (C. C. A., 8th Cir.), 40 Am. B. R. 330, 245 Fed. 442; Morse v. Scheibel (C. C. A., 8th Cir.), 40 Am. B. R. 311, 245 Fed. 546.

50. Matter of La Jolla L. & M. Co. (D. C., Cal.), 40 Am. B. R. 273, 243 Fed. 1004.

51. In re Leshar & Son (D. C., Pa.), 25 Am. B. R. 218, 176 Fed. 650, citing Collier on Bankruptcy (7th ed.), p. 796.

52. Debts and credits not in same rights.—In a suit by a trustee in bankruptcy of a corporation to recover money alleged to have been paid to defendant as commissions under contracts invalid under section 459 of the New York Penal Law, the defendant cannot set-off an indebtedness growing out of a deficiency judgment in an action upon bonds of the bankrupt and also based upon drafts accepted and paid by the defendant for account of the bankrupt, because such indebtedness is not in the same right and does not fall within the provisions of section 68 of the bankruptcy act. Palmer v. Doull Miller Co. (D. C., N. Y.), 37 Am. B. R. 617, 233 Fed. 309.

53. In re Lane, Fed. Cas. 8,043. Compare Boyd v. Mangles, 16 Mees. & W. 336.

54. In re Crystal, etc. (D. C., Vt.), 4 Am. B. R. 55, 104 Fed. 265.

55. In re Harper (D. C., N. Y.), 23 Am. B. R. 918, 175 Fed. 412.

56. Compare Bankr. Act, §§ 16 and 57-1. See also In re Bingham (D. C., Vt.), 2 Am. B. R. 223, 94 Fed. 796; Morgan v. Wor-

i. **Joint and several claims.**—Here the general rule is that a joint claim, as that of a partnership, cannot be set off against the debt of one of the individuals jointly claiming.<sup>55</sup> The reason for this is that the individual partner should not in justice to his associates, be permitted to pay his debts out of partnership property. The copartnership estate is separate and distinct from the individual estates of the partners; so where a bankrupt partnership owes its creditor a certain amount, and such creditor owes one of the partners a less amount, the debts are not mutual, and there may be no off-set.<sup>56</sup> A further exception is stated in a case,<sup>57</sup> where the joint credit was given on account of a separate debt, this being strictly an instance of "mutual dealing."<sup>58</sup>

j. **Waiver of set-off.**—If a creditor proves his debt, without claiming set-off, he will generally be deemed to have waived it.<sup>59</sup> And if he accepts dividends on composition without invoking his right of set-off, he will not be permitted to set up his claim as a defense.<sup>60</sup> At the same time, inadvertence or mistake is usually a sufficient excuse for leave to withdraw and amend. There are no cases under the present law yet reported.<sup>61</sup>

k. **Practice.**—This section seems to contemplate that, if a creditor's claim against the bankrupt is greater than the bankrupt's claim against him, he shall only prove for the balance; and if the creditor's claim is less than the bankrupt's claim against him, the time for a set-off would seem to be when the creditor is sued, and the place the forum in which the suit is brought.<sup>62</sup> Where a creditor files a proof of claim, the burden of proof is upon the trustee to establish a counterclaim thereto.<sup>63</sup>

## II. WHEN NOT ALLOWED.

a. **Not provable against the estate.**—Subdivision 1 of subsection b requires the debt, sought to be set off or counterclaimed, to be provable against the bankrupt's estate.<sup>64</sup> There is a difference between the former and the present

dell (Sup. Ct., Mass.), 6 Am. B. R. 167, 178 Mass. 350, 59 N. E. 1037.

**Set-off by surety of payment on principal's debt.**—In the case of *In re Dillon* (D. C., Mass.), 4 Am. B. R. 63, 66, 100 Fed. 627, the judge said: "The right of set-off, however, may not depend altogether upon the form required in proving the debt. A debt provable only in the name of A may perhaps be availed of in set-off by B. To hold this would not contravene the language of the present act. The rule that a surety may generally set-off a payment made on his principal's debt against his debt due to the principal does not seem to be based upon the technical form of proof, but upon broad principles applicable generally in bankruptcy."

<sup>55.</sup> *Gray v. Rollo*, 18 Wall. 629; *Ex parte Twogood*, 11 Ves. 516; *Ex parte Caldicott*, 25 Ch. D. 716. A debt due from a bankrupt to an individual partner of a solvent firm cannot be set-off against a debt due to the estate from the partnership. *In re Shults* (D. C., N. Y.), 13 Am. B. R. 84, 132 Fed. 573.

<sup>56.</sup> *Tucker v. Oxley*, 5 Cranch, 34. See *Matter of Neaderthal* (C. C. A., 2d Cir.), 34 Am. B. R. 542, 225 Fed. 38, revg. 33 Am. B. R. 152, holding that money due to an individual partner under the will of his mother cannot be set-off against an indebtedness of the bankrupt firm to the estate of the mother for money borrowed, although one of the notes given for the money borrowed was endorsed by the individual

partners, as the debts are not "mutual," within the meaning of this section.

<sup>57.</sup> *In re Crystal, etc., Co.* (D. C., Vt.), 4 Am. B. R. 55, 104 Fed. 265; *Gray of Rollo*, 18 Wall. 629, 21 L. Ed. 927, holding that a separate debt cannot be set-off against a joint debt in bankruptcy unless growing out of a transaction or under circumstances establishing that the joint credit had been given on account of a separate debt.

<sup>58.</sup> The words occur in the English section on set-off.

<sup>59.</sup> *Russell v. Owen*, 61 Mo. 185.

<sup>60.</sup> *Cumberland Glass Mfg. Co. v. De Witt*, 263 U. S. 238, 34 Am. B. R. 723, 59 L. Ed. 563, 35 Sup. Ct. 377.

<sup>61.</sup> Cases under the law of 1876 are: *Hunt v. Holmes*, Fed. Cas. 6,890; *Brown v. Farmers' Bank*, 6 Bush (Ky.), 198; *Standard Oil Co. v. Hawkins*, 74 Fed. 395.

<sup>62.</sup> *In re Leshar & Son* (D. C., Pa.), 25 Am. B. R. 218, 176 Fed. 650, citing *Collier on Bankruptcy* (7th ed.), p. 796.

If the trustee enters a waiver with respect to the excess and the right to proceed further against the creditor, the referee has jurisdiction to enter upon the consideration of the entire counterclaim, merely for the purpose of determining whether or not the amount actually due thereon is sufficient to off-set, in whole or in part, the claim actually allowed in favor of the creditor. *Matter of Continental Producing Co.* (D. C., Cal.), 44 Am. B. R. 218, 261 Fed. 627, citing *Collier on Bankruptcy* (11th ed.), 1069.

<sup>63.</sup> *In re Harper* (D. C., N. Y.), 23 Am. B. R. 918, 175 Fed. 412.

<sup>64.</sup> Debt must be provable.—*In re Harper* (D. C., N. Y.), 23 Am. B. R. 918, 931, 175 Fed. 412, the judge said: "This is not

law here, which has given rise to some speculation.<sup>65</sup> Formerly, to entitle to set-off, a debt must have been "provable in its nature;" now, it must be "provable." Under the law of 1867, it was held that a debtor of the estate holding a claim on which he had attempted to secure a preference might still use it as a set-off, because it was provable in its nature.<sup>66</sup> The distinction seems rather tenuous. Thus, under the present law, which denies allowance to claims whose owners have been preferred, the word "provable" was held to mean the same as "provable in its nature" and, the case being one of mutual credit, the set-off was allowed, in spite of a preference making it technically not provable.<sup>67</sup> Subject, however, to exceptions based on equitable principles like those applied in *Morgan v. Wordell*, *supra*, the general rule is that no claims tainted with a preference may be asserted by way of set-off, except those within the terms of § 60-e. The latter is new. It has already been discussed.<sup>68</sup>

**b. Purchased after bankruptcy or within four months before.**—(1) **IN GENERAL.**—Subdivision 2 of subsection *b* prevents the set-off or counterclaim of a claim which was acquired after the filing of the petition, or within four months before such filing, "with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy." This clause differs from that in the law of 1867 only in denying set-off to claims purchased within the four months' period; this that law did not do. The necessity of the rule is apparent. The doctrine of set-off would foster preferences of the worst kind, if a well-informed debtor of an insolvent could buy up claims against him either within four months of the bankruptcy or after the filing of the petition. For instance, if property was sold by the bankrupt within the four months' period to one of his creditors, partly for cash and partly on credit, the amount due on the sale should not be offset against the creditor's claim against the estate.<sup>69</sup> This provision prevents the set-off, against the amount due by a bankrupt to a creditor, of orders issued by employees of such creditor within the four months' period directing the payment of a part of the wages earned by them on account of

a limitation or restriction on the right of the trustee to set up, prove, and use any claim he has and which he may enforce against a creditor of the bankrupt presenting a claim against the estate he represents, provided it be a 'debt' owing by such creditor to the bankrupt estate within the meaning of section 68-a. The plainly disclosed policy of the Act is that where a person is indebted to the bankrupt estate, and the trustee seeks to enforce the indebtedness, the debtor to the estate may set up as an off-set or counterclaim only such just demands as he has against the estate which are provable in bankruptcy as a claim against the estate . . . . The debtor is limited to claims provable in bankruptcy. There is no provision or suggestion in the Act that a claim against a creditor of the bankrupt in the hands of the trustee, and which came to him by operation of law on his appointment, cannot be used as an off-set to or counterclaim against the claim of such creditor of the bankrupt estate, unless such claim in the hands of the trustee

be one of a character provable in bankruptcy in case the one liable thereon had been adjudicated a bankrupt."

<sup>65</sup> See *In re Dillon* (D. C., Mass.), 4 Am. B. R. 63, 100 Fed. 627, in which case the court said: "The language of the different statutes of bankruptcy doubtless differs, and the provision of section 68-b of the act of 1898, that a set-off, to be allowed, must be provable against the estate, is not found in all bankrupt acts, and apparently was not the law under the Act of 1800 . . . . The right of set-off, however, may not depend altogether upon the form required in proving the debt. A debt provable only in the name of A may perhaps be availed of in set-off by B."

<sup>66</sup> *Clark v. Iselin*, 21 Wall. 360.

<sup>67</sup> *Morgan v. Wordell* (Mass. Sup. Ct.), 6 Am. B. R. 167, 78 Mass. 350. Compare *In re Kingsley*, Fed. Cas. 7,919.

<sup>68</sup> See under Section Sixty of this work.

<sup>69</sup> *In re White* (C. C. A., 7th Cir.), 24 Am. B. R. 197, 177 Fed. 194.

supplies furnished by the bankrupt.<sup>70</sup> The mere fact of insolvency or mere knowledge of such insolvency is not alone sufficient to take away a bank's right of set-off.<sup>71</sup>

(2) "WITH A VIEW TO SUCH USE AND WITH KNOWLEDGE," ETC.—The words here were not in the original law of 1867.<sup>72</sup> The idea expressed by the words "with a view to such use" was incorporated by the amendatory act of 1874, but only as to involuntary cases; the words "with knowledge or notice," etc., to the end of the subsection, are new. The use of the conjunction "and" should be noted; those opposing a claim to set-off on the ground specified in subdivision 2 must show, not only its purchase within the time specified, but that such purchase was with a view to its use as a set-off *and* with knowledge or notice that the bankrupt was insolvent, *or* had committed an act of bankruptcy.<sup>73</sup> Such proof will not be difficult if the purchase antedates the bankruptcy; it may, if within the four months' period. The cases under the former should be read with the date of the amendatory act of 1874 carefully in mind.<sup>74</sup>

70. *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 13 Am. B. R. 447, 40 L. Ed. 571, 25 Sup. Ct. 339.

71. *Matter of Wright Dana Hardware Co.* (C. C. A., 2d Cir.), 31 Am. B. R. 816, 212 Fed. 397, modg. 31 Am. B. R. 192, 207 Fed. 636. As said in *Studley v. Boylston National Bank*, 229 U. S. 523, 30 Am. B. R. 161, 57 L. Ed. 1313, 33 Sup. Ct. 806, "there is nothing in the statute which deprives a bank, with whom an insolvent is doing business, of the rights of any other creditor taking money without reasonable cause to believe that a preference will result from the payment. The bankruptcy act contemplates that by remaining in business and at work an insolvent may become able to pay off his debts. It does not prevent him from continuing to trade, depositing money in bank, drawing checks and paying debts as they mature, either to his own bank or any other creditor. It does provide, however, that if bankruptcy ensues all payments thus made, within the four months' period, may be recovered by the trustee, if the creditor had reasonable cause to believe that a preference would be thereby effected."

72. *In re City Bank*, Fed. Cas. 2,742. Compare *Hitchcock v. Rollo*, Fed. Cas. 6,535.

73. See *Tomlinson v. Bank of Lexington* (C. C. A., 4th Cir.), 16 Am. B. R. 632, 145 Fed. 824; *Mason v. Herkimer Co. Bank* (C. C. A., 2d Cir.), 22 Am. B. R. 733, 172 Fed. 529, revg. 21 Am. B. R. 98.

**Burden of proof.**—Where a claim made up and based upon a certificate of deposit issued by the bankrupts, engaged in the business of private bankers, payable to the order of the claimant's wife and assigned to him, is sought to be used as an off-set against his indebtedness to the bank when it closed its doors, the burden of showing that the certificate was transferred before the bank suspended payment and without knowledge of its insolvency is upon the claimant. *In re Shults* (D. C., N. Y.), 14 Am. B. R. 278, 135 Fed. 623.

74. *Hovey v. Insurance Co.*, Fed. Cas. 6,743; *Hunt v. Holmes*, Fed. Cas. 6,890; *In re Perkins*, Fed. Cas. 10,982; *Bashore v. Rhodes*, 16 N. B. R. 72. Compare also *Smith v. Hill*, 8 Gray, 572; *Smith v. Brinkerhoff*, 6 N. Y. 305; also the numerous English cases on the same subject.



## SECTION SIXTY-NINE.

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### POSSESSION OF PROPERTY.

§ 69. **Possession of Property.**—*a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties, as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

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**Analogous provisions:** In U. S.: Act of 1867, § 40, R. S., § 5034.

In Eng.: Act of 1883, none.

In Can.: None.

**Cross-references:** To the law: Jurisdiction of court to appoint marshal to take custody of property, § 2(3).

Bond to be filed upon application to take possession of property, § 3-e

Referee to exercise power of judge in respect to taking possession of property, § 38-a(3).

To the General Orders: Indemnity for expenses of marshal, X.

Accounts of marshals, with vouchers, XIX.

To the Forms: Special warrant to marshal to take possession of property, No. 8.

Bond of petitioning creditor, No. 9; bond to marshal, No. 10.

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### SYNOPSIS OF SECTION.

#### I. Seizure of Bankrupt's Property, 1103.

a. *Cross-references*, 1103.

b. *Scope of section*, 1103.

c. *Bond of petitioning creditors*, 1103.

d. *Bonding the property back*, 1104.

e. *Remedy where property is claimed by a third person*, 1104.

f. *The marshal's liability*, 1104.

g. *Practice*, 1105.

**I. SEIZURE OF BANKRUPT'S PROPERTY.**

**a. Cross-references.**—The value of this section is not apparent; § 3-e, in connection with § 2 (3) and § 2 (15), is much broader.<sup>1</sup> It is difficult to conceive of a case within the terms of § 69 which is not also within those of the sections just mentioned. Further, a seizure under this provision can be authorized only by the judge, save in the contingency stated in § 38-a (3); while, under the earlier sections, property may be taken possession of by a receiver acting under the order of a referee. A similar practice was authorized by the law of 1867;<sup>2</sup> it included the arrest and detention of the debtor, but did not authorize the court to release the property to him on filing a new bond.

**b. Scope of section.**—The section divides itself naturally into three parts: (1) the authority to seize on a showing of specified facts, (2) a provision as to the bond to be given and its conditions and (3) a provision permitting the bankrupt to regain possession on filing a similar bond. A creditor desiring to seize property under this section must satisfy the judge that an alleged involuntary bankrupt either (1) has committed an act of bankruptcy, or (2) has so neglected or is so neglecting, or is about so to neglect his property that it has deteriorated or is deteriorating or will deteriorate in value. If so, on a specified bond being filed, the judge must issue the warrant to the marshal, but not to another; and the marshal must seize and hold the property subject to further orders. The application may be made only in involuntary cases, but not before the bankruptcy petition is filed or after the adjudication.<sup>3</sup> The remedy is, therefore, provisional. Its purpose is clearly to prevent deterioration or waste in the often long interval between the filing of an involuntary petition and an adjudication or dismissal.

**c. Bond of petitioning creditors.**—It is the obvious purpose of this section and of § 3-e to require indemnity to be given to an alleged bankrupt before his property shall be seized or taken from his possession in behalf of the petitioning creditor or creditors before there has been an adjudication. Without such indemnity a person not a bankrupt, or who has committed no act of bankruptcy, would not be adequately protected. Upon a dismissal of the petition for his adjudication he could in an extreme case probably maintain an action for malicious prosecution and recover in such action incidentally such damages as he may have sustained by the loss of the use of his property pending its restitution to him by the marshal. It would also be open to him to apply to the court and obtain an order directing a restitution of his property to him. It is the purpose of this provision to spare him the expense and trouble of seeking either of these remedies, by requiring the party or parties who seek to dispossess him of his property in advance of an adjudication to furnish him with a security adequate for his complete protection.<sup>4</sup> Before a warrant is issued the creditors petitioning therefor must give a bond in an amount and with such sureties as may be required by the judge, to indemnify the bankrupt for "such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained." The words here, unlike the

1. See under Section Three of this work.

2. Act of 1867, § 40, R. S., § 5924.

3. This follows from the words "against

whom an involuntary petition has been filed and is pending."

4. *Matter of Hoff* (O. C. A., 2d Cir.), 13 Am. B. R. 354, 135 Fed. 742.

section itself, are somewhat broader than those employed in § 3-e. It is thought that they mean substantially the same thing. "Damages" doubtless includes "costs" and "expenses."<sup>5</sup> The discretion given the judge as to the sureties is no more than is allowed him by general statutes.<sup>6</sup>

d. *Bonding the property back.*—This is equivalent to the reclaimer of a defendant in replevin. The judge has like discretion as to the amount of the bond and the sureties. The condition of the bond is specified in the statute.<sup>7</sup>

e. *Remedy where property is claimed by a third person.*—Manifestly, this section applies only to cases where the property is physically in the possession of the bankrupt or his agent.<sup>8</sup> The remedy is summary, as is that where a bankrupt, after adjudication, refuses to turn over property to his trustee.<sup>9</sup> But, where the property is held adversely, even if fraudulently, the usual remedy of a plenary suit must be resorted to.<sup>10</sup> This does not exclude the provisional remedy of injunction in cases where such a remedy is essential until an officer representing the court and the creditors can bring such suit.

f. *The marshal's liability.*—The marshal must decide what is, and what is not, the property of the bankrupt. If he seizes the property of another, he

5. A claim for damages under section 69-a, for a wrongful seizure of the bankrupt's property, is dismissed, where a judgment has already been awarded against the petitioning creditors and obligors upon the bonds filed in their behalf, as provided by section 3-e, for counsel fees, costs, disbursements and expenses, incurred in the proceeding. *Nixon v. Fidelity & Deposit Co. of Maryland* (C. C. A., 9th Cir.), 18 Am. B. R. 174, 150 Fed. 574. See also *Kennedy v. Nat. Jeweler's Board of Trade* (Sup. Ct. N. Y.), 39 Am. B. R. 85, 175 App. Div. 735.

6. See under Section Three of this work.

7. Compare *In re Harthill*, Fed. Cas. 6,161.

8. See *In re Hammond* (D. C., Mass.), 3 Am. B. R. 466, 474, 98 Fed. 845; *In re Ward* (D. C., Mass.), 5 Am. B. R. 215, 104 Fed. 985; *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 629; *In re Moody* (D. C., Ia.), 12 Am. B. R. 718, 721, 131 Fed. 525.

The filing of a petition in bankruptcy does not confer summary jurisdiction over property transferred to and in possession of a trustee for creditors. *Morning Telegraph Pub. Co. v. Hutchinson Co.* (Sup. Ct., Mich.), 17 Am. B. R. 425, 146 Mich. 38.

*Seizure of property claimed by third person unauthorized.*—"Section 69 is intended to authorize the court to prevent the waste, deterioration, or loss of the bankrupt's property in his possession, pending the hearing on the petition for adjudication, but it is not intended to authorize the taking away from third parties property to which they assert title." Thus, a warrant should not be issued to seize property claimed by virtue of a chattel mortgage and possessed prior to the filing of the petition. *In re Rockwood* (D. C., Ia.), 1 Am. B. R. 272, 91 Fed. 363. A warrant directing the marshal to seize property in the possession of third persons, under claim of title, is wholly unauthorized by the bankruptcy act, even though it is

claimed that the party holding the property received it by a transfer which is voidable or null under the act. *In re Kelly* (D. C., Tenn.), 1 Am. B. R. 306, 91 Fed. 504.

9. In such a case, a recusant bankrupt is, however, reached by contempt process.

10. See, generally, under Section Twenty-three of this work. Note also the method of avoiding preferences and fraudulent transfers considered under Section Sixty, Sixty-seven and Seventy. All these remedies are generally available only *after adjudication*.

*Property in possession of marshal.*—Where the marshal, under the order of the bankruptcy court directing him to seize the estate of the bankrupt, peaceably and quietly becomes possessed of property as the property of the bankrupt, although the latter was holding it merely as the agent for his mortgagee, whose mortgage is on record, but of which the marshal had no actual notice at the time, the court will not turn over the property so seized by the marshal to the mortgagee claimant. *In re Bender* (D. C., Ark.), 5 Am. B. R. 632, 106 Fed. 673.

*Property held adversely.*—In *Matter of Andre* (C. C. A., 2d Cir.), 13 Am. B. R. 132, 135, 68 C. C. A. 374, the court, in construing sections 2 and 69, said: "We conclude that it is only in cases in which the property of the bankrupt is in the possession of a party not an adverse claimant that the courts of bankruptcy have authority under these sections to interfere with it unless the adverse claimant chooses to consent, but that these courts have jurisdiction to entertain proceedings to ascertain whether there is an adverse claimant and that the mere refusal of a person in possession to surrender the property does not constitute him an adverse claimant."

Where, prior to his adjudication in bankruptcy, an insolvent debtor had made a gen-

is liable to that other.<sup>11</sup> It is elementary that his warrant is not operative outside of his district.

g. Practice.—This remedy will rarely be resorted to. The requirement of a bond against damages will halt most petitioning creditors. Besides, there are the equivalent remedies of a receiver or an injunction, or the two combined.<sup>12</sup> When resort is had to it, the practice is simple. The application is made by motion based on affidavits, usually accompanying and perhaps referring to the involuntary petition, but always separate and distinct from such petition.<sup>13</sup> The affidavits should be positive in their averments, not mere statements of opinions or conclusions, and establish all the essential facts.<sup>14</sup> In short, they should amount to a proven *prima facie* case. The form of the bond is suggested by Form No. 10, though the latter is intended for use by the alleged bankrupt in reclaiming the property. It is thought that affidavits for the justification of sureties should be added; this, that the court may be satisfied as to their responsibility without further inquiry. A surety company bond can be used. If the affidavits and bond are sufficient, the warrant issues in the form prescribed by Form No. 8. The procedure thereafter is the same as that on any seizure by a Federal marshal. A marshal of seizure will not be issued under this section except upon a compliance with all the conditions prescribed therein; there can, therefore, be no waiver of the required affidavits and bond.<sup>15</sup> The alleged bankrupt has two remedies; to move to vacate the warrant on the insufficiency of the affidavits or bond, or both, or to reclaim the property by filing a new bond. The latter method is more direct and is usually followed.<sup>16</sup>

eral assignment for the benefit of his creditors and subsequent to the filing of a petition in bankruptcy against the assignor, the assignee had sold the property of the bankrupt, and where, upon the petition of creditors of the bankrupt, the court of bankruptcy issued an order directing the marshal to seize the property so sold, and granted a rule directing the purchaser to appear before the court and prove his title to such property, it was held that the court of bankruptcy did not have jurisdiction by a summary proceeding to order the marshal to seize the property. The proper proceeding in such a case is a plenary action at law

or in equity. In re Abraham (C. C. A., 5th Cir.), 2 Am. B. R. 266, 93 Fed. 967.

11. In re Miller, Fed. Cas. 9,913; In re Marks, Fed. Cas. 9,096; Marsh v. Armstrong, 20 Minn. 81. This doctrine is subject to exceptions. In re Vogel, Fed. Cas. 16,982; In re Havens, Fed. Cas. 6,230.

12. Compare Blake v. Valentine (D. C., Cal.), 1 Am. B. R. 372, 89 Fed. 691. See also, generally, § 2(3) (15) and § 11-a, *ante*.

13. In re Kelly (D. C., Tenn.), 1 Am. B. R. 306, 91 Fed. 504.

14. *Id.*

15. In re Sarsar (D. C., Tenn.), 9 Am. B. R. 576, 120 Fed. 40.

16. See Form No. 10.

## SECTION SEVENTY.

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### TITLE TO PROPERTY

§ 70. **Title to Property.**—*a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

*b* All the real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

*c* The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

*d* Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

*e* The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.\**

*f* Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.

**Analogous provisions:** In U. S. As to property in general passing to the trustee, Act of 1867, § 14, R. S., § 5044; Act of 1841, § 3; Act of 1800, §§ 10, 11, 17, 27, 50; As to patents, copyrights, rights of action and the like, Act of 1867, § 14, R. S., § 5046; Act of 1841, § 3; Act of 1800, §§ 13, 17; As to sales by the trustee, Act of 1867, §§ 15, 25, R. S., §§ 5062, 5062B, 5063, 5064, 5065, 5066; As to sales of incumbered property, Act of 1867, § 20, R. S., § 5075.

In Eng.: As to property passing to the trustee, Act of 1883, §§ 43, 44, 59; As to burdensome property, Act of 1883, § 55; Act of 1890, § 13; As to sales by the trustee, Act of 1883, §§ 56(1), 70.

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\* This sentence was added by the amendatory act of 1903.

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## I. SECTION IN GENERAL.

**a. Comparative legislation.**—The analogous provisions of the English law are referred to in the Synopsis. The main differences are that title vests as of the date of the commission of the first act of bankruptcy,<sup>1</sup> and the property divisible among creditors includes not only what the debtor had at the commencement of the proceeding, but also what is acquired by or devolves on him before his discharge.<sup>2</sup> In Canada the title passes to the trustee on the making of the receiving order.<sup>2a</sup> Each of our laws has had clauses regulating the vesting of title and indicating what vests.<sup>3</sup> That of 1867 is most nearly like the section under discussion.<sup>4</sup> Specific differences are considered in appropriate paragraphs, *post*. The differences between the old method of evidencing the vesting of title and that now the law have already been considered.<sup>5</sup>

**b. Scope of section.**—This section is chiefly important (*a*) for its provisions fixing what property of a bankrupt vests in his trustee and the time when it vests, and (*b*) as adopting as a part of the bankruptcy system the respective State statutes providing a remedy against fraudulent transfers.<sup>6</sup> It also includes nearly all that is in the law relative to the method of selling a bankrupt's property. Besides, it provides for the appointment and reports of appraisers. The other subdivisions, *c*, *d* and *f*, have to do either with minor matters of practice or else refer directly to and would have been more appropriately incorporated in sections previously discussed.<sup>7</sup>

**c. Conflict between bankruptcy act and State law.**—Where the trustee in bankruptcy and a transferee of the bankrupt both claim certain property which once belonged to the bankrupt, it may be difficult to decide how far the title to the property in question depends upon the State law which determines the effect of the bankrupt's conveyance, and how far upon the bankruptcy act which declares what property the trustee shall take. The one law regulates the passage of title from the bankrupt, and is interpreted by the State court. The other law regulates its passage to the trustee, and is interpreted by the federal court.<sup>8</sup> Where there is conflict of jurisdiction, the exclusiveness of the jurisdiction of the court of bankruptcy will depend upon the possession, either actual or implied, of the property in question. If a petition has been filed and there has been an adjudication in the bankruptcy court, the property of the bankrupt, wherever situated, is brought into the control of the bankruptcy court and must be administered therein.<sup>9</sup> So that where a petition

1. Eng. Act of 1863, § 43.

2. Eng. Act of 1903, § 44.

2a. Can. Bankr. Act of 1919, § 6.

3. See "Analogous Provisions" at head of section.

4. For cases under that law, see *In re Rosenberg*, Fed. Cas. 12,055; *In re Wynne*, Fed. Cas. 18,117; *Markson v. Heaney*, Fed. Cas. 9,068.

5. See discussion under Section Twenty-one of this work. Compare, also, law of 1841, where the decree itself divested the bankrupt's title.

6. See under this section, *post*, subtitle "Transfers Fraudulent Under State Laws May Be Avoided by Trustee."

7. As to *d*, see discussion under Sections Thirteen and Fifteen of this work. As to *f*, see discussion under Section Twelve.

8. *In re Littlefield* (C. C. A., 1st Cir.), 19 Am. B. R. 18, 155 Fed. 838, holding that "although the rights of a trustee in bank-

ruptcy and those of an assignee in insolvency under the statute of Massachusetts are defined in similar language, yet a statute making a certain transfer void as against the latter *eo nomine* does not make it void as against the former."

9. *Bailey v. Baker Ice Machine Co.* 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275, 36 Sup. Ct. 50; *Lazarus v. Prentice*, 234 U. S. 263, 32 Am. B. R. 559, 58 L. Ed. 1305, 34 Sup. Ct. 851; *Robertson v. Howard*, 229 U. S. 254, 30 Am. B. R. 611, 57 L. Ed. 1174, 33 Sup. Ct. 854; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 27 Am. B. R. 262, 56 L. Ed. 208, 32 Sup. Ct. 96; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405, 22 Sup. Ct. 269;

has been filed against an alleged bankrupt, a State court has no right to seize or attach property admittedly belonging to the bankrupt, without the consent of the bankruptcy court, regardless of whether actual possession of the property has been taken by its officers.<sup>10</sup>

## II. TRUSTEE VESTED WITH TITLE OF BANKRUPT.

a. In general.—Subsection a is the most important of all the subsections of this section. Under it the trustee is vested with the title of the bankrupt to all property possessed by him at the date of the adjudication, being within the classes therein enumerated, "except in so far as it is to property which is exempt." He takes an absolute title which, of course, carries with it the right of possession.<sup>10a</sup> He is vested with such title only for the purpose of administration and distribution of the estate among the bankrupt's creditors.<sup>11</sup> He represents both the bankrupt and creditors. He succeeds to the right and title of the bankrupt for the benefit of his creditors, and in this capacity occasionally has rights not possessed by the bankrupt, as for instance, the right to recover assets which the bankrupt has conveyed in fraud of his creditors.<sup>12</sup>

b. When title vests.—(1) IN GENERAL.—Under the previous law, the trustee's title vested by relation as of the date of the commencement of the proceeding. This casts doubt on the validity even of *bona fide* transactions between petition filed and adjudication; in short, made business by an alleged, but not yet adjudicated, bankrupt practically impossible. Under the act of 1841, there seems to have been a similar doubt.<sup>13</sup> The words "as to the date he was adjudicated a bankrupt" seem to have been inserted to meet these difficul-

Matter of Continental Coal Corp. (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113; Board of Road Commissioners v. Kell (C. C. A., 6th Cir.), 44 Am. B. R. 259, 259 Fed. 70; Matter of Diamond's Estate (C. C. A., 6th Cir.), 44 Am. B. R. 268, 259 Fed. 70; Koger v. Clark (Tex. Ct. of Civ. App.), 44 Am. B. R. 512, 216 S. W. 434. See discussion under § 23, *ante*.

Property in *custodia legis*.—All the bankrupt's property, title to which is not held adversely by a third person, is, upon the filing of the petition in bankruptcy, placed in *custodia legis*. Matter of Larkey (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867.

10. Matter of Wellmade Gas. Mantle Co. (D. C., Mass.), 36 Am. B. R. 354, 230 Fed. 502, affg. 36 Am. B. R. 62; Matter of Huffman-Salvar Roofing Paint Co. (D. C., Ala.), 37 Am. B. R. 426, 234 Fed. 798.

10a. Harlin v. American Trust Co. (Ind. App. Ct.), 41 Am. B. R. 401, 119 N. E. 20.

11. Blacklee Co. v. O'Connor, 24 Am. B. R. 499, 122 N. Y. Supp. 710, 67 N. Y. Misc. 599; Reilley v. Buffalo German Insurance Co. (Sup. Ct. Spec. T., N. Y.), 32 Am. B. R. 728, 86 N. Y. Misc. 69, 147 N. Y. Supp. 1066; Chambers v. Kirk (Okla. Sup. Ct.), 32 Am. B. R. 175, 139 Pac. 986.

12. Matter of Place (D. C., N. Y.), 35 Am. B. R. 426, 224 Fed. 778.

Effect of discharge.—The title of a trustee in bankruptcy continues till the estate is closed, and it is not affected by the discharge of the bankrupt. Matter of Levy (D. C., Pa.), 44 Am. B. R. 248, 261 Fed. 432.

Representative of creditors in action to set aside fraudulent conveyance.—In the case of Cartwright v. West (Ala. Sup. Ct.), 26 Am. B. R. 831, 55 So. 917, the court said: "The trustee in bankruptcy in a sense is representative of

both the bankrupt and the creditors. As such he succeeds in right and title to the bankrupt's estate for the benefit of his creditors. He may, as a general rule, maintain all actions, both at law and in equity, for the recovery and preservation of the assets, both real and personal, of the bankrupt's estate that the bankrupt himself, but for the bankruptcy, could have maintained. Even more, he may maintain an action the bankrupt could not, where, as in the present case, he seeks to avoid conveyances made by the bankrupt in fraud of his creditors. In this latter instance it cannot be said that the trustee is a representative of the bankrupt, for he (the bankrupt) could not maintain such a bill, nor in any legal or equitable proceeding become a beneficiary of his own fraudulent act."

Rights of trustee as against committee of creditors.—Where after bankrupt had absconded, a committee of creditors, prior to bankruptcy, took charge of his property without authority, selling and disposing of the same paying the claims of alleged lienors, and depositing the balance, which was afterwards turned over to bankrupt's trustee, and it appeared that the bankrupt never ratified the transaction nor was informed thereof prior to his adjudication, the acts of the committee constituted a conversion of bankrupt's property, and bankrupt's trustee had the right to repudiate the transactions and follow the property, or, waiving the tort, sue the committee for the value. In re Thomas (D. C., N. Y.), 29 Am. B. R. 945, 199 Fed. 214.

See discussion under heading "Transfers fraudulent under State laws," *post*.

13. Compare *Ex parte Foster*, Fed. Cas. 4960; *Ex parte Newhall*, Fed. Cas. 10,159; In re Rust, Fed. Cas. 12,171.

ties.<sup>14</sup> They are not antagonistic to the words found later in subdivision (5). The former refer to the time of vesting; the latter to what vests.<sup>15</sup>

(2) **TITLE VESTS AT DATE OF ADJUDICATION RELATING BACK TO DATE OF FILING PETITION.**—Under the present law the trustee's title is that only which exists at the date of the adjudication,<sup>16</sup> although such title relates back to the time of filing the petition.<sup>17</sup> The purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.<sup>18</sup> The filing of an involuntary petition does not, *ipso facto*, take from the alleged bankrupt his dominion over his property; while his disposition of his property may be invalidated and set aside under certain circumstances, such property remains under his control until the adjudication. The remedy of the petitioning creditors, in case this freedom to trade is abused, is by the appointment of a receiver under § 2 (3) (15), or an appropriate proceeding under § 3-e or § 69.<sup>19</sup> The trustee must exercise

14. See House Report No. 1,228, 54th Congress. The reason given in the text for the use of the language is sustained in the case of *Matter of Zotti* (C. C. A., 2d Cir.), 26 Am. B. R. 234, 186 Fed. 84, in which the court said: "It was because of the act of 1867 threw doubt upon the validity of honest transactions that the words 'as of the date he was adjudicated a bankrupt,' were inserted by the act of 1898." (Citing Collier, 8th ed., p. 807.)

15. In re Pease (Ref., N. Y.), 4 Am. B. R. 578; In re Barrow (D. C., Va.), 3 Am. B. R. 414, 96 Fed. 582; In re Burka (D. C., Mo.), 5 Am. B. R. 12, 104 Fed. 326; In re Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456. Compare In re Harris (Ref., Ill.), 2 Am. B. R. 359, and In re Mussey (D. C., Mass.), 3 Am. B. R. 692, 99 Fed. 71.

16. *Matter of Zotti* (C. C. A., 2d Cir.), 26 Am. B. R. 234, 186 Fed. 84; In re Hurley (D. C., Mass.), 26 Am. B. R. 434, 185 Fed. 851; *Williams v. Noyes & Nutter Mfg. Co.* (Maine Sup. Ct.), 33 Am. B. R. 865, 92 Atl. 482; *Barber v. Wiemer* (Ia. Sup. Ct.), 40 Am. B. R. 752, 105 N. W. 440; *Matter of Soltmann* (C. C. A., 2d Cir.), 41 Am. B. R. 42, 249 Fed. 455; *Brown v. Crawford* (D. C., Ore.), 42 Am. B. R. 263, 252 Fed. 248; *Matter of Arctic Stores* (D. C., N. J.), 43 Am. B. R. 543, 258 Fed. 688; *Neuberger v. Fellis* (Ala. Sup. Ct.), 43 Am. B. R. 703, 82 So. 172.

Payment of check after adjudication.—*Edison Elec. Illum. Co. v. Tibbetts* (C. C. A., 1st Cir.), 39 Am. B. R. 640, 241 Fed. 468.

17. *Everett v. Judson*, 228 U. S. 474, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 568, aff'd 27 Am. B. R. 704, 102 Fed. 834; *Toof v. City National Bank* (C. C. A., 6th Cir.), 30 Am. B. R. 79, 208 Fed. 250; *Carter etc., Transfer Co. v. Robertson* (Tex. Ct. of Civ. App.), 40 Am. B. R. 628, 198 S. W. 791; *Archenhold Co. v. Schaefer* (Tex. Ct. of Civ. App.), 42 Am. B. R. 232, 205 S. W. 139; *Neuberger v. Fellis* (Ala. Sup. Ct.), 43 Am. B. R. 703, 82 So. 172; *Matter of Diamond's Estate* (C. C. A., 6th Cir.), 44 Am. B. R. 268, 259 Fed. 70.

Title vests as of date of adjudication.—In the *Matter of Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 362, 368, 142 Fed. 445, 75 C. C. A., 548, Judge Wallace, speaking for this court, said: "By the present act, the title of the trustee is vested in the estate of the bankrupt 'as of the date he was adjudged a bankrupt.' We are of opinion that until the date of the adjudication a lienor or pledgee is at liberty to perfect any

title which the nature of the lien permits. Under the act of 1867, no lien could be acquired after the filing of the petition in bankruptcy, because the title of the assignee vested as of the commencement of the proceeding in bankruptcy. Now the trustee takes the property of the bankrupt in the condition in which he finds it at the date of the adjudication, unless it has been numbered fraudulently or in contravention of some of the provisions of the act." The principle here declared is in conflict with the rule laid down by the Supreme Court in *Everett v. Judson*, 228 U. S. 474, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 568.

18. *Matter of Continental Coal Corp.* (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113; *Arnold v. Hoorigan* (C. C. A., 6th Cir.), 38 Am. B. R. 174, 238 Fed. 89; *Emerson-Brantingham Co. v. Lawson* (D. C., Iowa), 38 Am. B. R. 344, 237 Fed. 877; *Duncan v. Watson* (Ala. Sup. Ct.), 38 Am. B. R. 613, 73 So. 448; *Brewer v. Brown* (Ill. Sup. Ct.), 38 Am. B. R. 890, 109 N. E. 284; *Fairbanks Steam Shovel Co. v. Willis*, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, 38 Sup. Ct. 466, affg. *Matter of Federal Contracting Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 881, 212 Fed. 688; *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275, 36 Sup. Ct. 50; *Everett v. Judson*, 228 U. S. 474, 479, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 568; *Zavelo v. Reeves*, 227 U. S. 625, 29 Am. B. R. 493, 57 L. Ed. 676, 33 Sup. Ct. 365; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 27 Am. B. R. 262, 56 L. Ed. 208, 32 Sup. Ct. 96; *Petty v. Wilkins* (Ark. Sup. Ct.), 40 Am. B. R. 259, 196 S. W. 453; *Bramham v. Lanier Bros.* (Tenn. Sup. Ct.), 41 Am. B. R. 215, 200 S. W. 830; *Matter of Mitchell* (D. C., N. Y.), 42 Am. B. R. 653; *Matter of Swift* (D. C., Ga.), 44 Am. B. R. 211, 259 Fed. 612.

Rights determined as of date of filing petition.—When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and his creditors are stayed, and that his estate passes actually or potentially into the control of the court. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275, 36 Sup. Ct. 50.

The rights of a trustee in bankruptcy, as against a mortgagee under an unfilled chattel mortgage, are determined as of the day the

his option to accept within a reasonable time or he will be held to have waived his rights.<sup>20</sup>

**c. Bankrupt's title between petition filed and (1) adjudication and (2) appointment of trustee.**—It follows that, under the present law, the title remains in the bankrupt at least to the date of adjudication; perhaps even to the date of the appointment of the trustee.<sup>21</sup> Thus, the bankrupt is not divested of his title until the appointment and qualification of the trustee.<sup>22</sup> A suit for the infringement of a copyright may be prosecuted,<sup>23</sup> and lands sold for taxes may be redeemed by the bankrupt after a petition has been filed and before the appointment of a trustee.<sup>24</sup> But after the adjudication the bankrupt has no standing in court as to his property which is not exempt.<sup>25</sup> Prior to adjudication, fraud being absent, it may be transferred; but, being liable to be divested, no permanent lien can attach to it.<sup>26</sup> When, however, the trustee is appointed, his title goes back by relation to the date of the adjudication,<sup>27</sup> although for jurisdictional purposes rights in the property will relate back to the date of the commencement of the proceeding.<sup>28</sup> Illustrative cases under the former

petition is filed. *Lake View State Bank v. Jones* (C. C. A., 7th Cir.), 40 Am. B. R. 148, 242 Fed. 821.

19. *In re LaPlume Condensed Milk Co.* (D. C., Pa.), 16 Am. B. R. 729, 145 Fed. 1,013; *American Trust Co. v. Wallis* (C. C. A., 3d Cir.), 11 Am. B. R. 360, 126 Fed. 464.

20. *Smith v. Gordon*, 6 Law Rep. 313. See Am. Bankr. Dig. § 413.

**Estoppel to assert title.**—Where a trustee in bankruptcy without asserting his claim thereto within a reasonable time, having knowledge of all the circumstances, allows third parties, in the prosecution of their legal rights, to acquire an interest in any part of the unclaimed assets of the bankrupt, he may be held to have waived his claim thereto. *Mesirov v. Innis Sperden & Co.* (N. J. Sup. Ct.), 37 Am. B. R. 201, 97 Atl. 160.

**Failure of trustee to assert title.**—The fact that a trustee in bankruptcy, after an attachment of property within four months of bankruptcy, fails to assert title for some time, does not estop him from subsequently asserting title or from interfering with a sale under the attachment. *Matter of Gilsonite Mines Co.* (D. C., Pa.), 37 Am. B. R. 473.

21. Though the better view is that, after adjudication, it is *in custodia legis*. *Keegan v. King* (D. C., Ind.), 3 Am. B. R. 79, 96 Fed. 758; *March v. Heaton*, Fed. Cas. 9,061; *In re Rosenberg*, Fed. Cas. 12,056; *Reilly v. Insurance Co.* (N. Y. Sup. Ct., Spec. T.), 32 Am. B. R. 728, 86 N. Y. Misc. 69, 147 N. Y. Supp. 1086.

22. *Rand v. Iowa Central R. Co.*, 16 Am. B. R. 692, 186 N. Y. 58, 78 N. E. 574, rev'd. 12 Am. B. R. 164, 96 N. Y. App. Div. 413, 89 N. Y. Supp. 212; *Fuller v. New York Fire Ins. Co.*, 184 Mass. 12, 67 N. E. 879; *Gordon v. Mechanics & Traders' Ins. Co.*, 22 Am. B. R. 649, 120 La. Ann. 441, 45 So. 384; *In re Thomas* (D. C., N. Y.), 29 Am. B. R. 945, 199 Fed. 214; *In re Banks* (D. C., N. Y.), 31 Am. B. R. 270, 207 Fed. 662.

**Cancellation of executory contract of sale to bankrupt between adjudication and appointment of trustee.**—During the interval between the adjudication in bankruptcy and the appointment of a trustee, the vendor in an executory contract for the sale of land

to the bankrupt may serve notice upon the bankrupt for the termination and cancellation of the contract for default in payment of the purchase price, and the notice so served is valid and effectual unless the result of fraud or collusion with the bankrupt and for the purpose of defeating the rights of creditors. *Christopherson v. Harrington* (Minn. Sup. Ct.), 32 Am. B. R. 842, 136 N. W. 289.

23. *Myers v. Callaghan*, 5 Fed. 726.

24. *Hampton v. Rouse*, 22 Wall. 263, 22 L. Ed. 765.

25. *Pickens v. Roy*, 187 U. S. 177, 9 Am. B. R. 47, 47 L. Ed. 123, 23 Sup. Ct. 78, aff'g. *Pickens v. Dent* (C. C. A., 4th Cir.), 5 Am. B. R. 644, 106 Fed. 653; *Edison Elec. Illum. Co. v. Tibbits* (C. C. A., 1st Cir.), 39 Am. B. R. 640, 241 Fed. 468.

26. *In re Engle* (D. C., Pa.), 5 Am. B. R. 372, 105 Fed. 993; *State Bank of Chicago v. Cox* (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91. Compare *In re Corbett* (D. C., Wis.), 5 Am. B. R. 224, 104 Fed. 872.

**Purchasers in good faith.**—Those acquiring rights to a bankrupt's property subsequent to his adjudication, who have knowledge of sufficient facts to put them on inquiry, are not *bona fide* purchasers. *Hull v. Burr* (Fla. Sup. Ct.), 26 Am. B. R. 897, 56 So. 852.

27. *Hiscock v. Varick Bank*, 206 U. S. 28, 18 Am. B. R. 1, 9, 51 L. Ed. 945, 27 Sup. Ct. 691, aff'g. 15 Am. B. R. 362, 142 Fed. 445; *French v. White*, 18 Am. B. R. 906, 78 Vt. 89, 62 Atl. 35; *Matter of Morse* (D. C., N. Y.), 32 Am. B. R. 207, 210 Fed. 900; *Christopherson v. Harrington* (Minn. Sup. Ct.), 32 Am. B. R. 842, 136 N. W. 289.

**Upon the appointment and qualification of a trustee, his title relates back to the time of the adjudication, and his rights and remedies as to property previously disposed of are definitely defined and limited by the bankruptcy act.** *In re Letson* (C. C. A., 8th Cir.), 19 Am. B. R. 506, 157 Fed. 78.

28. *In re Appel* (D. C., Neb.), 4 Am. B. R. 722, 103 Fed. 931. Compare *In re*

law, which, however, for reasons above stated, should be read with caution, will be found in the foot-note.<sup>29</sup>

**d. What vests.**—(1) **IN GENERAL.**—In respect to the property which vests the present statute deals in particulars, where in the former general words were used.<sup>30</sup> It is not thought that they differ in meaning. The various subdivisions are considered *seriatim* later. Stated broadly, the rule is that the trustee takes all the property of the bankrupt, whether in possession or in action, at the time the petition was filed,<sup>31</sup> subject, of course, to the new rule as to vesting just considered. Whether the bankrupt was in possession and the owner of the property at the time, must be determined by the circumstances; the determination of such question will depend upon the same facts as though bankruptcy had not intervened.<sup>32</sup> The trustee does not take title to money and property in possession of third persons which did not belong to the bankrupt prior to his adjudication. The question of ownership is one

Cramond (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966, holding that the amount due to a bankrupt upon a paving contract with a city, when he files his petition, is properly paid to his trustee. *Matter of Hooks Smelting Co.* (D. C., Pa.), 15 Am. B. R. 83, 138 Fed. 954, holding that trustee is entitled to combination of safe belonging to bankrupt at time of filing petition; *Whittlesley v. Becker & Co.*, 25 Am. B. R. 672, 678, 142 N. Y. App. Div. 313, 126 N. Y. Supp. 1046, citing text; *Corbett v. Riddle* (C. C. A., 4th Cir.), 31 Am. B. R. 330, 209 Fed. 811. And see cases cited under preceding heading "When title vests."

<sup>29</sup> *Connor v. Long*, 104 U. S. 228, 26 L. Ed. 723; *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83, 5 Sup. Ct. 799; *Howard v. Compton*, Fed. Cas. 6,758; *Babbett v. Burgess*, Fed. Cas. 693; *Miller v. O'Brien*, Fed. Cas. 9,586; *In re Lake*, Fed. Cas. 7,992; *Stevens v. Bank*, 101 Mass. 109.

<sup>30</sup> Compare Act of 1867, § 14, R. S., § 5044.

<sup>31</sup> *In re Pease* (Ref., N. Y.), 4 Am. B. R. 578; *In re Burka* (D. C., Md.), 5 Am. B. R. 12, 104 Fed. 326. For peculiar cases bearing on this general doctrine, see *In re Meyer* (D. C., N. Y.), 5 Am. B. R. 593, 106 Fed. 828; see also *McFarland Carriage Co. v. Solanas* (D. C., La.), 6 Am. B. R. 221, 108 Fed. 532; *Matter of Sherman Mfg. Co.* (Ref., Mass.), 15 Am. B. R. 740; *In re Driggs* (D. C., N. Y.), 22 Am. B. R. 621, 171 Fed. 897, holding that wages or salary due at the time of filing the petition belong to the trustee unless an exemption is claimed, and cannot be reached under an execution issued within the four months' period; *In re Peacock* (D. C., N. Car.), 24 Am. B. R. 159, 178 Fed. 851; *Toof v. City National Bank* (C. C. A., 6th Cir.), 30 Am. B. R. 79, 206 Fed. 260; *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 223 Fed. 667; *Matter of Place* (D. C., N. Y.), 35 Am. B. R. 426, 224 Fed. 778; *Bynum v. Scott* (D. C., N. Car.), 33 Am. B. R. 436, 217 Fed. 122; *Jackson v. Jetter* (Iowa Sup. Ct.), 32 Am. B. R. 667, 142 N. W. 431; *Barber v. Wiener* (Ia. Sup. Ct.), 40 Am. B. R. 732, 165 N. W. 440; *Neuberger v. Fells* (Ala. Sup. Ct.), 43 Am. B. R. 703, 82 So. 172.

The effect of an adjudication in bank-

ruptcy is to transfer the title of the property of the bankrupt, whenever situated, and vest the same in the trustee, who has the right under the authority and control of the court to administer the same. *Robertson v. Howard*, 229 U. S. 254, 30 Am. B. R. 611, 57 L. Ed. 1174, 33 Sup. Ct. 854; *Koger v. Clark* (Tex. Ct. of Civ. App.), 44 Am. B. R. 512, 216 S. W. 434.

**Bill of sale.**—As a trustee in bankruptcy has the right of an execution creditor he has the title to property of the bankrupt which the latter has sold on a bill of sale but has not delivered possession. *Herritt v. Clark* (C. C. A., 3d Cir.), 41 Am. B. R. 232, 247 Fed. 100.

**Extent of title.**—The effect of the adjudication of bankruptcy to vest the trustee of the estate by operation of law with the title of the bankrupt, as of the date he was adjudicated a bankrupt, to all property not exempt, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process, is both expressly provided and well settled in meaning to this extent, that the estate is absolutely vested in the trustee until it has subverted the purpose of the bankruptcy proceedings, although the bankrupt is entitled to restoration of any residue which may remain when that purpose is fulfilled. *Matter of Scott* (C. C. A., 7th Cir.), 33 Am. B. R. 53.

<sup>32</sup> *Matter of Rawlins Mercantile Co.* (D. C., Ga.), 42 Am. B. R. 218, 251 Fed. 164.

**Effect of agreement of majority stockholder of bankrupt corporation as to its property.**—*Sandborn-Cutting Co. v. Paine* (C. C. A., 9th Cir.), 40 Am. B. R. 525, 244 Fed. 672.

**Sufficiency of delivery of assets by bankrupt.**—A written contract between the petitioner and the bankrupt, made more than a year before the adjudication, provided that petitioner was to purchase certain lumber sawed at the bankrupt's mills at designated prices, which when sawed was to be piled at the mills according to detailed specifications, twice each month the petitioner to cause the lumber so piled to be estimated and branded with petitioner's initials "O. C. & L. Co." and to make an advance payment thereon of \$10 per thousand, and that such acts should constitute a delivery of the same for all intents and purposes. Held, that, having regard to the situation and condition of the property, the customs of business men adapted thereto and the intent of the statute, such delivery was sufficient under a Missouri law providing that "every sale made by the vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continued change of possession of the things sold,

of fact.<sup>33</sup> The property which passes is not confined to that described in the bankrupt's schedule; any property owned by him passes to the trustee on adjudication.<sup>34</sup> Where, under a State statute, a stockholder's liability is enforceable only by creditors and not by the corporation, as for an overvaluation of property transferred in payment of a stock subscription, it is not property which passes to the trustee.<sup>35</sup> In those jurisdictions where tenancy by the entirety is recognized a trustee in bankruptcy of a husband or wife is clothed with the interest of the bankrupt in property held by the entirety, but his right to it must await the contingency of the bankrupt surviving his spouse.<sup>36</sup>

(2) PROPERTY ACQUIRED AFTER FILING PETITION.—The trustee only acquires such property as belonged to the bankrupt at the time the petition was filed. Property not then owned but acquired before the adjudication,<sup>37</sup> and surely property acquired after it and before the discharge,<sup>38</sup> does not vest in the trustee, but becomes the bankrupt's, clear of the claims of creditors, save those after the commencement of the proceedings or those who, for statutory reasons, are not affected by the discharge.<sup>39</sup> This rule is especially applicable in case of earnings by labor and services performed subsequent to the filing of the petition.<sup>40</sup> And where land remains in the possession of the bankrupt after the adjudication because of an exemption or of a statutory provision giving such possession to the bankrupt as a special privilege, the crops growing thereon will be deemed "after acquired property," and do not pass to the trustee.<sup>41</sup> Property acquired between the filing of the petition and the adjudication is subject to the same rule as after-acquired property and

shall be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith," and that petitioner's claim of title to lumber so estimated and marked should be allowed. In re Ozark Cooperage & Lumber Co. (C. C. A., 8th Cir.), 24 Am. B. R. 835, 180 Fed. 105. See also Lovell v. Newman & Son (D. C., La.), 26 Am. B. R. 660, 188 Fed. 534.

33. *Clay v. Waters* (C. C. A., 8th Cir.), 20 Am. B. R. 561, 161 Fed. 815; *Matter of McCord* (C. C. A., 2d Cir.), 23 Am. B. R. 164, 174 Fed. 820.

When trustee may recover savings of wife from business earnings of husband.—Savings by a wife from the business earnings of her husband are a part of his estate in bankruptcy, and may be reached by his trustee, unless an absolute gift under proper circumstances, while the husband was solvent, can be shown. *Milkman v. Arthe* (D. C., N. Y.), 38 Am. B. R. 418, 221 Fed. 124.

34. *Jones v. Barnes* (Miss. Sup. Ct.), 35 Am. B. R. 64, 66 So. 212; *Davis v. Findley* (Ala. Sup. Ct.), 41 Am. B. R. 692, 78 So. 869; *Raley v. Sullivan & Co.* (Tex. Comm. of App.), 42 Am. B. R. 753, 207 S. W. 906; *Newberger v. Felis* (Ala. Sup. Ct.), 43 Am. B. R. 703, 82 So. 172.

35. *Matter of Huffman-Salvar Roofing Paint Co.* (D. C., Ala.), 37 Am. B. R. 426, 234 Fed. 798; *State Bank of Commerce v. Kennedy Band Instrument Co.* (Minn. Sup. Ct.), 44 Am. B. R. 91, 173 N. W. 560.

36. *Frey v. McGraw* (Md. Ct. of App.), 35 Am. B. R. 822. See also *Ades v. Caplan* (Md. Ct. of App.), 41 Am. B. R. 401, 103 Atl. 94.

37. In re *Harris* (Ref., Ill.), 2 Am. B. R. 359; *Matter of Morris & Rice* (D. C., Mass.), 44 Am. B. R. 146, 258 Fed. 712.

Legacies.—Where testator died in the morning of the day on which a legatee filed a petition and was adjudicated a bankrupt, the legacy vests in his trustee. In re *McKenna* (D. C., N. Y.), 15 Am. B. R. 4, 137 Fed. 611. Otherwise where legacy takes effect after adjudication. In re *Woods* (D. C., Pa.), 13 Am. B. R.

240, 133 Fed. 82. See also *Matter of Swift* (D. C., Ga.), 44 Am. B. R. 211, 259 Fed. 612; *Matter of Seal* (D. C., N. Y.), 44 Am. B. R. 556, 261 Fed. 112.

38. In re *Rennie* (Ref., Ind. Terr.), 2 Am. B. R. 182; In re *Stoner* (D. C., Pa.), 5 Am. B. R. 402, 106 Fed. 752; In re *West* (D. C., Ore.), 11 Am. B. R. 782, 128 Fed. 205; *Leitch v. Northern Pac. Ry. Co.*, 24 Am. B. R. 409, 103 N. W. 704; *Matter of American Candy Mfg. Co.* (D. C., N. Y.), 41 Am. B. R. 461, 248 Fed. 145.

39. See *Bankr. Act*, § 17. In re *West* (D. C., Ore.), 11 Am. B. R. 782, 128 Fed. 205. Text cited and approved in *Whitlock's License*, 22 Am. B. R. 262, 39 Pa. Super. Ct. 34, holding that a liquor license granted to a bankrupt after his adjudication belongs to him and not his trustee. *Matter of Mitchell* (D. C., N. Y.), 42 Am. B. R. 658, citing *Collier on Bankruptcy* (10th ed.), 995.

40. In re *Lineberry* (D. C., Ala.), 25 Am. B. R. 164, 183 Fed. 338; *Leitch v. Northern Pac. Ry. Co.* (Minn.), 14 Am. B. R. 409, 103 N. W. 704; In re *Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 147 Fed. 538; *Matter of O'Gillespie* (D. C., N. Y.), 32 Am. B. R. 434, 206 Fed. 1003; *Matter of Green* (D. C., N. Y.), 32 Am. B. R. 433, 213 Fed. 542; *Matter of Collins* (D. C., N. Y.), 32 Am. B. R. 431, 213 Fed. 543; *Progressive Bldg. & Loan Co. v. Hall* (C. C. A., 4th Cir.), 33 Am. B. R. 313, 220 Fed. 45.

Bonus on wages.—*Matter of Mitchell* (D. C., N. Y.), 42 Am. B. R. 658.

41. *Matter of Miller* (D. C., Mont.), 34 Am. B. R. 614, 221 Fed. 690, holding that where a voluntary bankrupt at the date of his adjudication occupied a homestead upon public lands of the United States and had sown thereon 50 acres of winter wheat, which he harvested in due time, such growing crop did not vest in the trustee upon filing the petition in bankruptcy, and the bankrupt cannot be compelled

belongs to the bankrupt.<sup>43</sup> A claim for a reward for information given against smugglers, which is not allowed until after the claimant's adjudication, does not pass to his trustee; the reward belongs to the bankrupt and does not pass upon his bankruptcy, and his failure to oppose his bankruptcy does not estop him from insisting that the reward is his own property.<sup>42</sup>

c. Subject to all claims, liens, and equities.—(1) IN GENERAL.—It is well settled that the trustee takes not as an innocent purchaser, but subject to all valid claims, liens, and equities.<sup>44</sup> The validity of such claims, liens, and equities is to be determined, in the absence of federal statutes, by the local

to schedule the same; *Jackson v. Jetter* (Iowa Sup. Ct.), 22 Am. B. R. 697, 142 N. W. 431.

42. *In re Harris* (D. C. Ill.), 2 Am. B. R. 399, 99 Fed. 71; *In re Pease* (Ref., N. Y.), 4 Am. B. R. 578; *In re Burke* (D. C. Tenn.), 5 Am. B. R. 12, 104 Fed. 326; *In re Elmira Steel Co.* (D. C. N. Y.), 5 Am. B. R. 487, 109 Fed. 493; *Sibley v. Nason*, 22 Am. B. R. 712, 196 Mass. 123, 31 N. E. 837, 12 L. R. A. (N. E.), 1173, 124 Am. St. Rep. 520; *In re Judson* (D. C. N. Y.), 28 Am. B. R. 773, 128 Fed. 702.

43. *Matter of Ghasal* (C. C. A., 3d Cir.), 23 Am. B. R. 178, 174 Fed. 809.

44. *Chattanooga Nat. Bank v. Rome Iron Co.* (C. C. Ga.), 4 Am. B. R. 441, 103 Fed. 755. The valid liens referred to are those valid as to creditors. *In re Cramond* (D. C. N. Y.), 17 Am. B. R. 22, 145 Fed. 908; *Receivers, etc., v. Staske* (C. C. A., 4th Cir.), 13 Am. B. R. 281, 132 Fed. 717. This case was affirmed in 202 U. S. 141, 15 Am. B. R. 689, 50 L. Ed. 967, 28 Sup. Ct. 580. Compare *In re Standard Laundry Co.* (D. C. Cal.), 7 Am. B. R. 254, 112 Fed. 126; *Crosby v. Miller* (C. C. A., D. Cal.), 16 Am. B. R. 806, 25 N. E. 172; *In re Kohn* (C. C. A., 7th Cir.), 13 Am. B. R. 581, 134 Fed. 857; *In re Plattville P. & M. Co.* (D. C. Wis.), 17 Am. B. R. 201, 147 Fed. 528; *Godwin v. Murchison Nat. Bank*, 22 Am. B. R. 703, 145 N. C. 320, 59 S. E. 154; *In re Scruggs* (D. C. Ala.), 31 Am. B. R. 84, 205 Fed. 673, citing text; *Matter of Seefeld Co.* (C. C. A., 3d Cir.), 22 Am. B. R. 817, 215 Fed. 46; *Matter of Hollins* (C. C. A., 2d Cir.), 22 Am. B. R. 812, 215 Fed. 41; *Matter of Elmora Cotton Mills* (D. C. Ala.), 23 Am. B. R. 544, 217 Fed. 219; *Matter of Johnson* (D. C. Conn.), 23 Am. B. R. 104, 215 Fed. 695; *Matter of Morse* (D. C. N. Y.), 23 Am. B. R. 207, 210 Fed. 900; *Hart-*

*ford's Lien. Lentes v. Coppard* (C. C. A., 5th Cir.), 40 Am. B. R. 575, 246 Fed. 808.

Trustee takes property subject to equities, etc.—The trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act. *Thompson v. Fairbanks*, 198 U. S. 514, 13 Am. B. R. 487, 445, 49 L. Ed. 577, 25 Sup. Ct. 304. The trustee takes his interest of the bankrupt subject to such liens or incumbrances as would have affected it had no adjudication in bankruptcy been made. *Matter of Alden* (Ref., Ohio), 18 Am. B. R. 362, 370. A trustee takes not as a bona fide purchaser for value, but as the bankrupt held the property, subject to all valid claims, liens and equities. *Zartman v. First Nat. Bank*, 216 U. S. 124, 23 Am. B. R. 635, 54 L. Ed. 413, 20 Sup. Ct. 303, 255, 189 N. Y. 633, 83 N. E. 1124.

Same plight or condition.—*In re Gracovich* (C. C. A., 3d Cir.), 8 Am. B. R. 149, 115 Fed. 87-89, 53 C. C. A. 510, 512, the rule is thus stated:

"Under the present Bankruptcy Act, as under previous bankruptcy acts, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the Act."

*In First National Bank v. Staske*, 203 U. S. 141-149, 15 Am. B. R. 639, 36 Sup. Ct. 580, 50 L. Ed. 967, the Supreme Court approves the following language of the Circuit Court of Appeals for the Fourth Circuit:

"This rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors." See also *In re Hurley* (D. C. Mass.), 26 Am. B. R. 434, 185 Fed. 851.

Character of trustee's title.—Trustees and receivers in bankruptcy, in the absence of fraud, take the assets of a bankrupt, subject to all equitable liens in favor of third parties, to the extent that such assets have been augmented by the wrongful act of the bankrupt. *In re Dunn & Co.* (D. C. Ark.), 28 Am. B. R. 137, 193 Fed. 312.

Effect of attempt to enforce liens.—*In Pugh v. Loisel* (C. C. A., 5th Cir.), 33 Am. B. R. 590, 319 Fed. 417, the court said:

45. *Matter of North Star Ice & Coal Co.* (D. C. Tenn.), 42 Am. B. R. 78, 232 Fed. 301; *Matter of Roseboom* (D. C. N. Y.), 42 Am. B. R. 487, 233 Fed. 136; *American Bottle Co. v. Finney* (Ala. Sup. Ct.), 43 Am. B. R. 823, 83 So. 198; *Rader v. Star Mill & Elevator Co.* (C. C. A., 8th Cir.), 43 Am. B. R. 704, 238 Fed. 121.

The rights of a landlord against his bankrupt tenant are fixed at the moment of adjudication, at which time the bankrupt occupying the leased premises, his goods and chattels contained therein are impressed with the land-



law as evidenced by the decisions of the State courts.<sup>45</sup> Thus, he has no better title than the bankrupt had,<sup>46</sup> and is affected with every equity which would affect the bankrupt himself if he were asserting the same rights and

"We think it is apparent that the bankruptcy act, as a whole, contemplates the taking possession and control of the bankrupt's estate by the court of bankruptcy acting through its trustee. The property is taken into custody in the condition in which it is found at the time of the filing of the petition, subject to all existing valid liens upon it. The filing of petition, of course, does not displace or disturb such liens; but neither the existence of such liens nor attempts of the lienors to enforce them without resorting to the court of bankruptcy for that purpose constitute obstacles to the exercise by that court of the right to take into custody the bankrupt's estate and to control the administration of it. The court is vested with ample power to protect the rights of lienholders otherwise than by permitting them to be enforced in some other court or courts."

45. *In re Wade* (D. C., Mo.), 26 Am. B. R. 160, 185 Fed. 664; *Thompson v. Fairbanks*, 190 U. S. 516, 15 Am. B. R. 633, 49 L. Ed. 577, 25 Sup. Ct. 306; *In re Standard Telephone & Elec. Co.*, 216 U. S. 545, 24 Am. B. R. 761, 767, 54 L. Ed. 610, 30 Sup. Ct. 412; *Matter of Fite* (D. C., Pa.), 31 Am. B. R. 308, 61 Pittsburgh Leg. J. 160; *Matter of F. J. Sullivan Co., Inc.* (D. C., N. Y.), 41 Am. B. R. 159, 247 Fed. 139, and 42 Am. B. R. 530, 254 Fed. 600; *Matter of American Candy Mfg. Co.* (C. C. A., 2d Cir.), 43 Am. B. R. 77, 256 Fed. 87; *Matter of Flint* (D. C., N. Y.), 43 Am. B. R. 243.

46. *In re N. Y. Economical Pr. Co.* (C. C. A., 2d Cir.), 6 Am. B. R. 615, 110 Fed. 514; *In re Platteville Foundry & Machine Co.* (D. C., Wis.), 17 Am. B. R. 291, 293, 147 Fed. 828, holding that the trustee does not take property sold to the bankrupt by conditional sale with a reservation of title in the vendor; *Matter of Hamill* (D. C., N. Y.), 38 Am. B. R. 205, 236 Fed. 292, holding that a trustee occupies no different position as to a contract of conditional sale than the latter would have occupied if bankruptcy had not intervened. The property is subject to all equities impressed upon it in the hands of the bankrupt; *In re Snelling* (D. C., Mass.), 29 Am. B. R. 818, 202 Fed. 259; *Keefe v. Worcester Trust Co.* (C. C. A., 1st Cir.), 42 Am. B. R. 297, 253 Fed. 536.

Where a bankrupt assigns contracts held by him such contracts do not pass to his trustee in bankruptcy though notice of such assignment is not given to the debtor in the contracts. *Goodwin v. Barre Sav. Bank & Trust Co.* (Vt. Sup. Ct.), 39 Am. B. R. 153, 100 Atl. 24.

In Pennsylvania the vendee under a contract for a sale of land is regarded as the real owner and the vendor has no lien thereon aside from his legal estate, or the remedy which he has by reason thereof; so where the vendee is adjudged a bankrupt before the purchase price is paid, the trustee succeeds to his interests and is entitled to the proceeds of the sale of certain removable fixtures erected thereon by the vendee. *In re Clark & Co.* (D. C., Pa.), 9 Am. B. R. 252, 118 Fed. 358; *Bush v. Export Storage Co.* (C. C., Tenn.), 14 Am. B. R. 138, 138 Fed. 918.

Covenant running with land; effect on title acquired by trustee, see *Hinchman v. Consolidated Arizona Smelting Co.* (D. C., Me.), 29 Am. B. R. 893, 198 Fed. 907.

Trade fixtures may be removed by trustee under a lease providing for surrender of premises in good order, with all improvements, etc. *Montello Brick Co. v. Trexler*

(C. C. A., 6th Cir.), 21 Am. B. R. 806, 167 Fed. 492. See rule in Pennsylvania as laid down in *Matter of Beeg* (D. C., Pa.), 25 Am. B. R. 572, 184 Fed. 522.

Title no better than that of bankruptcy.—Mr. Justice Peckham, speaking for the Supreme Court in *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291, 51 L. Ed. 1117, 27 Sup. Ct. 720, affg. 16 Am. B. R. 49, 143 Fed. 32, said: "It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the bankrupt act, is subject to all the equities impressed upon it in the hands of the bankrupt. This has been the rule under former acts and is now the rule."

The decision in this case received the attention of the Supreme Court in the case of *In re Standard Telephone & Elec. Co.*, 216 U. S. 545, 24 Am. B. R. 761, 767, 54 L. Ed. 610, 30 Sup. Ct. 412, where the court says: "But it is said the trustee in bankruptcy may not defend against these mortgages. It is contended that they are good as between the parties, and that as to them the trustee in bankruptcy occupies no better position than the bankrupt. This question was raised and decided in *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291, 51 L. Ed. 1117, 27 Sup. Ct. 720. That case arose in Wisconsin, and it was therein held that, under the Wisconsin law, an attempted pledge of property, without change of possession, was void under the laws of that State. In that case, as in this one, the question was raised as to whether the trustee in bankruptcy could question the transaction, and it was contended that, being valid as between the parties, the trustee took only the right and title of the bankrupt. The question was fully considered therein, and the previous cases in this court were reviewed. The principle was recognized that the trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands is subject to the equities impressed upon it while in the hands of the bankrupt."

"But it was held that the attempt to create a lien upon the property of the bankrupt was void as to general creditors under the laws of Wisconsin. Applying § 70-a of the bankruptcy act, it was held that the trustee in bankruptcy was vested by operation of the bankruptcy law with the title of the property transferred by the bankrupt in fraud of creditors, and also that the trustee took the property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against the bankrupt."

"It was therefore held that as there had been no valid pledge of the property, for want of change of possession, it could have been

interests.<sup>47</sup> A trustee in bankruptcy stands in the shoes of the bankrupt, and has no better title than he had at the time of the filing of the petition, except so far as the status is modified by fraud of the bankrupt,<sup>48</sup> or as conditions may have been changed by the amendment of 1910 of § 47-a (2), so far as the right of the trustee to attack fraudulent transfers or liens is concerned.<sup>49</sup> If special creditors have claims against specific property as against other creditors having alleged liens thereon, a trustee is clothed with the power and duty of protecting and preserving such claims.<sup>50</sup> Where a right of action passes to the trustee any defense, legal or equitable, which might have been raised against the bankrupt's claim may be raised against the trustee.<sup>51</sup> Where

levied upon and sold under judicial process against the bankrupt, at the time of the adjudication in bankruptcy and passed to the trustee in bankruptcy." See also *In re Gebble & Co.* (D. C., Pa.), 21 Am. B. R. 694, 167 Fed. 699; *Wood Co. v. Hubbanks* (C. C. A., 4th Cir.), 22 Am. B. R. 307, 169 Fed. 929.

47. *In re Dow*, Fed. Cas. 4,036, 6 N. B. R. 10, quoting from *Bacon v. Heathcote*, 1 Atl. 160: "The ground that the court goes upon is this, that assignees of bankrupts, though they are trustees for creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could."

48. *In re Blake* (C. C. A., 8th Cir.), 17 Am. B. R. 668, 150 Fed. 279; *In re Great Western Mfg. Co.* (C. C. A., 8th Cir.), 18 Am. B. R. 259, 152 Fed. 123; *In re Dunlop* (C. C. A., 8th Cir.), 19 Am. B. R. 361, 367, 156 Fed. 945; *In re Chantler Cloak & Suit Co.* (D. C., R. I.), 18 Am. B. R. 498, 151 Fed. 952; *Drede v. Gilley* (N. Y. Sup. Ct.), 21 Am. B. R. 170, 61 N. Y. Misc. 530, revd. on other grounds 21 Am. B. R. 821, 132 N. Y. App. Div. 293, 47 N. Y. Supp. 5; *In re De Long Furniture Co.* (D. C., Pa.), 26 Am. B. R. 469; *In re Thompson* (D. C., N. J.), 30 Am. B. R. 64, 205 Fed. 556; *Abele v. Meagher* (Mass. Sup. Jud. Ct.), 41 Am. B. R. 638, 116 N. E. 805; *Matter of Moose River Lumber Co.* (D. C., N. Y.), 42 Am. B. R. 242, 251 Fed. 409; *Matter of American Candy Mfg. Co.* (C. C. A., 2d Cir.), 43 Am. B. R. 77, 256 Fed. 87; *Custard v. McNary* (W. Va. Sup. Ct. of App.), 45 Am. B. R. 105, 102 S. E. 216.

Property in possession of trustee not belonging to estate.—*Matter of Amy* (C. C. A., 2d Cir.), 45 Am. B. R. 15, 263 Fed. 8.

Materials delivered under building contract.—Where a contract to construct a municipal high school entitled the board of education to take possession of building materials upon a breach by the contractor and to use the materials for the completion of the work, the board of education, having appropriated such material on the contractor's default, obtained a vested right therein and a trustee subsequently appointed on the bankruptcy of the contractor cannot maintain an action in replevin or for the conversion of the material while such possession continued pursuant to the building contract. *Wilds v. Board of Education* (N. Y. App. Div.), 43 Am. B. R. 385, 186 App. Div. (N. Y.), 472. See also *Matter of P. J. Sullivan & Co.* (D. C., N. Y.), 41 Am. B. R. 189, 247 Fed. 139, affd. 42 Am. B. R. 530, 264 Fed. 660.

Character of trustee's title.—A trustee in bankruptcy takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens and equities. *In re Interstate Paving Co.* (D. C., N. Y.), 28 Am. B. R. 573, 197 Fed. 871.

As to real estate held by the bankrupt as a tenant in common, the trustee takes the interest of the bankrupt, not as an innocent purchaser, but in the same plight and condition as the bankrupt held it and subject to all the equities that exist in favor of his cotenant. *In re McConnell* (D. C., N. Y.), 28 Am. B. R. 659, 197 Fed. 492.

Whatever rights a third party had against the property of a bankrupt before the adjudication, that party, in the absence of fraud, or fixed liens created by State statutes in favor of others, has against his estate in bankruptcy. *Atchison, etc., Ry. Co. v. Hurley* (C. C. A., 8th Cir.), 18 Am. B. R. 398, 153 Fed. 503; *Foerster v. Citizens' Sav. & Trust Co.* (C. C. A., 8th Cir.), 26 Am. B. R. 377, 136 Fed. 1.

Stock bought by a bankrupt broker for a customer with the customer's money belong to the customer and the certificates cannot be retained by the trustee of the bankrupt. *In re Meadow, Williams & Co.* (D. C., N. Y.), 23 Am. B. R. 124, 173 Fed. 694, affd. 24 Am. B. R. 251, 177 Fed. 1004; *Cummings v. Synnot* (C. C. A., 3d Cir.), 25 Am. B. R. 859, 184 Fed. 718; *Matter of McIntyre & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 626, 181 Fed. 955.

Trustee takes property in same condition as bankrupt.—It has been often declared by the Supreme Court of the United States that under the present bankrupt act the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt. The trustee in a certain sense is the bankrupt. The bankrupt's title is his title, whether it be to things in possession or to choses in action. This title cannot rise higher than that of the bankrupt, so as to infringe upon or destroy the interest in or title to the property, good as against the bankrupt himself. *Davis v. Compton* (C. C. A., 3d Cir.), 20 Am. B. R. 53, 158 Fed. 735.

Right of pledge of mortgages on real property to collect rents.—A pledge of mortgages on real property as collateral security is not entitled to collect the rents as against the trustee in bankruptcy of the pledgor, where he is not in possession, although he has given notice of an asserted right to collect the rents. *Matter of Sweeney* (C. C. A., 3d Cir.), 32 Am. B. R. 302, 212 Fed. 1.

49. See discussion under 47-a (2), *ante*.

50. *In re Martin* (C. C. A., 8th Cir.), 29 Am. B. R. 151, 173 Fed. 597.

51. *Jenkins v. Pierce*, 98 Ill. 646.

Fraud of bankrupt as defense.—Where the bankrupts agreed to build a locomotive for certain parties and notified them that it was completed and had been shipped, and thereupon were paid the price, it appearing that no engine existed at the time it was represented as having been shipped, but that subsequently two were built, either of which would answer the contract, it was held that the bankrupt and his assignee were both estopped by the fraud of the bankrupt from denying that one of the engines then in their possession was the property of the parties who had thus been defrauded. *In re McKay & Aldus*, 3 N. B. R. 50, 1 Lowell,

a bankrupt in due course of the transaction of its business, some time prior to bankruptcy, treats property as sold, and the proceeds thereof as due, and assigns the same as collateral security to a loan, the trustee will be bound by the bankrupt's acts and is estopped from asserting that there was no sale.<sup>62</sup>

(2) **DISPOSITION OF PROPERTY SUBJECT TO LIEN OR INCUMBRANCE.**—A lien or other incumbrance on real property belonging to the bankrupt attaches to such property in the hands of his trustee, and is effectual against such property to the same extent as though bankruptcy had not intervened, and will attach to such fixtures as from their nature and the circumstances of the case become a part of the freehold.<sup>63</sup> But a judgment rendered in a State court

345. Compare *Kelly v. Scott*, 40 N. Y. 595, citing *Mitchell v. Winslow*, 2 Story, 630. Where a party fraudulently induces an owner to part with his title to goods, the defrauded party having the right to disaffirm the contract and to recover the goods, may assert that right against the trustee in bankruptcy as well as against the bankrupt himself. *Donaldson v. Farwell*, 15 N. B. R. 277, Fed. Cas. 3983, 5 Biss. 451, affd. 93 U. S. 631, 23 L. Ed. 993; *In re Gany* (D. C., N. Y.), 4 Am. B. R. 576, 103 Fed. 930; *In re Spann* (D. C., Ga.), 25 Am. B. R. 551, 183 Fed. 819; *Gillespie v. Piles & Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 502, 178 Fed. 886.

Where there was an action to foreclose a mortgage, and proceedings for the appointment of a receiver of the rents and profits were instituted before the adjudication of the mortgagor as bankrupt, and there was a deficiency on the sale of the mortgaged premises it was held that the assignee in bankruptcy could not claim the fund in the receiver's hands, as against the mortgagees. *Hayes v. Dickinson*, 15 N. B. R. 350, 9 Hun (N. Y.), 277.

52. **Property vesting in trustee; estoppel.**—A bankrupt corporation had, sometime prior to bankruptcy, agreed as subcontractors to furnish and set tile for several buildings then in course of construction and had delivered tile to each of the buildings, after which it borrowed money from a trust company giving its notes therefor and as collateral security for their payment executed assignments of the money due for material furnished. The assignments stated and it was orally represented to the trust company at the time of the loans that the money was then due. Before the work of setting the tile had been begun, the corporation went into bankruptcy and the trustee claimed title to the tile. Held, that the bankrupt having treated the tile as sold to the contractors, and the proceeds thereof as due, and having assigned the same as collateral security to the loans, neither it nor its trustee will be heard to assert the contrary as against the trust company. *Aldine Trust Co. v. Smith* (C. C. A., 3d Cir.), 25 Am. B. R. 608, 182 Fed. 449, citing *Fourth Street Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855.

53. **Lien of judgment creditor upon machinery in factory as part of the realty.**—In *Pennsyl-*

*vania*, as between judgment creditors and the general creditors in bankruptcy, machinery of a factory, which is a necessary part of it, and without which it would not be a fully equipped establishment, is a fixture to be regarded as a part of the freehold, subject to the lien of a judgment creditor as part of the realty. Held, that as certain chattels, machinery, utensils, etc., used in a sausage factory owned and occupied by the bankrupt, whether fast or loose, were indispensable in carrying on the business as a sausage factory, they became a part of the realty and were subject to the lien of judgment entered long prior to the bankruptcy proceedings, and that the fact that there had been bills of sale of such machinery, etc., executed in some of the conveyances to the bankrupt and prior to his ownership thereof, did not alter the character of the property. *Matter of Beeg* (D. C., Pa.), 26 Am. B. R. 572, 184 Fed. 522.

After insolvency has taken the debtor's real estate out of his hands, its income or product belongs to the lien creditors, who have thus become its virtual owners; this rule applies to real estate in a court of bankruptcy. *In re Torchia* (C. C. A., 3d Cir.), 26 Am. B. R. 578, 188 Fed. 207; *In re Industrial Storage Co.* (D. C., Pa.), 20 Am. B. R. 904, 163 Fed. 390; *In re Hasle* (D. C., Tex.), 30 Am. B. R. 83, 208 Fed. 789; *Pugh v. Loisel* (C. C. A., 5th Cir.), 33 Am. B. R. 590, 219 Fed. 417; *Matter of Dooner & Smith* (D. C., N. J.), 40 Am. B. R. 116, 243 Fed. 984.

**Mortgage held by bank for collection under agreement to apply on note.**—*Matter of Friedman* (D. C., N. Y.), 39 Am. B. R. 777, 241 Fed. 603.

**Fixtures removal by consent of mortgagee.**—*Herritt v. Clark* (C. C. A., 3d Cir.), 41 Am. B. R. 232, 247 Fed. 100.

**Property which was intended to be covered by a mortgage but which was not described therein passes to the trustee in bankruptcy where there is nothing to charge the trustee with notice of the intention of the parties.** *Matter of Scruggs Brothers* (D. C., Ala.), 49 Am. B. R. 543, 252 Fed. 322.

**Lien under unrecorded lease.**—Under the law of Rhode Island a lease, giving the landlord a lien on personal property on the premises, although not recorded, gives to the lessor an equitable lien good against attaching creditors, and, hence, the trustee in bankruptcy of the lessee takes such property subject to the equitable lien, although the lease was not recorded until six days before bankruptcy, when the lessor had reasonable cause to believe that the lessee was insolvent, and that the lien claimed would constitute a preference. *Matter of Floyd-Scott Co.* (D. C., Mass.), 35 Am. B. R. 463, 224 Fed. 987.

**Proceeds from fire insurance policy.**—Money payable as the proceeds of a fire insurance policy taken out by the bankrupt prior to bankruptcy for his own benefit does not arise from real property, but from a personal contract, and upon distribution will be awarded to the trustee in bankruptcy and not to a judgment creditor of the bankrupt.

during the pendency of the proceedings does not impose a lien on lands forming a part of the assets of the bankrupt.<sup>54</sup> Where the particular property is fully covered by liens, the trustee should not administer it, although he may do so with the consent of the lien holders.<sup>55</sup> In respect to the incumbered property the trustee may (1) take possession of the property, if, in his judgment, the unsecured creditors will profit thereby, and sell the property free of the liens, in which event the liens will attach to the proceeds; or (2) sell the equity of redemption.<sup>56</sup> In all such cases he will be guided, subject to the control of the court, by what, in his judgment, is for the best interests of the general creditors.<sup>57</sup> If a mortgage or other lien is invalid because not authorized by law, as where given to secure the payment of loans unlawfully made by municipal officers to a bankrupt corporation, the trustee takes the property of the bankrupt freed of the lien.<sup>58</sup>

(3) **PROPERTY IN POSSESSION OF BANKRUPT.**—It is the plain purpose of the statute that the title and right to all things and rights which do not fall within the vesting words of § 70 shall remain in the bankrupt.<sup>59</sup> If property is in the bankrupt's hands as bailee or agent, the trustee holds it as such, and the bailor or principal may recover the proceeds,<sup>60</sup> or the property,<sup>61</sup> notwithstanding that certain of the provisions of the agency contract are illegal and void.<sup>61a</sup> The

whose judgment was a valid lien on the real property, for a judgment creditor of a bankrupt, claiming a preference by reason of its lien on the real estate of a bankrupt, has no more title to the proceeds of an insurance policy than any other creditor. *Matter of Balsier* (D. C., Pa.), 32 Am. B. R. 458, 215 Fed. 134.

**Proceeds of fire insurance on property subject to mortgage.**—When a receiver in bankruptcy insures buildings on the mortgaged property of the alleged bankrupt, and a loss by fire is adjusted and paid before the appointment and qualification of the receiver as trustee in bankruptcy, the proceeds of the insurance are impressed with an equitable lien in favor of the mortgagees of the property as their interest may appear. *Rielley v. Buffalo German Insurance Co.* (N. Y. Sup. Ct., Spec. T.), 32 Am. B. R. 726, 86 N. Y. Misc. 69, 147 N. Y. Supp. 1086.

54. *Chambers v. Kirk* (Okla. Sup. Ct.), 32 Am. B. R. 175, 139 Pac. 966.

55. *Matter of Hosmer* (D. C., Iowa), 37 Am. B. R. 464, 233 Fed. 313; *In re Rauch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982, holding that "estates" as used in the law means the unincumbered assets, properly administrable in bankruptcy, as distinguished from that of the property of a bankrupt dedicated by law to the payment of a particular obligation, or upon which there is a specific lien. *Trabue v. Ash* (Tex. Ct. of Civ. App.), 41 Am. B. R. 122, 200 S. W. 415.

56. *Matter of Cutler v. John* (D. C., N. Car.), 36 Am. B. R. 420, 228 Fed. 771; *Matter of Patterson Lumber Co.* (D. C., Tenn.), 40 Am. B. R. 545, 247 Fed. 578.

57. *Matter of Hosmer* (D. C., Iowa), 37 Am. B. R. 464, 233 Fed. 313.

58. *In re Manistee Watch Co.* (D. C., Mich.), 28 Am. B. R. 316, 197 Fed. 455, in which case it was held that where a contract between the incorporators of a bankrupt company and a municipality, under which the city turned over certain municipal bonds,

and a mortgage on its factory plant and premises, executed by bankrupt to secure the performance of its part of the contract, were invalid, they did not constitute a lien upon the factory property, and the trustee was entitled to have such property sold free from liens.

59. *In re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 169, 181, 147 Fed. 538.

60. *In re Reboulin Fils & Co.* (D. C., N. J.), 21 Am. B. R. 296, 165 Fed. 246; *Wood Co. v. Van Story* (C. C. A., 4th Cir.), 22 Am. B. R. 740, 171 Fed. 375.

Where the relation of bailor and bailee or principal and agent is terminated by a final settlement between the parties by which the obligation of the agent is accepted in lieu of the property or proceeds of property theretofore consigned to him the principal becomes a general creditor. *Matter of Handy* (D. C., Md.), 33 Am. B. R. 666, 218 Fed. 956.

**Property held by bankrupt as agent; proceeds of accounts receivable.**—A credit company purchased the accounts receivable of a corporation, making the latter its agent to collect the same and remit the proceeds. The corporation at the time of its bankruptcy held the proceeds of some of the accounts sold to the credit company. No notice was given to creditors. An order of the referee, holding that, there being no insolvency, fraud usury or intent to create a preference, the transfer should be declared valid and the trustee directed to turn over the proceeds of the accounts to the credit company, was reversed by the District Court. Held, that the decree of the District Court should be reversed and the order of the referee approved. *Hawley Down-draft Furnace Co. v. Chidsey* (C. C. A., 3d Cir.), 38 Am. B. R. 219, 238 Fed. 122.

61. *Thomas v. Field-Brundage Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 569, 215 Fed. 891.

61a. *Matter of Herbert & Co.* (C. C. A., 2d Cir.), 45 Am. B. R. 20, 263 Fed. 351.

cases under the present law are already numerous,<sup>63</sup> and have been classified and considered for the most part under subsequent headings.<sup>63</sup> They are, however, so dependent on their own facts as to make a scientific classification and summary difficult.

(4) **EFFECT OF AMENDMENT OF 1910 TO § 47-A (2).**—The rules laid down in this paragraph should be applied in view of the amendment of § 47-a (2) by the amendatory act of 1910 which vests the trustee with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings on property in the custody, or coming into the custody of the bankruptcy court; this amendment has extended the title of the trustee, so that he has more than the limited title of the bankrupt.<sup>64</sup> But it may not be invoked to deprive a creditor of the bankrupt of equities existing in his favor at the time of the bankruptcy, and was not intended to limit the general rule that a trustee takes the bankrupt estate subject to all valid claims, liens and equities.<sup>65</sup>

### III. TITLE TO SPECIFIC PROPERTY.

**a. In general.**—Subsection *a* specifies particularly the property the title to which vests in the trustee upon the adjudication of the bankrupt. It was intended to classify in the several subdivisions all the property of which the bankrupt might then be possessed, which should become a part of the bankrupt estate for administration and distribution as provided in the act. A careful consideration of these subdivisions will clearly indicate their comprehensiveness; everything belonging to the bankrupt which his creditors could reach by judicial process, everything which might be obtained by his creditors to aid in securing the payment of their claims, and all property rights which might have been subjected to such claims, become assets in the hands of the trustee; except such as are herein expressly saved.

**b. Documents relating to bankrupt's property.**—Subdivision 1 vests the trustee with title to all "documents relating to his property." Documents include deeds, contracts, securities, bills receivable, notes, bank books, bills of exchange, account books and all papers and books relating to the bankrupt's business.<sup>66</sup> Such books and papers may not be detained upon the ground that they contain evidence that might be used against him in a criminal prosecution.<sup>67</sup> Document is defined as including "any book, deed,

<sup>63</sup> For instance *In re Goldman* (D. C., N. Y.), 4 Am. B. R. 100, 102 Fed. 122; *Morton v. Lumber Co.* (Ref., Ark.), 5 Am. B. R. 850; *Spencer v. Dunplan Co.* (C. C., Pa.), 7 Am. B. R. 563, 112 Fed. 638. Compare *Marden v. Phillips* (D. C., Mass.), 4 Am. B. R. 566, 103 Fed. 190. See also *sub nom.* "Reclamation Proceedings," *post*.

<sup>63</sup> See particularly "Property which might have been transferred or levied upon," *post*, and subheadings thereunder.

<sup>64</sup> *In re Hammond* (D. C., Ohio), 26 Am. B. R. 336, 188 Fed. 1020; *Grand Rapids Trust Co. v. Nichols* (Mich. Sup. Ct.), 40 Am. B. R. 801, 165 N. W. 801. See discussion under § 47 of this work.

<sup>65</sup> *Marcus Shipping Assn. v. Barnes* (Iowa Sup. Ct.), 34 Am. B. R. 682, 151 N. W. 525, in which it was held that certificates of shares of a corporation issued upon the dissolution thereof, passed to the trustee subject to the equities of the corporation based upon a claim against the bankrupt for money received by him as an officer of the corporation. *Matter of Creech Bros. Lumber Co.* (C. C. A., 9th Cir.),

39 Am. B. R. 487, 240 Fed. 8; *Matter of Shelly* (C. C. A., 3d Cir.), 39 Am. B. R. 519, 242 Fed. 251; *Brown v. Crawford* (D. C., Ore.), 42 Am. B. R. 677, 254 Fed. 146.

<sup>66</sup> *In re Hess* (D. C., Pa.), 14 Am. B. R. 559, 134 Fed. 109. See Schedule B (6) in Form No. 1.

<sup>67</sup> **Self-incriminating evidence; compelling bankrupt to turn over books.**—An order requiring bankrupt to deposit, in the office of the receiver, books of account which he claims contain matter that might tend to incriminate him, there to remain in the custody of bankrupt, the receiver to be permitted to inspect and use them for the civil administration of the estate, but not for any criminal proceeding, provision being made to give bankrupt an opportunity to assert the question of his constitutional privilege in case of process for their production, is a proper exercise of authority on

or instrument in writing."<sup>68</sup> These documents are regarded as personal property, the title to which, by operation of law, is vested in the trustee.<sup>69</sup>

c. **Patents, copyrights, and trade-marks.**—Subdivision 2 passes to the trustee all "interests in patents, patent rights, copyrights and trade-marks." These, it would seem, should vest, irrespective of the statute. There can be no doubt about it now.<sup>70</sup> But where, though application has been made, the letters-patent have not yet been granted, the trustee takes no interest,<sup>71</sup> although it has been held that rights accruing because of such an application may be deemed "property" within the meaning of subdivision 5, and that therefore the trustee would take the bankrupt's interest in the patent subsequently obtained.<sup>72</sup> A trustee is under no obligation to accept a license under a patent which was transferred to the bankrupt burdened with executory obligations.<sup>73</sup> The similarity between these classes of property and those known as "personal privileges" should be noted.<sup>74</sup>

d. **Personal powers.**—Subdivision 3 provides that powers which the bankrupt might have exercised in his own behalf pass to the trustee. This subdivision is expressive of a general rule of law. A power which is beneficial

the part of the bankruptcy court and not an infringement of his constitutional right. In such case the question is not of forcing bankrupt to be a witness against himself in a criminal case, but of compelling him to yield possession of property to which he is no longer entitled. *Matter of Harris*, 221 U. S. 274, 26 Am. B. R. 302, 55 L. Ed. 732, 31 Sup. Ct. 557, affg. 20 Am. B. R. 911, 164 Fed. 292.

68. Bankr. Act, § 1 (13).

69. *In re Hess* (D. C., Pa.), 14 Am. B. R. 559, 134 Fed. 109; *In re Madden* (C. C. A., 2d Cir.), 6 Am. B. R. 614, 110 Fed. 348.

70. An assignment of a copyright vests title in the assignee which passes to his trustee in bankruptcy. *In re Howley-Dresser Co.* (D. C., N. Y.), 13 Am. B. R. 94, 132 Fed. 1002. Compare *In re McBride* (D. C., N. Y.), 12 Am. B. R. 81, 132 Fed. 285. See generally Am. Bankr. Dig. § 340.

A conveyance of a trade-mark, unaccompanied by any business whatever, gives no title to the assignee. *In re Jaysee Corset Co.* (D. C., N. Y.), 29 Am. B. R. 856, 201 Fed. 779.

71. *In re McDonnell* (D. C., Iowa), 4 Am. B. R. 92, 101 Fed. 239; *In re Dann* (D. C., Ill.), 12 Am. B. R. 27, 129 Fed. 495.

72. Rights accruing from application for patent.—In the case of *In re Cantelo Mfg. Co.* (D. C., Me.), 26 Am. B. R. 57, 185 Fed. 276, the court said: "In the case of *In re McDonnell* (D. C., Ia.), 4 Am. B. R. 92, 101 Fed. 239, Judge Shiras, of the Northern District of Iowa, in a clear and well considered opinion, held that section 70-a, subd. 2, can have reference only to letters patent actually issued at the date of the adjudication in bankruptcy; and that the trustee in bankruptcy takes no title to the patent granted to the bankrupt after the date of the adjudication in bankruptcy, although the application was made before bankruptcy, and was pending at the time of the adjudication. The case *In re Dann* (D. C., Ill.), 12 Am. B. R. 27, 129 Fed. 495, is to the same effect, but goes further, and discusses subdivision 5 of section 70-a.

"The case at bar is presented by the record in a somewhat stronger position for the trustee than is found in either of the cases which I have cited. It is for the court to say whether, under all the facts which the record discloses, it shall refuse to the trustee of the bankrupt corporation the use and benefit of the patent applications which had actually constituted a valuable asset to the corporation before bankruptcy. Clearly the trustee in bankruptcy

should not be deprived of their benefit if, under a fair construction of the law, they may be held to be a part of the bankrupt estate. In spite of the well-considered opinion in the *McDonnell* case, I think it not altogether clear, but that the interest in the inventions which have become the subject of patent applications may fairly be held to be an 'interest in patents' within the meaning of the law; but, whether or not these inventions may be so held, it seems to me, under subdivision 5 of section 70-a, they may be held to be 'property' which could be transferred. It affirmatively appears that upon these inventions the credit of the company was obtained; and that part of the claims provable in bankruptcy against the estate of the bankrupt were based upon such credit." See also s. c., 29 Am. B. R. 704, 201 Fed. 158.

See *In re Myers-Wolf Mfg. Co.* (C. C. A., 3d Cir.), 30 Am. B. R. 572, 205 Fed. 289; *Ingle v. Landis Tool Co.* (D. C., Pa.), 45 Am. B. R. 89, 262 Fed. 150.

73. *Matter of Wisconsin Engine Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 106, 234 Fed. 281.

74. See discussion under this section, subtitle "Licenses, Franchises and Personal Privileges," *post*.

75. Compare discussion under this section, *post*, subtitle "Property which might have been transferred or levied upon."

Power of bankrupt to appoint by will.—The bankruptcy act does not enable a trustee in bankruptcy to make an appointment under a power which was to be exercised by the bankrupt by will and by will only, whether the bankrupt is alive or dead. *Montague v. Silsbee* (Mass. Sup. Ct.), 32 Am. B. R. 573, 105 N. E. 611.

76. *Fisher v. Cushman* (C. C. A., 1st Cir.), 4 Am. B. R. 646, 654, 103 Fed. 860.

77. *In re Yukon Woolen Co.* (D. C., Conn.), 2 Am. B. R. 905, 96 Fed. 328; *In re McNamara* (Ref., N. Y.), 2 Am. B. R. 566; *English v. Ross* (D. C., Pa.), 15 Am. B. R. 370, 140 Fed. 630; *In re Holbrook Shoe & Leather Co.* (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973; *Cowan v. Burchfield* (D. C., Ala.), 25 Am. B. R. 295, 180 Fed. 614; *Lovell v. Latham Co.* (D. C., Ala.), 32 Am. B. R. 191, 211 Fed. 374; *McMahon v. Pithan* (Sup. Ct. Iowa), 33 Am. B. R. 125, 147 N. W. 920; *Barrett v. Kaigler* (Ala. Sup. Ct.), 40 Am. B. R. 161, 76 So. 320, citing *Collier on Bankruptcy* (10th Ed.), 987; *Cooper Grocery Co. v. Penland* (C. C. A., 5th Cir.), 40 Am. B. R.

to a bankrupt donee vests in his trustee; not so a power in trust.<sup>75</sup> The powers here referred to are probably those known to the common law,<sup>76</sup> although there may be some doubt about this. The English statute from which this clause was derived had reference to such technical powers, and it seems likely that the intent of congress was the same.

**e. Property fraudulently transferred.**—(1) **IN GENERAL.**—By subdivision 4 property transferred by the bankrupt in fraud of his creditors passes to his trustee. This is the converse of the doctrine that trustees take title subject to equities; they also take title to property which the bankrupt has fraudulently transferred,<sup>77</sup> and in which, therefore, the creditors have equities. The trustee's interest in such property is stronger than was that of the creditors in whose stead he stands, for he has a title. The trustee is vested not only with the title of the property, but also with the creditors' rights of action with respect to property of the bankrupt fraudulently transferred or incumbered by him, and he may assail in their behalf all of such transfers and incumbrances to the same extent as though the debtor had not been declared a bankrupt. The trustee's remedy when title is claimed adversely is, as has been seen, usually a suit in the proper court. This subdivision should be read in connection with § 22, § 67-e and § 70-a.<sup>78</sup>

(2) **PROPERTY AFFECTED; CHARACTER OF TRANSFER.**—It is apparent that this provision applies to all property transferred by the bankrupt at any time in fraud of his creditors.<sup>79</sup> Where after the filing of an involuntary petition and before adjudication a creditor attaches the bankrupt's assets, the trustee may recover the proceeds of the attachment, even though they were less than the percentage to which the creditor would have been entitled in the bankruptcy proceedings.<sup>80</sup> Money procured on a policy of insurance on buildings on land, conveyed to the insured in fraud of the grantor's creditors, is not the proceeds of the property, and cannot be recovered by the grantor's trustee in bankruptcy.<sup>81</sup>

(3) **ACTUAL OR IMPLIED FRAUD.**—The fraud may be either actual or implied; if the creditor obtained undue advantage because of the transfer, within the four months' period, although no actual fraud be shown, the trustee is entitled to the title and possession of the property.<sup>82</sup> If actual fraud be

589, 247 Fed. 480; *Riggs v. Price* (Mo. Sup. Ct.), 48 Am. B. R. 413, 210 S. W. 420; *Brown v. Kossove* (C. C. A., 8th Cir.), 43 Am. B. R. 408, 255 Fed. 806; *Newberger v. Fellis* (Ala. Sup. Ct.), 43 Am. B. R. 703, 82 So. 172.

**Insurable interest.**—A trustee has an insurable interest in property fraudulently transferred where a decree of reconveyance has been made, though an appeal has been taken. *Underwood v. Winslow* (Mass. Sup. Jud. Ct.), 44 Am. B. R. 569, 125 N. E. 681.

75. *In re Rodgers* (C. C. A., 7th Cir.), 11 Am. B. R. 79, 125 Fed. 169; *In re Butterwick* (D. C., Pa.), 12 Am. B. R. 536, 131 Fed. 371; *Thomas v. Roddy*, 9 Am. B. R. 873, 876, 122 N. Y. App. Div. 851, 107 N. Y. Supp. 473, holding that the fact that the complaint shows, or facts are alleged from which it may be fairly inferred, that at least some creditors who were in a position to attack the alleged fraudulent conveyance at the time of the filing of the petition in bankruptcy, had filed their claims in the bankruptcy proceedings does not prevent the trustee from maintaining the action. *Barrett v. Kaigler* (Ala. Sup. Ct.), 40 Am. B. R. 161, 76 So. 320; *McCabe v. Guido* (Miss. Sup. Ct.), 41 Am. B. R. 178, 77 So. 801.

79. *In re Kohler* (C. C. A., 6th Cir.), 20 Am. B. R. 89, 159 Fed. 871; *Boyd v. Arnold* (Sup.

Ct., Ark.), 32 Am. B. R. 859, 146 S. W. 118; *Barrett v. Kaigler* (Ala. Sup. Ct.), 40 Am. B. R. 161, 76 So. 320.

**Sale in bulk.**—*Matter of Clayton* (D. C., N. J.), 43 Am. B. R. 687, 259 Fed. 911; *Matter of Thompson* (D. C., Wash.), 40 Am. B. R. 82, 242 Fed. 602. See also *note*, section 67, V. e. (3) (IV) Sales of goods on account; bulk sales.

**Execution against property fraudulently transferred.**—The bankrupt cannot, after his discharge, question the right of a judgment creditor to proceed against property fraudulently transferred as he is not in any way affected by such proceedings; and this is true though the property proceeded against is held by his wife. *Deposit Nat. Bank v. Hay* (Pa. Sup. Ct.), 43 Am. B. R. 206, 105 Atl. 463.

**Property subsequently acquired by transfer and used in connection with that fraudulently acquired does not pass to the trustee.** *McCabe v. Guido* (Miss. Sup. Ct.), 41 Am. B. R. 178, 77 So. 801.

80. *State Bank of Chicago v. Cox* (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91.

81. *Trenholm v. Klinker* (Sup. Ct., Miss.), 33 Am. B. R. 562, 66 So. 738.

82. *Matter of Webb Company* (D. C., Pa.), 34 Am. B. R. 785, 224 Fed. 258, holding that where a creditor, without notice or reason to suspect

shown, as where a bankrupt while insolvent transfers real estate to his brother for an inadequate consideration, and the transfer was not recorded, the transfer may be set aside.<sup>83</sup> A conveyance of real estate by a debtor to another to be held wholly or partly in trust for him is a fraud on creditors whether so intended or not, and may be void both as to existing and subsequent creditors, the fraud being a continuing one and the property may be recovered by his trustee in bankruptcy.<sup>84</sup>

(4) VOLUNTARY TRANSFERS; TRANSFERS TO WIFE OR CHILDREN.—A voluntary transfer is at least presumptively fraudulent as against creditors; if made to a wife or child, however meritorious, it must be known to be in good faith and without intent to defraud or injure creditors.<sup>85</sup> Transactions between husband and wife to the prejudice of the husband's creditors will be closely scrutinized by the courts in New York, as elsewhere, to see that they are fair and honest and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of creditors.<sup>86</sup> But a transfer by a bankrupt to his wife made in good faith more than two years before bankruptcy and while the bankrupt was solvent in payment of an antecedent debt is not fraudulent.<sup>87</sup> In a suit to set aside a transfer from a bankrupt husband to his wife, while the husband is insolvent, the burden is upon the wife to show good faith.<sup>88</sup>

(5) EFFECT OF A GENERAL ASSIGNMENT.—A general assignment, within the four months' period, being not only a fraud on the act<sup>89</sup> but an act of bankruptcy, seems to stand on a different footing from fraudulent transfers *per se*. The assignment being void by operation of law,<sup>90</sup> no title passes, and

the insolvency of a debtor and more than four months prior to bankruptcy, received an assignment of all moneys due to the debtor under a contract for the sale of fire apparatus, and thereafter with knowledge of the debtor's insolvency and within the four months' period obtained from the debtor a transfer of the apparatus and took possession thereof, the trustee in bankruptcy of the debtor is entitled to the possession of the apparatus, as against the bank.

83. *Peterson v. Mettler* (D. C., Wash.), 29 Am. B. R. 158, 198 Fed. 938.

84. *McKey v. Cochran* (Sup. Ct., Ill.), 33 Am. B. R. 78, 104 N. E. 693, holding that although the general rule is that where the purchase money of land is paid by one person and the title taken in the name of another, such person holds the title in trust for him who paid the purchase money, the purchase by a husband in the name of his wife will *prima facie* be presumed to be an advancement or settlement and not a trust; but such presumption may be either supported or rebutted by proof of antecedent or contemporaneous act or facts so soon after the purchase as to be fairly considered a part of the transaction.

85. The law recognizes legal obligations to creditors as superior to the moral obligations one is under to a wife or child. That one engaged in hazardous pursuits owes a sacred duty to his wife and children to set apart a reasonable portion of his estate to secure them against the ills of poverty is not denied. But in the discharge of moral obligation to wife and children one is not at liberty to forget that he is under legal as well as moral obligations to his creditors. The law will not allow him to hinder, delay or defraud the latter. It is not that the law is oblivious to the moral obligations due from the husband to his wife. It is only that in discharging them he must not be dishonest. *Klinger v. Hyman* (C. C. A., 2d Cir.), 34 Am. B. R. 338, 223 Fed. 257; *McCrory v. Donald* (Miss. Sup. Ct.), 43 Am. B. R. 181, 80 So. 643.

The title to an insurance policy assigned by a husband to his wife is not affected as against his trustee in bankruptcy by the fact that he paid premiums thereon, and that she had loaned the policy to him for the purpose of raising money, but it was reassigned to her three years prior to the bankruptcy. *Longbottom v. Emery* (Pa. Sup. Ct.), 42 Am. B. R. 248, 104 Atl. 561.

86. *Klinger v. Hyman* (C. C. A., 2d Cir.), 34 Am. B. R. 338, 223 Fed. 257. The rule in the New York courts that a voluntary conveyance by one indebted at the time is presumptively fraudulent as against existing creditors, is laid down in *Smith v. Beid*, 134 N. Y. 568, 31 N. E. 1082, and *Kerker v. Levy*, 206 N. Y. 109, 99 N. E. 181, the latter expressly overruling a contrary opinion expressed in *Kain v. Larkin*, 131 N. Y. 800, 30 N. E. 105; *Shaver v. Mowry* (Pa. Sup. Ct.), 43 Am. B. R. 101, 105 Atl. 505.

87. *Johnson v. Wilson* (D. C., Ga.), 33 Am. B. R. 518, 217 Fed. 90.

An atomnuptial settlement, though made by fraudulent design by the settler should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage which was the consideration of the settlement. *Robertson v. Schlotsbauer* (C. C. A., 7th Cir.), 40 Am. B. R. 237, 245 Fed. 324.

88. *Stroecker v. Patterson* (C. C. A., 9th Cir.), 34 Am. B. R. 287, 220 Fed. 21; *Adams v. Osley* (D. C., Ga.), 42 Am. B. R. 605, 255 Fed. 117; *Shaver v. Mowry* (Pa. Sup. Ct.), 43 Am. B. R. 101, 105 Atl. 505.

Burden of proof.—The rule stated in the text relates only to creditors whose rights accrued at the time the wife acquired title and not to those whose rights accrued many years thereafter. *Longbottom v. Emery* (Pa. Sup. Ct.), 42 Am. B. R. 248, 104 Atl. 561.

89. See *In re Gray*, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, 62 N. Y. Supp. 618; *Whittlesey v. Becker & Co.*, 25 Am. B. R. 672, 142 N. Y. App. Div. 313, 126 N. Y. Supp. 1046, quoting language



the general assignee does not become an adverse claimant, but at most but an agent of the assignor. Being such agent, his possession is that of his principal, and he, therefore, does not hold adversely to the bankrupt or to the latter's trustee by the mere fact that he held in his hands funds or property received by him under the assignment.<sup>91</sup> Such funds or property may, therefore, be reached summarily by the method suggested in *Bryan v. Bernheimer*.<sup>92</sup> Under such an assignment, the title of the trustee in bankruptcy relates back to the date of the adjudication, and the assignee is thereafter merely a custodian without title; after that time he may not lawfully sell the assets, and all his acts in relation thereto, other than custodial, are null and void.<sup>93</sup> If the assignment was made prior to the four months' period, the only interest or title retained by the bankrupt which passes to his trustee is an equitable interest in the surplus remaining after the payment of the assignor's debt.<sup>94</sup>

(6) RECEIVERSHIP; DISSOLUTION OF CORPORATION.—Where dissolution or winding up proceedings are instituted in a State court, within the period of four months prior to bankruptcy, the trustee in bankruptcy is entitled to the assets in the hands of the receiver appointed in such proceedings,<sup>95</sup> but the trustee should not take summary possession of them for such practice is not in accord with the comity existing between the State and National courts.<sup>96a</sup>

(7) ASSIGNMENT OF CLAIMS AGAINST THE UNITED STATES.—Section 3477 of the Revised Statutes prohibits the assignment of a claim against the United States, prior to the allowance of such claim and the issuing of a warrant for the payment thereof. The voluntary assignment of such a claim by a bankrupt before bankruptcy, contrary to the provisions of this section, is absolutely void. Such claim remains an asset of the bankrupt estate, and

of text. *Matter of Neuburger, Inc.* (C. C. A., 2d Cir.), 39 Am. B. R. 130, 240 Fed. 947. See also Section Twenty-three of this work.

90. *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098, 19 Sup. Ct. 836; *Pelton v. Sheridan* (Sup. Ct., Ore.), 33 Am. B. R. 472, 144 Pac. 410; *Matter of Einstein* (D. C., N. Y.), 40 Am. B. R. 507, 245 Fed. 189.

91. *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 691, 179 Fed. 222; *Matter of Williams* (D. C., Ohio), 38 Am. B. R. 762; *Matter of Neuburger, Inc.* (C. C. A., 2d Cir.), 39 Am. B. R. 130, 240 Fed. 947.

Rent moneys collected under an agreement that the agent would apply the moneys to the "present indebtedness" of the bankrupt pass to the trustee in bankruptcy and he may sue for and collect the same from the agent. *Petty v. Portman* (Pa. Com. Pl.), 39 Am. B. R. 747, 65 Pittsb. Leg. J. 203.

92. 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814, 21 Sup. Ct. 557.

93. *Matter of Wellmade Gas Mantle Co.* (C. C. A., 1st Cir.), 37 Am. B. R. 7, 233 Fed. 250; *Matter of Neuburger* (D. C., N. Y.), 37 Am. B. R. 248, 233 Fed. 701. See Am. Bankr. Dig. § 379.

94. Right to property conveyed by bankrupt to a trustee for benefit of creditors prior to four months' period.—Where, prior to the four months' period before bankruptcy, a debtor conveyed his property to another in trust for the benefit of all his creditors, his trustee in bankruptcy, under section 70-e of the bankruptcy act and by reason of such conveyance, did not take the legal title to such property, but only an equitable interest in the surplus after payment of debts, no control over or interest in the property having been reserved by the debtor in the conveyance; and while, under section 70-e of the bankruptcy act, the

trustee becomes subrogated to the rights of non-assenting creditors to avoid such conveyance by a plenary suit, in the absence of such suit he is not entitled to restrain a sale of the property conveyed under attachment proceedings. In re *Shinn* (D. C., N. J.), 25 Am. B. R. 833, 185 Fed. 990; In re *Bridge* (D. C., Wash.), 37 Am. B. R. 53, 230 Fed. 184; *Stern v. Truax* (D. C., Wash.), 38 Am. B. R. 418, 236 Fed. 1014.

Right to compel assignee for creditors to account.—Where a voluntary bankrupt several months before filing his petition assigned the property in his store to a trustee under an agreement not constituting a general assignment, and the assignee in good faith more than four months before the bankruptcy sold the property and paid the proceeds pro rata to the assignor's creditors, except two who refused to consent to the agreement, such assignee is not liable to the trustee in bankruptcy for the shares of the non-assenting creditors, which he had paid to the assignor. *Matter of Martinez* (D. C., N. Y.), 35 Am. B. R. 106, 223 Fed. 433. An assignee for the benefit of creditors may be compelled to account in the bankruptcy court although he has already accounted in the State court. *Matter of Neuburger, Inc.* (C. C. A., 2d Cir.), 39 Am. B. R. 130, 240 Fed. 947.

Common law assignment.—Where a general assignment has been made by a debtor of his property that would have been available at common law, or when made pursuant to a State statute, regulating the procedure, which enactment does not provide for the debtor's release, and hence is not an insolvency law, such transfer is upheld, if not attacked in federal bankruptcy proceedings within the time limited therefor. *Pelton v. Sheridan* (Sup. Ct., Ore.), 33 Am. B. R. 472, 144 Pac. 419.

95. *Matter of Mullings Clothing Co.* (C. C. A.,

may be collected by the trustee and administered for the benefit of creditors, with other assets.<sup>95</sup>

f. Property which might have been transferred or levied upon.—(1) IN GENERAL.—Subdivision 5 passes to the trustee all "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." It is the broadest and most comprehensive of all the subdivisions. It probably includes nearly, if not all, the kinds of property mentioned in the four that precede it, as well as that specified in subdivision 6. All of the other subdivisions are silent as to time. Here, however, there is a distinct reference to "the filing of the petition," and the idea expressed in these words is, as to the enumerated kinds of property, doubtless implied. Thus, the doctrine that only property vested in the bankrupt at the time the petition is filed passes to the trustee, is emphasized. It will be noted that the words here are very general, and seem to include every vested right and interest attaching to or growing out of property.<sup>96a</sup>

(2) TEST TO BE APPLIED.—The test is simple and easily applied.<sup>97</sup> Could the property in question have been (1) transferred by, or (2) levied on and sold under judicial process against, the bankrupt? If so, it passes to the trustee; if not, it does not. Whether the property has a market value is immaterial.<sup>98</sup> It may be a right to acquire property, as for instance a desert entry under the public lands law of the United States, which confers a right to acquire title to lands upon compliance with certain conditions, is transferable and therefore passes to the entryman's trustee in bankruptcy.<sup>99</sup> The "property which prior to the filing of the petition he [the bankrupt] could by any means have transferred" is property that he could by any means have transferred to another lawfully under the same terms that he transfers it by law to the trustee; that is to say, without consideration. If the property may have been transferred, it is immaterial that it could not have been levied on at the date of the bankrupt's adjudication, although ordinarily what may be transferred may be levied upon for the debts of the owner.<sup>100</sup> Whether or not the property, prior to the filing of the petition

2d Cir.), 38 Am. B. R. 199, 238 Fed. 58; *Hooks v. Aldridge* (C. C. A., 5th Cir.), 16 Am. B. R. 658, 145 Fed. 865; *In re Hecox* (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 823; *Mauran v. Crown Carpet Lining Co.*, 6 Am. B. R. 734, 23 R. I. 321, 50 Atl. 331; *Carter, etc. Transfer Co. v. Robertson* (Tex. Ct. of Civ. App.), 40 Am. B. R. 628, 198 S. W. 791.

95a. *Brown v. Crawford* (D. C., Ore.), 42 Am. B. R. 677, 254 Fed. 146.

96. *Claims against the United States*.—In the case of *National Bank of Commerce v. Downie*, 218 U. S. 345, 25 Am. B. R. 199, 54 L. Ed. 1065, 31 Sup. Ct. 89, affg. 20 Am. B. R. 531, the court says: "The present cases are not assignments which, by operation of law, created an interest in the assignor's claims against the United States. They are clean-cut cases of a voluntary transfer of claims against the United States, before their allowance, in direct opposition to the statute. If any regard whatever is to be had to the intention of Congress, as manifested by its words,—too clear, we think, to need construction,—we must hold such a transfer to be absolutely null and void, and as not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred. The result is that when *Gamwell & Wheeler* were adjudged bankrupts, they were still in law the owners of these claims on the United States, and all interest

therein passed under the Bankruptcy Act to their general creditors, to be disposed of as directed by the Bankruptcy Act, just as if there had been no attempt to transfer them to the banks. Any other holding will effect a repeal of the statute by mere judicial construction, in disregard of the plain, unequivocal intent of Congress, as indicated by the statute." See also *Guarantee Title & Trust Co. v. First National Bank* (C. C. A., 8d Cir.), 26 Am. B. R. 85, 185 Fed. 373; *Matter of Hudford Co.* (C. C. A., 2d Cir.), 43 Am. B. R. 504, 257 Fed. 722. 96a. *Brown v. Crawford* (D. C., Ore.), 42 Am. B. R. 263, 252 Fed. 248.

97. Compare *In re Burka* (D. C., Mo.), 5 Am. B. R. 12, 104 Fed. 326; *Herritt v. Clark* (C. C. A., 3rd Cir.), 41 Am. B. R. 232, 247 Fed. 100.

98. *Kinsale v. Winston*, Fed. Cas. 7,835. Language of text quoted and applied, *Gillaspay v. International Harvester Co.* (Miss. Sup. Ct.), 38 Am. B. R. 827, 67 So. 904. See as to marketability, *Pollack v. Meyer Bros. Drug Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 835, 845; *In re Wight* (C. C. A., 2d Cir.), 19 Am. B. R. 454, 157 Fed. 544.

99. *Matter of Evans* (D. C., Idaho), 38 Am. B. R. 361, 235 Fed. 958.

100. *Pollack v. Meyer Bros. Drug Co.* (C. C. A., 8th Cir.) 36 Am. B. R. 835, in which the court says: "There are many equitable interests which if owned by the bankrupt may be

could have been levied upon and sold under judicial process against the bankrupt, must be determined by the local law.<sup>101</sup> It must appear that the property in possession of the bankrupt is subject to claims or liens valid as against his creditors, otherwise it passes to his trustee.<sup>102</sup> For instance, the validity of a chattel mortgage or contract of conditional sale depends upon State statutes; ordinarily the title of the property mortgaged or conditionally sold is retained by the mortgagee or vendor, but if there is a failure to comply with a State law which affects the validity of the transfer, the property passes to the trustee of the mortgagor or vendee in the same plight and subject to the claims of general creditors, as though bankruptcy had not intervened.<sup>103</sup> Unfiled chattel mortgages, in States where they are declared void as against creditors for want of filing, do not prevent creditors from levying judicial process upon the property therein described, and consequently such property responds to the text to be applied under subdivision 5 of this subsection.<sup>104</sup> So where the legal title of land is in the bankrupt, but the actual title and possession was in another, a conveyance having been inadvertently omitted, the trustee takes, subject to the equities of the third party.<sup>105</sup> Wages earned prior to bankruptcy but paid thereafter pass to the trustee.<sup>105a</sup>

(3) PROPERTY PLEDGED.—The title of a pledgee, under the ordinary contract of pledge, is, in the absence of fraud, good as against all the world, except creditors who have acquired enforceable liens against the property while it was in the possession of the pledgor, and upon his bankruptcy it passes to his trustee, subject to the superior title of the pledgee.<sup>106</sup> It is the

of value and increase the assets of the estate, and yet not be subject to seizure on execution. But being transferrable, they will pass to the trustee."

**Growing crops as assets.**—Since under the Law of Tennessee, the owner's interest in a growing crop is not exempt property but is property which he may sell or mortgage, title to such property passes to the owner's trustee in bankruptcy, although under the statutes of such State such a crop may not be levied upon prior to a certain date. *In re Burnett & Co. D. C., Tenn.*, 29 Am. B. R. 872, 201 Fed. 162; *Olmsted-Stevenson Co. v. Miller (C. C. A., 9th Cir.)*, 36 Am. B. R. 816, 231 Fed. 69.

101. *Matter of Barker (Ref., Colo.)*, 20 Am. B. R. 674; *Godwin v. Murchison Nat. Bank*, 22 Am. B. R. 703, 145 N. C. 320, 59 S. E. 154; *In re Waite-Robbins Motor Co. (D. C., Mass.)*, 27 Am. B. R. 541, 192 Fed. 47; *Matter of Berry (D. C., Mich.)*, 41 Am. B. R. 357, 247 Fed. 700.

102. *In re Miller & Brown (D. C., Pa.)*, 14 Am. B. R. 439, 135 Fed. 868. And see *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 986, 24 Sup. Ct. 690.

103. Failure to execute mortgage according to State statute; title of trustee of mortgagor.—Under sections 4106 and 4133 of the Revised Statutes of Ohio which provide that a mortgage of real property shall be executed in the presence of two witnesses and when so executed shall be recorded and shall take effect from the time the instrument is left for record, a mortgage delivered for record, which had been signed by the mortgagor, but not witnessed pursuant to statute, confers upon the mortgagee merely a promise or agreement to give a mortgage which will create a lien, which to be effective must be followed by a suit in equity by the mortgagee for a reformation of the instrument; so that where property so mortgaged passes to a trustee in bankruptcy before any proceedings are taken to reform the instrument, the trustee, by virtue of section 70-a, of the bankruptcy act, takes it in the plight in which it then stood and the

mortgage cannot be enforced against him. *Foerstner v. Citizens' Savings & Trust Co. (C. C. A., 6th Cir.)*, 26 Am. B. R. 377, 186 Fed. 1.

See also *Davies v. Harlow (Md. Ct. of App.)*, 39 Am. B. R. 300, 100 Atl. 102, quoting *Collier on Bankruptcy* (9th ed.), 1006; *Rader v. Star Mill & Elevator Co. (C. C. A., 8th Cir.)*, 43 Am. B. R. 754, 255 Fed. 121.

104. *Foerstner v. Citizens' Savings & Trust Co. (C. C. A., 6th Cir.)*, 26 Am. B. R. 377, 384, 186 Fed. 1; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 986, 24 Sup. Ct. 690; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291, 51 L. Ed. 1117, 27 Sup. Ct. 720; *In re Standard Telephone & Elec. Co.*, 216 U. S. 545, 24 Am. B. R. 761, 54 L. Ed. 610, 30 Sup. Ct. 412; *Ritchie County Bank v. McFarland (C. C. A., 4th Cir.)*, 24 Am. B. R. 893, 183 Fed. 715.

105. *Clark v. Snelling (C. C. A., 1st Cir.)*, 30 Am. B. R. 50, 205 Fed. 240, affg. 29 Am. B. R. 818, 202 Fed. 259; *Young v. Allen (C. C. A., 6th Cir.)*, 30 Am. B. R. 261, 207 Fed. 318.

105a. *Matter of Evans (D. C., Tenn.)*, 42 Am. B. R. 448, 253 Fed. 276.

106. *Matter of Harvey (D. C., Ala.)*, 32 Am. B. R. 337, 212 Fed. 340, citing *Collier on Bankruptcy* (9th ed.), p. 1004. *Griffin v. Smith (Cal. Sup. Ct.)*, 41 Am. B. R. 354, 171 Pac. 92; *Atherton v. Beaman (D. C., Mass.)*, 42 Am. B. R. 631, 256 Fed. 871; *Commercial Security Co. v. Holcombe (C. C. A., 5th Cir.)*, 44 Am. B. R. 481, 262 Fed. 657; *Connecticut Mut. Life Ins. Co. v. Allen (Mass. Sup. Ct.)*, 45 Am. B. R. 127, 126 N. E. 367 (assignment of life insurance policy); *Howard v. Mechanics' Bank (D. C., N. Y.)*, 45 Am. B. R. 112, 262 Fed. 699. See Am. Bankr. Dig. § 384.

**Pledge of property already pledged.**—*Matter of Germantown Aimegum Co. (D. C., Pa.)*, 41 Am. B. R. 598, 251 Fed. 755.

**Chattel mortgages assigned as security.**—*Matter of Michigan Furniture Co. (D. C., N. Y.)*, 41 Am. B. R. 784, 249 Fed. 978.

**A life insurance policy validly pledged by a bankrupt passes to his trustee in bankruptcy**

duty of the bankruptcy court to turn over all property in the possession of the bankrupt to the lawful pledgee thereof.<sup>107</sup> The validity of a contract of pledge must be determined under the laws of the State where made.<sup>108</sup> The pledge is a lien, dependent upon possession of the pledged property by the pledgee, and if the lien is established the trustee in bankruptcy of the pledgee will succeed to the pledgee's title subject to terms of the pledge contract.<sup>109</sup>

(4) STOCK BROKERAGE TRANSACTIONS.—Where a broker purchases stock for a customer and retains the stock as security for the amount due thereon, the relationship of pledgor and pledgee exists between the parties; if the broker is adjudicated a bankrupt the owner of the stock is entitled to a delivery thereof upon payment of the amount due.<sup>110</sup> Where money is left with a stock-broker for the purchase of stock and is found in his possession, ear-marked for identification, upon his bankruptcy, the money should be returned to the depositor.<sup>111</sup> It is unnecessary for the customer to place his finger upon the identical certificates of stock purchased for him; it is sufficient if the broker had at the time of his bankruptcy shares of the same kind, which are legally subject to the demand of the customer.<sup>112</sup> Nor is it essential that the customer

subject to the rights of the pledgee. *Matter of Baird* (D. C., Del.), 40 Am. B. R. 552, 245 Fed. 504.

**Title of trustee of pledgor under valid pledge.**—Bankrupt, an automobile dealer, had in his possession when the petition was filed a demonstrating car which had been pledged to the claimant bank to secure bankrupt's note, given pursuant to an arrangement whereby the claimant bank paid drafts, accompanied by bills of lading drawn on bankrupt for the purchase price of automobiles, and bankrupt, giving his collateral note pledging the specific cars by numbers, retained possession of the cars for the purpose of sale and was expected, though not bound, to pay \$1,000 on his note for each car sold. The pledge was free from fraud and under the Pennsylvania law valid between the parties. *Held*, that the trustee in bankruptcy under section 70-a (5) of the bankruptcy act took title subject to the superior right of the claimant bank. *In re Twining* (D. C., Pa.), 26 Am. B. R. 200, 185 Fed. 555.

**Pledge of unmined coal.**—Where the lessee of coal lands agreed to supply a railway company with all coal required on certain of its lines at stated prices, payment to be made upon the 15th of each month for all coal delivered during the preceding calendar month, and the lease, which was terminable by the railway company on the lessee's failure to comply with the contract, was, with the assent of the railway company, assigned to a coal company, and while the contract was still in force and being executed, the assignee, becoming embarrassed and unable to meet its pay-rolls, the railway company advanced the money therefor, under an oral agreement that it should be repaid by the subsequent delivery of coal at the contract price, and the coal company is adjudicated a bankrupt, the advances made by the railway company amount to a pledge of the unmined coal to the extent of the advancement, and the trustees in bankruptcy, upon assuming the contract and continuing its performance, are bound to furnish the railway company sufficient coal to cover the advances made by it. *Hurley v. Atchison, etc., R. Co.*, 213 U. S. 126, 22 Am. B. R. 17, 53 L. Ed. 729, 29 Sup. Ct. 466.

<sup>107.</sup> *Commercial Nat. Bank v. Hiller* (C. C. A., 5th Cir.), 32 Am. B. R. 236, 211 Fed. 337.

<sup>108.</sup> *Matter of Harvey* (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340; *Atherton v. Beaman* (C. C. A., 1st Cir.), 45 Am. B. R. 212, 264 Fed. 878.

In New York there can be no valid pledge without delivery of the property pledged to the pledgee. *Matter of P. J. Sullivan Co., Inc.* (D. C., N. Y.), 41 Am. B. R. 189, 247 Fed. 139, *affd.* 42 Am. B. R. 530, 254 Fed. 660.

<sup>109.</sup> *Guarantee Title & Trust Co. v. First Nat. Bank* (C. C. A., 3d Cir.), 26 Am. B. R. 85, 185 Fed. 373; *In re Elm Brewing Co.* (D. C., N. Y.), 12 Am. B. R. 623, 132 Fed. 299.

<sup>110.</sup> *Duel v. Hollins*, 241 U. S. 523, 37 Am. B. R. 1, 60 L. Ed. 1143, 38 Sup. Ct. 615, *revd.* 34 Am. B. R. 34, 219 Fed. 544; *In re Berry & Co.* (C. C. A., 2d Cir.), 17 Am. B. R. 467, 149 Fed. 176; *Richardson v. Shaw* (C. C. A., 2d Cir.), 16 Am. B. R. 42, 147 Fed. 650, *affd.* 209 U. S. 365, 19 Am. B. R. 717, 52 L. Ed. 835, 28 Sup. Ct. 512; *In re Bolling* (D. C., Va.), 17 Am. B. R. 399, 147 Fed. 786; *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315; *Hutchinson v. LeRoy* (C. C. A., 1st Cir.), 8 Am. B. R. 20, 113 Fed. 212; *In re Meadows, Williams & Co.* (D. C., N. Y.), 23 Am. B. R. 124, 173 Fed. 694, *affd.* 24 Am. B. R. 251, 177 Fed. 1004; *In re Brown & Co.* (D. C., N. Y.), 22 Am. B. R. 659, 171 Fed. 254; *In re Brown & Co.* (D. C., N. Y.), 25 Am. B. R. 800, 183 Fed. 961; *In re McIntyre & Co.* (Petition of Pipepy) (C. C. A., 2d Cir.), 24 Am. B. R. 626, 181 Fed. 965. *See Am. Bankr. Dig.* § 385.

**Stock deposited as margin.**—A customer of a firm of stockbrokers indebted to him is entitled upon their bankruptcy to receive back certificates of stock in their possession as margin on his account. *Boston Safe Deposit & Trust Co. v. Adams* (Mass. Sup. Ct.), 37 Am. B. R. 609, 113 N. E. 277.

<sup>111.</sup> *Matter of Wettengel* (C. C. A., 3d Cir.), 38 Am. B. R. 444, 238 Fed. 798.

<sup>112.</sup> *Gorman v. Littlefield*, 229 U. S. 19, 30 Am. B. R. 266, 57 L. Ed. 1047, 33 Sup. Ct. 690; *Sexton v. Kessler & Co.*, 225 U. S. 90, 28 Am. B. R. 85, 56 L. Ed. 995, 32 Sup. Ct. 657.

**Sufficient stock to cover claims.**—The rule in *Gorman v. Littlefield* (229 U. S. 19, 30 Am. B. R. 266), as to the identification of stock upon the bankruptcy of a broker, should not

show that at the time of the broker's bankruptcy he had in his possession a sufficient number of stock certificates of like kind to replace those purchased by the customer.<sup>113</sup> Customers of bankrupt stockbrokers are entitled to a *pro rata* allotment of shares of stock of a corporation found in the possession of the bankrupt and purchased for them, although such shares are not the identical ones purchased, and are insufficient to fully satisfy all.<sup>114</sup> The right of the customer will depend largely upon the possession by the broker of the shares of stock at the time of the adjudication; if at that time they have been transferred or disposed of by him, the customer has no superior claim against other securities of a different kind in the broker's possession.<sup>115</sup> Where a broker repledges shares of stock deposited by customers, as security for a loan, and the shares are sold, the proceeds should be applied in payment of the loan, and the surplus be distributed *pro rata* among the customers, according to the value of their stock. If some of the stock is sold and part retained by the pledgee, there should be such a distribution of the proceeds as to make all of the owners share ratably in the burden of the loan.<sup>116</sup> The fact that certain customers have failed to prove their claim for *pro rata* share of unconverted stock, does not enlarge the *pro rata* share of those who have traced their stock.<sup>116a</sup> If the shares are repledged to different persons as security for separate loans made by each of them, and subsequently sold, each transaction must be taken separately, and the surplus proceeds in each case be paid to the owners of the shares deposited as collateral for each loan.<sup>117</sup>

(5) PROPERTY INCLUDED GENERALLY.—It was evidently intended by the word "property" as used in subdivision 5 to include in the term every vested right or interest attaching to or growing out of property. It is meant to embrace much of the property that is designated under the other subdivi-

be restricted to stock actually in the box on the day of the failure. The rationale of the decision is that if the receiver has enough or more than enough of the particular stock to cover all customers who were long on the day of the failure, then the presumptions that he intended to keep their stock on hand is a sufficient identification of the stock or of so much of it as is needed as theirs. If, however, the stock on hand, though sufficient to cover all actual claims, is not sufficient to cover all the long customers, no such presumption arises. The fact that some of the long customers make no specific claim for stock in the surplus cannot enlarge the rights of one who does. *Matter of Pierson and Fell* (C. C. A., 2d Cir.), 37 Am. B. R. 10, 233 Fed. 519.

113. *Duel v. Hollins*, 241 U. S. 523, 37 Am. B. R. 1, 60 L. Ed. 1143, 36 Sup. Ct. 615, revg. 34 Am. B. R. 34, 219 Fed. 544; As to necessity of identification. In re *McIntyre & Co.* (C. C. A., 2d Cir.), 25 Am. B. R. 93, 181 Fed. 960.

114. *Duel v. Hollins*, 241 U. S. 523, 37 Am. B. R. 1, 60 L. Ed. 1143, 36 Sup. Ct. 615, revg. 34 Am. B. R. 34, 219 Fed. 544; *Matter of McIntyre* (C. C. A., 2d Cir.), 34 Am. B. R. 487, 221 Fed. 232.

115. *Stock repledged by pledgee.*—Where shares of stock are pledged with a broker by his customers as collateral and the broker, without authority and without substituting other stock, hypothecates the customers' stock and afterwards becomes bankrupt, and the stock is sold by his pledgee in the regular way, the sale conveys good title to the particular securities as against the customers of the bankrupt, although they might have claimed them from the bankrupt estate, if still in its possession, and the customers have only a general claim against the surplus paid to the trustee

by the bankrupt's pledgee. *Matter of Stringer* (D. C., N. Y.), 37 Am. B. R. 44, 230 Fed. 177. See rule laid down in *Matter of Hollins & Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 698.

*Stock converted by bankrupt.*—Where brokers wrongfully pledged securities belonging to their customers as collateral for a loan in their bank, and upon their bankruptcy the bank under the terms of a collateral note applied the deposit of the brokers upon the note and sold the securities, which left a balance, the owners of the securities are subrogated to the rights of the bank in the deposit and are entitled to the possession thereof as against the trustee in bankruptcy of the brokers. *Matter of Leavit & Grant* (C. C. A., 2d Cir.), 33 Am. B. R. 63, 215 Fed. 901.

*Presumptions.*—Where it can be shown that stock has been legitimately used by a bankrupt stockbroker under the terms of an agreement to cover short sales, it is a proper and fair presumption that the broker utilized only those securities which he had a right to lend, leaving unaffected the securities paid for by cash customers. *Matter of Wilson & Co.* (D. C., N. Y.), 42 Am. B. R. 350, 252 Fed. 631. But when a stockbroker, for his own purposes, converts securities of customers, it will not be presumed that he converted shares belonging to margin customers, because he owed the cash customers the highest duty not to deal wrongfully with their securities. *Matter of Wilson & Co.* (D. C., N. Y.), 42 Am. B. R. 350, 252 Fed. 631.

*Identifying proceeds.*—Where a customer of a bankrupt stockbroker traces property into a pledge with another stockbroker before insolvency, and shows that the pledgee sold the property and had the proceeds before insolvency, and that it remained with the pledgee that is, was not paid to the pledgor or used

visions; it includes everything that can properly be the subject of a lawful transfer, whether it be corporeal or incorporeal.<sup>118</sup> An estate in real property by the entirety, being without possibility of severance, may not be transferred by the husband without the consent of his wife and may not be levied upon by his creditors, and does not therefore pass to his trustee in bankruptcy.<sup>119</sup> A Federal homestead for which a receipt had been issued entitling the bankrupt to a patent, does not pass to his trustee, since until a final patent had been issued, the homestead was not subject to levy for the collection of the homesteader's debts.<sup>120</sup>

(6) PROPERTY IN WHICH OTHERS HAVE AN INTEREST.—Property, within the meaning of such subdivision, does not include the property of another, which the bankrupt is authorized to transfer only on the condition that he sells it for value, or sells it and holds its proceeds for its owner.<sup>121</sup> Where under a State statute a plaintiff's interest in a pending action is assignable, and is of such a character as to enable his creditors to obtain a benefit therefrom upon an administration of his estate, such interest has been held to be property within the meaning of this subdivision rather than a "right of action," under subdivision 6.<sup>122</sup> The language of clause 5 is sufficiently broad to include not only the property belonging to the bankrupt absolutely, but also such property the title to which is, under a State law, held to be in him, as to his creditors.<sup>123</sup> As for instance where, under a State statute, delivery of chattels is essential to pass title as against certain judgment or lien creditors,<sup>124</sup> or where it is provided that a trader who acquires and uses property in his business shall be deemed the owner of such property as against creditors, unless it appear by public declaration or notice that he is acting as agent, in which cases the property so retained or acquired passes to the trustee in bankruptcy.<sup>125</sup> Special property, by way of lien, in securities deposited with the bankrupt as a pledge, is not property within the meaning of the act which passes to the trustee.<sup>126</sup> Materials delivered under a building contract by which they are to be treated as the property of the owner of the building as security for the performance of the contract by the contractor, do not pass to the trustee of the contractor.<sup>126a</sup> But the title to stock, deposited by a bankrupt with a creditor as collateral, previous to his adjudication, vests in the trustee, as of the date of the adjudication.<sup>127</sup> Deposits in a bank to the credit of a bankrupt at the time of adjudication pass to the trustee, even as against a payee of a check who did not present it for payment until after such adjudication.<sup>128</sup> The title to grain and flour in the possession of a bankrupt

by it after that time, he is entitled to reclaim. *Matter of Wilson & Co.* (D. C., N. Y.), 42 Am. B. R. 350, 252 Fed. 631.

118. *Jones on Collateral Securities*, § 512; *Matter of McIntyre* (C. C. A., 2d Cir.), 24 Am. B. R. 4, 178 Fed. 552; *Matter of Jamison Bros. & Co.* (C. C. A., 3d Cir.), 38 Am. B. R. 972, 200 Fed. 541. See also *Matter of Gay & Sturgis* (D. C., Mass.), 41 Am. B. R. 569, 251 Fed. 420. Compare *Johnson v. Bixby* (C. C. A., 8th Cir.), 42 Am. B. R. 306, 252 Fed. 103.

Time of valuation of stock pledged.—*Matter of Wilson & Co.* (D. C., N. Y.), 42 Am. B. R. 350, 252 Fed. 631.

The provisions of a penal law providing a punishment for the unauthorized pledge, or disposition of stock of a customer cannot *per se* affect the equities existing between the different customers to securities or their proceeds. *Matter of Wilson & Co.* (D. C., N. Y.), 42 Am. B. R. 350, 252 Fed. 631.

118a. *Matter of Wilson & Co.* (D. C., N. Y.), 42 Am. B. R. 350, 252 Fed. 631.

117. *Matter of Jamison Bros. & Co.* (C. C. A., 3d Cir.), 38 Am. B. R. 972, 200 Fed. 541.

118. *In re Cantelo Mfg. Co.* (D. C., Me.), 26 Am. B. R. 57, 185 Fed. 276, holding that an application for a patent constitutes property within the meaning of subdivision 5.

Property passing to trustee.—This section does not define "property" in its broad sense, but it is merely a declaration, by way of enumeration or schedule, of the rights, privileges, or things which, being possessed or enjoyed by the bankrupt, and being property, shall, as respects their title, devolve, by operation of law, upon a trustee; and being an enumeration of certain classes of property, is on its face a limitation within the larger field of property in general. *Board of Trade v. Weston* (C. C. A., 7th Cir.), 40 Am. B. R. 263, 243 Fed. 332.

Rights under contract.—*Matter of Berry* (D. C., Mich.), 41 Am. B. R. 357, 247 Fed. 700.

119. *In re Beihl* (D. C., Pa.), 28 Am. B. R. 310, 197 Fed. 870.

120. *In re Cohn* (D. C., N. D.), 22 Am. B. R. 761, 171 Fed. 568.

121. *In re Dunlop* (C. C. A., 8th Cir.), 19 Am. B. R. 361, 308, 156 Fed. 945. See *In re Reboulin Fils Co.* (D. C., N. J.), 21 Am. B. R. 296, 165 Fed. 245; *Wood Co. v. Van Story* (C. C. A., 4th Cir.), 22 Am. B. R. 740, 171 Fed. 375; *In re Marx Tailoring Co.* (D. C., Ala.), 28 Am. B. R. 147, 196 Fed. 243; *International Agric. Corp. v. Sparks* (D. C., S. C.), 40 Am. B. R. 80, 250 Fed. 318.

Checks left with bank for collection and deposit.—*Matter of Jarmulowsky* (C. C. A., 2d Cir.), 41 Am. B. R. 39, 249 Fed. 319.

122. *Cleland v. Anderson* (Neb. Sup. Ct.), 10 Am. B. R. 429, 66 Neb. 273; *First Nat. Bank v. Staake*, 202 U. S. 141, 15 Am. B. R. 639, 50 L. Ed. 967, 26 Sup. Ct. 580.

123. *Chesapeake Shoe Co. v. Seldner* (C. C. A., 4th Cir.), 10 Am. B. R. 406, 122 Fed. 593; *In re Tweed* (D. C., Iowa), 12 Am. B. R. 648, 131 Fed. 355.

124. See cases digested in Am. Bankr. Dig. § 390.

Delivery of chattels is essential in Illinois to pass title or to create a lien as against execution or attaching creditors, except only when dispensed with by reason of the publicity of the transaction. Hence pictures sold by the bankrupt or exchanged for others, but not removed from the bankrupt's store or seen at the time by the purchaser, and remaining in the bankrupt's possession at the time of the bankruptcy, pass to the trustee and the purchaser is not entitled to reclaim them. *Matter of Ricketts* (C. C. A., 7th Cir.), 37 Am. B. R. 124, 234 Fed. 285.

125. *Gillaspay v. International Harvester Co.* (Miss. Sup. Ct.), 38 Am. B. R. 827, 67 So. 904; *Virginia Book Co. v. Siles* (C. C. A., 4th Cir.), 41 Am. B. R. 450, 254 Fed. 46.

126. *Matter of Berry & Co.* (D. C., N. Y.), 15 Am. B. R. 360, 146 Fed. 623.

126a. *Matter of Shelly* (C. C. A., 3d Cir.), 39 Am. B. R. 519, 242 Fed. 251; *Wilds v. Board of Education* (N. Y. Ct. of App.), 44 Am. B. R. 439, 227 N. Y. 211. Compare *Matter of Sullivan Co.*

corporation passes to its trustee in bankruptcy, though it had issued grain and flour certificates as security for loans, calling for delivery of a certain quantity of flour on demand of the holders of the certificates.<sup>129</sup> An estate by the entirety does not pass to the trustee of the husband or wife.<sup>129a</sup>

(7) **EQUITIES IN PROPERTY.**—The equity of an individual in copartnership property, which is his separate estate, passes to his trustee in bankruptcy.<sup>130</sup> The equity of redemption of mortgaged property passes to the trustee, and he may take and retain actual possession of the property.<sup>131</sup> However, where the rule prevails that an equity of redemption, while assignable by the mortgagor, is not subject to sale and execution, such equity of redemption although passing to the trustee, is not saleable by him, so as to transfer to the purchaser the statutory right of redemption.<sup>132</sup> Any further attempt to differentiate the cases would be useless. Those appropriate to the subjects discussed in the next paragraphs are there collated. Others of a miscellaneous character will be found in the foot-note.<sup>133</sup>

(C. C. A., 2d Cir.), 42 Am. B. R. 530, 254 Fed. 660.

127. *French v. White*, 18 Am. B. R. 905, 78 Vt. 89, 62 Atl. 35; *First Nat. Bank of Memphis v. Towner* (C. C. A., 6th Cir.), 38 Am. B. R. 576.

128. *Proceeds of check paid after adjudication of drawer.*—Where a voluntary bankrupt, in good faith, two days before bankruptcy, delivers a check to a light company in payment for service, and the payee, in good faith without knowledge of the bankruptcy, deposits the check in another bank and it was not paid until after the adjudication of the drawer, the payee is not entitled as against the trustee in bankruptcy to retain the sum received on the check, because the bankrupt's deposit came into the complete custody of the bankruptcy court upon the adjudication. *Matter of Howe* (D. C., Mass.), 37 Am. B. R. 601, 235 Fed. 908.

129. *In re Melbourne Mills Co.* (D. C., Pa.), 20 Am. B. R. 740, 102 Fed. 988, *affd.*, 22 Am. B. R. 442, 172 Fed. 177. *Compare Central State Bank v. McFarlin* (C. C. A., 8th Cir.), 44 Am. B. R. 1, 257 Fed. 535.

129a. *Matter of Berry* (D. C., Mich.), 41 Am. B. R. 357, 247 Fed. 700.

130. *New York Institution for the Instruction of the Deaf and Dumb v. Crockett*, 17 Am. B. R. 233, 242, 117 N. Y. App. Div. 200, 102 N. Y. Supp. 412.

131. *In re Roger Brown & Co.* (C. C. A., 8th Cir.), 28 Am. B. R. 336, 196 Fed. 758.

*Equity of redemption.*—Where the owner of an equity of redemption subordinates it in proceedings in a State court to the rights of the unsecured creditors of a bankrupt corporation, the property passes to the trustee in bankruptcy, who may execute the trustee and subject the property to the payment of the claims. *Brown v. Crawford* (D. C., Ore.), 42 Am. B. R. 677, 254 Fed. 146.

132. *Luth v. Galloway Coal Co.* (Ala. Sup. Ct.), 32 Am. B. R. 866.

133. *As to property of a partnership:* *In re Rudnick* (D. C., Wash.), 4 Am. B. R. 531, 102 Fed. 750; *In re Groetsinger* (D. C., Pa.), 6 Am. B. R. 899, 110 Fed. 366. *As to mortgaged realty:* *In re Kellogg* (D. C., N. Y.), 7 Am. B. R. 623, 113 Fed. 120, *affd.*, 10 Am. B. R. 7, 121 Fed. 338.

*As to proceeds of a sale under a void execution still in the hands of the sheriff:* *In re Easley* (D. C., Va.), 1 Am. B. R. 715, 93 Fed. 419; *In re Kenney* (D. C., N. Y.), 2 Am. B. R. 494, 95 Fed. 427; on reargument, 3 Am. B. R. 353, 97 Fed. 554, *affd.*, 5 Am. B. R. 355, 105 Fed. 897. *Compare also In re Francis-Valentine Co.* (D. C., Cal.), 2 Am. B. R. 188, 93 Fed. 953; *In re Kimball* (D. C., Pa.), 3 Am. B. R. 161, 97 Fed. 29, and *Lavor, Trustee v. Seiter*, 8 Am. B. R. 459, 69 N. Y. App. Div. 33, 74 N. Y. Supp. 490.

*As to property vested in a receiver in the State court:* *In re Meyers & Co.* (Ref., N. Y.), 1 Am. B. R. 347; *In re Tyler* (D. C., N. Y.), 5 Am. B. R. 152, 104 Fed. 778; *Hanson v. Stephens* (Sup. Ct., Ga.), 11 Am. B. R. 172, 116 Ga. 722.

*As to exercise of right to redeem:* *In re Goldman* (D. C., N. Y.), 4 Am. B. R. 100, 102 Fed. 122; *In re Novak* (D. C., Iowa), 7 Am. B. R. 27, 111 Fed. 161.

*As to unpaid legacy:* *In re May* (Ref., Minn.), 5 Am. B. R. 1.

*As to rents:* *In re Cass* (Ref., Ohio), 6 Am. B. R. 721; *In re Dole* (D. C., Vt.), 7 Am. B. R. 21, 110 Fed. 926; *In re Oleson* (D. C., Iowa), 7 Am. B. R. 22, 110 Fed. 796; *Matter of Clark Realty Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 129, 234 Fed. 576; *Matter of Dooner & Smith* (D. C., N. J.), 40 Am. B. R. 116, 243 Fed. 984; *Bindseil v. Liberty Trust Co.* (C. C. A., 3d Cir.), 41 Am. B. R. 454, 248 Fed. 112; *Matter of Brose* (C. C. A., 2d Cir.), 42 Am. B. R. 543, 254 Fed. 664.

*As to purchase money notes for property sold by bankrupt on condition and assigned to third party without assignment of conditional sale contracts.* *Waterbury Trust Co. v. Weisman* (Conn. Sup. Ct.), 44 Am. B. R. 575, 108 Atl. 550.

*As to mortgage on grain in bins:* *Matter of Ballard* (D. C., Tex.), 44 Am. B. R. 651.

*As to trade fixtures:* *Matter of Myerson* (D. C., Pa.), 42 Am. B. R. 337, 253 Fed. 510.

*As to payments assigned by bankrupts contractor to surety.* *Montgomery v. City of Philadelphia* (D. C., Pa.), 42 Am. B. R. 498, 253 Fed. 473.

*As to property which bankrupt agreed to make and deliver to purchaser who had advanced the purchase price:* *The Gref Bros. Cooperage Co. v. Mullenix* (C. C. A., 8th Cir.), 45 Am. B. R. 265, 264 Fed. 391.

*As to agreement of vendor to release mortgage on certain lots:* *Matter of East Stroudsburg, etc., Co.* (D. C., Pa.), 41 Am. B. R. 57, 248 Fed. 356.

*As to right to dividends.*—*Matter of Brantman* (C. C. A., 2d Cir.), 40 Am. B. R. 18, 244 Fed. 101.

*Right of trustee of bankrupt tenant to crops under lease:* *In re Luckenbill* (D. C., Pa.), 11 Am. B. R. 455, 127 Fed. 984.

*As to property acquired by bankrupt's agent without authority:* *Matter of Partridge Lumber Co.* (D. C., N. J.), 33 Am. B. R. 537, 215 Fed. 973.

*As to wife's interest in property vested in her husband:* *In re Garner* (D. C., Ga.), 6 Am. B. R. 496, 110 Fed. 123. *Compare In re Rooney* (D. C., Vt.), 6 Am. B. R. 478, 109 Fed. 601.

*As to title of stocks bought by broker for customer:* *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 815. *As to stocks pledged by bankrupt pledgee:* *Hutchinson v. LeRoy* (C. C. A., 1st Cir.), 8 Am. B. R. 20, 113 Fed. 212.

*As to shares of stock fraudulently carried in the name of the bankrupt as trustee, and in the names of other parties for the purpose of concealment:* *Fowler v. Jenks* (Sup. Ct., Minn.), 11 Am. B. R. 255, 90 Minn. 74.

*As to delivery sufficient to pass title as against debtor's trustee:* *Allen v. Hollander* (C. C., Mass.), 11 Am. B. R. 753, 128 Fed. 159. *As to delivery of locomotives remaining in possession of bankrupt vendor:* *In re Pease Car & Locomotive Works* (D. C., Ill.), 14 Am. B. R. 331, 134 Fed. 919.

*An oral agreement to insure will operate as an equitable assignment of the proceeds of fire insurance policies taken out in the mortgagor's own name.* *Hanson v. Blake & Co.* (D. C., Me.), 19 Am. B. R. 325, 155 Fed. 342.

(8) **REMAINDERS AND CONTINGENT INTERESTS.**—Considerable difficulty is often experienced in applying the test fixed by subdivision 5 to contingent interests. Reference must usually be had to the State statutes and decisions. The following summary is, however, thought to be quite generally applicable: Remainders, either vested<sup>134</sup> or contingent, pass to a trustee;<sup>135</sup> but do not where the contingency is one both of time of vesting and of person.<sup>136</sup> Where the interest of the bankrupt depends on the exercise of a discretionary power in trust, it does not pass to his trustee.<sup>137</sup> It has been held, that a devise of an equitable life interest in property, "free from the interference or control of creditors," does not pass to the trustee, although such interest was assignable.<sup>138</sup> But where a remainder is created dependent upon a life estate as to which the life tenant is vested with "full power to sell and convey any real estate," the remainderman's interest, although contingent as to amount and value, passes to his trustee in bankruptcy.<sup>139</sup>

(9) **TRUST INTERESTS AND PROPERTY IN TRUST.**—(I) *Resulting or constructive trusts.*—If property in the hands of the bankrupt is impressed with

As to proceeds of property belonging to another sold by a bankrupt: In re Wood & Malone (D. C., Ga.), 9 Am. B. R. 615, 121 Fed. 599.

As to money paid upon stocks subscription, to be returned on certain conditions: In re North Carolina Car Co. (D. C., N. Car.), 11 Am. B. R. 488, 127 Fed. 178. As to bankrupt's interest in an unadministered estate: Osmun v. Galbraith (Sup. Ct., Mich.), 9 Am. B. R. 339, 131 Mich. 577.

Money saved by the wife of a deceased bankrupt from a weekly allowance for maintenance and household expenses made to her by her husband and deposited in the bank in her own name, will not be ordered turned over to the trustees of a bankrupt partnership of which the deceased was a member, where the station in life of the parties, the solvency of the husband during the entire period, the economy of the wife in performing her household duties and dispensing with the assistance of servants, all point to the intention of the husband to relinquish possession, control and ownership of the various amounts and to vest her with title to the unexpended balance. In re Simon No. 2 (D. C., N. Y.), 28 Am. B. R. 616, 197 Fed. 102.

**Miscellaneous:** In re Cobb (D. C. N. Car.), 3 Am. B. R. 129, 96 Fed. 821; In re Hana & Kirk (D. C., Pa.), 5 Am. B. R. 127, 105 Fed. 587; In re Swift (Ref., Mass.), 5 Am. B. R. 232; Duplan Silk Co. v. Spencer (C. C. A., 3d Cir.), 8 Am. B. R. 367, 115 Fed. 689, revg. s. c., 7 Am. B. R. 563, 112 Fed. 688; White v. Graybill (Ia. Sup. Ct.), 42 Am. B. R. 392, 169 N. W. 135.

134. In re Woodward (D. C., N. Car.), 2 Am. B. R. 339, 95 Fed. 260; In re McHarry (C. C. A., 7th Cir.), 7 Am. B. R. 88, 111 Fed. 498. Compare In re Mosler (D. C., Vt.), 7 Am. B. R. 268, 112 Fed. 138.

135. In re Shenberger (D. C., Ohio), 4 Am. B. R. 487, 102 Fed. 978; In re St. John (D. C., N. Y.), 5 Am. B. R. 190, 106 Fed. 284; In re Twadell (D. C., Del.), 6 Am. B. R.

539, 110 Fed. 145. As to when a contingent remainder in realty passes to the trustee, see Belcher v. Bernard, 106 Mass. 230.

**Bankrupt's interest as remainderman; sale of interest.**—By virtue of an adjudication in bankruptcy, the interest of bankrupt in a remainder in real property passes to his trustee by devolution of law, so that no conveyance by bankrupt is necessary to vest the trustee with his rights therein. Where it does not appear that a trustee in bankruptcy can obtain a sufficient amount for bankrupt's remainder interest in real property to justify a direction that he sell such interest and pay off the lien of a judgment creditor, an order restraining such creditor from proceeding to collect his judgment other than in bankruptcy proceedings will be vacated subject to the right of the trustee, for the protection of other creditors, to join in any action the judgment creditor might take. In re Arden (D. C., N. Y.), 26 Am. B. R. 664, 188 Fed. 475.

136. In re Hoadley (D. C., N. Y.), 3 Am. B. R. 780, 101 Fed. 233; In re Gardner (D. C., N. Y.), 5 Am. B. R. 432, 106 Fed. 670.

137. In re Wetmore (D. C., Pa.), 4 Am. B. R. 336, 102 Fed. 290; s. c., affd. 6 Am. B. R. 210, 108 Fed. 520. See also s. c., on application for discharge, 3 Am. B. R. 700, 99 Fed. 703. Compare In re Ehle (D. C., Vt.), 6 Am. B. R. 476, 109 Fed. 626.

138. Boston Safe Deposit & Trust Co. v. Luke, 34 Am. B. R. 321, 220 Mass. 494, 108 N. E. 64, affd. *sub nom.* Easton v. Boston Safe Deposit & Trust Co., 240 U. S. 427, 36 Am. B. R. 701, 60 L. Ed. 723, 36 Sup. Ct. 391. See also, Hull v. Farmers' Loan & Trust Co. (U. S. Sup. Ct.), 40 Am. B. R. 594, 38 Sup. Ct. 108.

139. Matter of Dorgan (D. C., Iowa), 38 Am. B. R. 157, 237 Fed. 507; Pollock v. Meyer Bros. (C. C. A., 8th Cir.), 36 Am. B. R. 635, 233 Fed. 861, in which the majority opinion holds that in a trust fund set apart for the support and maintenance of Mary Pollock, under which she had the use of the income and such portions of the principal as



a trust it passes to the trustee subject to the same trust.<sup>140</sup> Where, though title is in the bankrupt, another is the real party in interest under the doctrine of resulting trust, the trustee in bankruptcy will be directed to convey to the real owner.<sup>141</sup> Money paid to the bankrupt before adjudication under a mistake of fact is impressed with a constructive trust, which follows it into the hands of the trustee.<sup>142</sup> Where a banker received deposits knowing that he was insolvent and on the day following made an assignment of his property, a trust was impressed upon the funds deposited in favor of the depositors, which must be recognized by the banker's trustee in bankruptcy.<sup>143</sup> If property was consigned to a bankrupt for sale and the proceeds were used by the bankrupt in his business as his own, the relationship between the consignor and the bankrupt is that of debtor and creditor and not that of trustee and beneficiary.<sup>144</sup>

(II) *Express trusts; interest of beneficiary.*—A trustee in bankruptcy takes the bankrupt's interest in property held in trust for him, whether the trust be open or secret,<sup>145</sup> unless it is so devised as to be inalienable by the *cestui que trust* and not subject to the claims of his creditors.<sup>146</sup> Under the New York statute<sup>146</sup> the surplus income derived from

was reasonably necessary for her support and maintenance, the remainder going to certain persons, including the bankrupt, the interest of the bankrupt passed to the trustee.

140. *Taylor v. Plumer*, 3 Maule & Selw. 562. See, to the same effect, *Cook v. Tullis*, 13 Wall. 332; *Hawkins v. Blake*, 108 U. S. 422. Compare *Cummings v. Synnott* (C. C. A., 3d Cir.), 25 Am. B. R. 859, 184 Fed. 718.

Bankrupt's interest in real estate purchased with funds of another.—Petitioner under an arrangement with bankrupt advanced the money with which to purchase a vacant lot to be divided up into building lots and resold, and the deed was taken to petitioner and bankrupt. It was understood that the purchase was a speculation and agreed that when the lots were sold the surplus, after payment to petitioner of the money advanced by her, was to be divided equally between them. Held, that petitioner was entitled to show her real interest in the property, and the rights of general creditors not being harmed, since they had no lien or claim superior to petitioner, growing out of the form of the deed in failing to disclose the actual interests of the parties, bankrupt's trustee was only entitled to one-half the surplus remaining after reimbursing petitioner from the proceeds of a sale of the property. *In re McConnell* (D. C., N. Y.), 28 Am. B. R. 659, 197 Fed. 492; *Jones v. Dugan* (Md. Ct. of App.), 38 Am. B. R. 874, 92 Atl. 775.

141. *In re Davis* (D. C., Mass.), 7 Am. B. R. 258, 112 Fed. 129. See also *In re Coffin* (D. C., Conn.), 16 Am. B. R. 682, 146 Fed. 181; *In re Taft* (C. C. A., 6th Cir.), 13 Am. B. R. 417, 133 Fed. 611; *Young v. Allen* (C. C. A., 6th Cir.), 30 Am. B. R. 201, 207 Fed. 318; *Scott v. Cline* (C. C. A., 8th Cir.), 44 Am. B. R. 8, 257 Fed. 706.

142. *Matter of Berry & Co.* (C. C. A., 2d Cir.), 16 Am. B. R. 564, 146 Fed. 623.

143. *Matter of Silver* (D. C., Ohio), 31 Am. B. R. 106, 208 Fed. 797; *In re Stewart* (D. C., N. Y.), 24 Am. B. R. 474, 178 Fed. 463.

144. *In re Emerson, Marlow & Co.* (C. C. A., 7th Cir.), 29 Am. B. R. 173, 199 Fed. 95. Compare *International Agric. Corp. v. Sparks* (D. C., S. Car.), 40 Am. B. R. 80, 250 Fed. 318.

145. *Ury v. Van Every* (Cal. Sup. Ct.), 45 Am. B. R. 282, — Pac. —.

146. *Hull v. Farmers Loan & Trust Co.* (U. S. Sup. Ct.), 40 Am. B. R. 594, 38 Sup. Ct. 103; *Munroe v. Dewey*, 4 Am. B. R. 264,

176 Mass. 184, 57 N. E. 340; *Eaton v. Boston Safe Deposit & Trust Co.*, 240 U. S. 427, 36 Am. B. R. 701, 60 L. E. 723. 36 Sup. Ct. 391, in which it was held that the life interest of a beneficiary in trust, providing that the income to her is "to be free from the interference or control of her creditors," does not pass to her trustee in bankruptcy, where the State law treats such restrictions as limiting the character of the equitable property and as inherent in it.

Termination of trust by bankruptcy.—

*In the case of Nicholas v. Eaton*, 91 U. S. 716, 23 L. Ed. 254, it appeared that real estate was devised to trustees who were directed to pay the income to one who was afterward adjudged a bankrupt, and the devise contained the condition and proviso that if the said beneficiary should become bankrupt, the trust should cease; and thereafter the trustees in their discretion were to apply the income to the support of the beneficiary and to his family, and the trustees were empowered in their discretion to transfer any portion of the trust fund to the beneficiary. The court held that the bankruptcy terminated all of the bankrupt's legal and vested rights in and to the estate and left nothing to which his assignee in bankruptcy could assert a claim, and that the discretionary power vested in the trustees to pay sums to the bankrupt could not be subjected to the control of the trustee in bankruptcy, the court saying: "No case is cited; none is known to us which goes so far as to hold that an absolute discretion in the trustee, a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt, confers such an interest on the latter that he or his assignee can successfully assert it in a court of equity or in any other court."

146. N. Y. Real Property Law, § 103.

a trust to receive and apply the rents and profits of real property is inalienable and does not pass to the trustee of the bankrupt beneficiary.<sup>147</sup> But if the beneficiary's interest is in the nature of an annuity it is subject to levy and will pass to the beneficiary's trustee in bankruptcy,<sup>148</sup> especially where it is in lieu and takes the place of the beneficiary's interest in her husband's estate.<sup>149</sup> It has been held that a trustee in bankruptcy may bring a suit in equity to obtain the surplus of income from a trust fund, if that income be more than sufficient for the support of the bankrupt,<sup>150</sup> and under the New York code a continuing execution in the nature of garnishment may be had against the income of a trust fund.<sup>151</sup> Property allotted to an Indian under an act of Congress to be held in trust for such Indian by the United States for twenty-five years, after which a conveyance is to be made by the government to the Indian free and clear from all charges and incumbrances, is not during the twenty-five years an alienable estate and does not pass to the trustee.<sup>152</sup>

(III) *Mingling trust funds; following such funds.*—It seems also that where the bankrupt mingles trust funds with his own so that their identity is lost, the beneficiaries must share *pari passu* with the creditors.<sup>153</sup> Persons, seeking to trace trust funds into a bank and thence into collateral which ultimately came into the hands of a trustee in bankruptcy, are under the burden of proving their title, and if their evidence leaves the matter of identification in doubt must be resolved in favor of the trustee in bankruptcy.<sup>154</sup> There can be no departure from the general principle that to follow trust funds there must be some identification of the property sought to be charged with

147. *McNaboe v. Marks*, 16 Am. B. R. 767, 51 N. Y. Misc. 207, 99 N. Y. Supp. 960; *Butler v. Baudouine*, 16 Am. B. R. 238 n., 84 N. Y. App. Div. 215, 62 N. Y. Supp. 773, *affd.* 177 N. Y. 530, 60 N. E. 1121. *Contra*: *In re Baudouine* (C. C. A., 2d Cir.), 3 Am. B. R. 651, 101 Fed. 574; *Brown v. Barker*, 8 Am. B. R. 450, 68 N. Y. App. Div. 592, 74 N. Y. Supp. 43; *Matter of Reynolds* (D. C., N. Y., 40 Am. B. R. 141, 243 Fed. 272. Compare *Smith v. Belden*, 6 Am. B. R. 432, 35 N. Y. Misc. 113, 71 N. Y. Supp. 246, for method of reaching such a surplus.

148. *Wetmore v. Wetmore*, 149 N. Y. 520, 44 N. E. 109, 33 L. R. A. 708, 52 Am. St. Rep. 752; *Mills v. Husson*, 140 N. Y. 99, 35 N. E. 422.

149. *In re Burtis* (D. C., N. Y.), 26 Am. B. R. 310, 133 Fed. 799; *In re Baudouine* (C. C. A., 2d Cir.), 3 Am. B. R. 651, 101 Fed. 574.

151. Code Civil Procedure, New York, § 1391, as amended by L. 1908, ch. 148.

152. *In re Russie* (D. C., Oreg.), 3 Am. B. R. 6, 96 Fed. 609.

153. *In re Richard* (D. C., Tenn.), 4 Am. B. R. 700, 104 Fed. 792; *In re Marsh* (D. C., Conn.), 8 Am. B. R. 576, 116 Fed. 396; *In re Kurts* (D. C., Pa.), 11 Am. B. R. 129, 125 Fed. 992; *In re Mulligan* (D. C., Mass.), 9 Am. B. R. 8, 116 Fed. 715; *Matter of See* (C. C. A., 2d Cir.), 31 Am. B. R. 680, 188 Fed. 527.

150. *In re Tiffany* (D. C., N. Y.), 13 Am. B. R. 360, 209 Fed. 172; *Matter of Leigh* (D. C., Ill.), 31 Am. B. R. 379, 206 Fed. 486, holding that a trust fund must be clearly traced in order to charge a bankrupt's estate with liability therefor. *Matter of Ferrer* (D. C., Porto Rico), 40 Am. B. R. 689, 10 P. R. Fed. 262.

*Mingling trust funds with general funds.*—Where trust funds have been unlawfully diverted and intermingled with the general funds of a bankrupt, so as to render their identification impossible, the bankruptcy court, acting as a court of equity, will follow them and decree restitution to the *cestui que trust*, if the unlawful appropriation of the trust funds resulted in swelling the assets and came into the possession of the trustee; but if after the misappropriation and mingling all the money is withdrawn, the equities are lost, although moneys from other sources are subsequently

deposited in the same place; or if a part of the funds so mingled is withdrawn, so that the fund is reduced to a smaller sum than the trust fund, the latter must be regarded as dissipated, except as to the balance, and funds subsequently added from other sources cannot be subjected to the equitable claim of the *cestui que trust*. *In re Dunn & Co.* (D. C., Ark.), 28 Am. B. R. 127, 193 Fed. 212. See also *Matter of Ferrer* (D. C., Porto Rico), 40 Am. B. R. 689, 10 P. R. Fed. 262.

Where money is intrusted to the bankrupt for safe keeping, and is deposited by him to his credit, it may be claimed by the owner out of the balance of such deposit coming into the hands of the trustee, although it cannot be specifically identified, it appearing that at all times the bankrupt's account at the bank exceeded the amount intrusted to him. *In re Rovea* (D. C., Wash.), 16 Am. B. R. 141, 143 Fed. 182.

154. *Schuyler v. Littlefield*, 232 U. S. 707, 35 Am. B. R. 209, 58 L. Ed. 806, 34 Sup. Ct. 466, holding that where one has deposited trust funds in his individual bank account and the mingled fund is at any time wholly depleted the trust fund is thereby dissipated, and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account. See also *Knauth v. Knight* (C. C. A., 5th Cir.), 42 Am. B. R. 743, 255 Fed. 677.

155. *In re McIntyre & Co.* (Petition of Grace) (C. C. A., 2d Cir.), 26 Am. B. R. 51, 135 Fed. 96; *Comings v. Synnot* (C. C. A., 3d Cir.), 25 Am. B. R. 859, 184 Fed. 718; *Central State Bank v. McFarlin* (C. C. A., 8th Cir.), 44 Am. B. R. 1, 257 Fed. 535; *Matter of Jarmulowsky* (C. C. A., 2d Cir.), 44 Am. B. R. 432, 261 Fed. 779; *Matter of Ballard* (D. C., Tex.), 44 Am. B. R. 651.

*Trust funds.*—Where money was paid to a bankrupt for transmission to a foreign country and was mingled with other funds of the bankrupt, and it appeared that some of the depositors received drafts which were not paid and some never received any drafts, it was held that the former could not claim against

the trust.<sup>155</sup> But if there has been no mingling, the trustee of a bankrupt estate takes no title, though he has the right to possession and a quasi-interest until the beneficiaries prove their right.<sup>156</sup>

(10) **DOWER AND CURTESY RIGHTS.**—Here also the State law controls.<sup>156a</sup> It is the general rule that, if the dowress is the bankrupt and her estate is vested, the trustee takes her interest;<sup>157</sup> conversely, if her interest is still inchoate, it does not pass. So also of the husband's curtesy: if vested, it passes; if merely initiate, it does not.<sup>158</sup> Where, however, the husband, not the wife, is the bankrupt, her inchoate interest is, in most States, sufficiently vested to endure, and the husband's title passes to the trustee subject thereto;<sup>159</sup> if the husband dies after his bankruptcy, she is entitled to the same interest she would have taken had he died before it.<sup>160</sup> If a purchase-money mortgage has been given by a bankrupt husband, the contingent right of dower of his wife only attaches to the surplus remaining after the payment of the mortgage debt.<sup>161</sup> If a bankrupt's wife consents to the sale by the trustee of the bankrupt's real property, and to accept a gross sum in lieu of her dower, such property may be sold free from her inchoate right of dower;<sup>162</sup> but there can be no such sale without the wife's consent.<sup>162a</sup> On the other hand, where the wife is the bankrupt, the husband is not entitled to have his curtesy initiate admeasured. If the mortgage in which the wife has joined is declared void as a preference, the wife's right of dower is restored.<sup>163</sup> These doctrines flow from well-recognized principles of real estate law. Cases collaterally valuable will be found in the foot-note.<sup>164</sup>

the fund which had been traced but that the latter were *prima facie* entitled to share in the fund, and that the amount must be stated and the various priorities awarded beginning on the first day when the fund was less than the trust money and then on the next day when the new deposits in the fund were insufficient to cover the new trust money, and so on. *Matter of Bolognesi & Co.* (C. C. A., 2d Cir.), 42 Am. B. R. 548, 254 Fed. 770.

156. *In re Cobb* (D. C., N. C.), 3 Am. B. R. 129, 96 Fed. 821. If the trust is coupled with an interest, he becomes vested with the interest. *Walker v. Siegel*, Fed. Cas. 17,085.

156a. *Carver v. Ward* (W. Va. Sup. Ct. of App.), 41 Am. B. R. 557, 95 S. E. 828; *Matter of Munford* (D. C., N. Car.), 43 Am. B. R. 218, 255 Fed. 108.

157. Compare *In re Watterson*, 95 Pa. St. 312.

158. *Hesseltine v. Prince* (D. C., Mass.), 2 Am. B. R. 600, 95 Fed. 802; *Matter of Russell* (Ref., Ohio), 13 Am. B. R. 24.

Interest in property purchased for wife with money of husband; *Virginia Rule*.—Where a husband causes property to be conveyed to his wife and pays a portion of the purchase price from his own funds, with the intent of giving the same outright to his wife, and subsequently pays the balance of the purchase price after her death, and thereafter becomes a voluntary bankrupt, his trustee cannot, under the law of Virginia, claim an interest of the bankrupt as tenant by curtesy in the property which belonged to his wife, for the rule in that State is that where a husband transfers, or causes to be transferred, real estate to his wife the presumption is that he transfers his entire interest, including all his marital rights. *Cox v. Wallace* (C. C. A., 4th Cir.), 33 Am. B. R. 186, 219 Fed. 126.

159. *In re Shaeffer* (D. C., Pa.), 5 Am. B. R. 248, 104 Fed. 973; *In re Forbes* (Ref., Ohio), 7 Am. B. R. 42; *Porter v. Lascar*, 100 U. S. 84, 27 L. Ed. 895, 3 Sup. Ct. 58; *Matter of Hawkins* (Ref., R. I.), 9 Am. B. R. 598; *Thomas v. Woods*

(C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 589. But see *Kelly v. Strange*, Fed. Cas. 7,676. As to rule in Pennsylvania, see *In re Freedman* (Ref., Pa.), 29 Am. B. R. 135; *Matter of Chotiner* (D. C., Pa.), 32 Am. B. R. 760, 216 Fed. 916; *Carver v. Ward* (W. Va. Sup. Ct. of App.), 41 Am. B. R. 557, 95 S. E. 828.

Computation of value of dower; effect of assent to compromise.—In Ohio the wife of a bankrupt is entitled to receive from the trustee out of the proceeds of the sale of the bankrupt's real property remaining after satisfaction of mortgage liens, the value of her contingent right of dower, computed upon the gross selling price of the property. The wife's right to dower is not barred by the compromise of a claim by the trustee to which she assented. *Matter of Strauch* (D. C., Ohio), 31 Am. B. R. 30, 208 Fed. 842.

Where a fixed sum in lieu of dower rights in the surplus remaining from the sale of mortgaged lands of a bankrupt is determined by the difference of the expectancy of the life of the wife and the bankrupt as shown by mortality tables, and the wife is willing to accept such sum in lieu of dower, the court may direct its payment, if there are no objections by other interested parties. *Matter of Munford* (D. C., N. Car.), 43 Am. B. R. 219, 255 Fed. 108.

160. *In re Hester*, Fed. Cas. 4,437. But see *Bostock v. Jordan*, 54 Tenn. 370. The rule is different under the Arkansas statute. *In re McKensie* (C. C. A., 8th Cir.), 15 Am. B. R. 679, 142 Fed. 383.

161. *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 669, 181 Fed. 674; *Matter of Mumford* (D. C., N. Car.), 43 Am. B. R. 218, 255 Fed. 108.

162. *Matter of Acetelli* (D. C., N. Y.), 21 Am. B. R. 537, 173 Fed. 121; *Savage v. Savage* (C. C. A., 4th Cir.), 15 Am. B. R. 599, 141 Fed. 346. See also *Matter of Mumford* (D. C., N. Car.), 43 Am. B. R. 218, 255 Fed. 108.

162a. *Kelly v. Minor* (C. C. A., 4th Cir.), 41 Am. B. R. 215, 252 Fed. 115.

(11) LICENSES, FRANCHISES, AND PERSONAL PRIVILEGES.—(I) *In general*.—Property rights which by their terms are either nonassignable or restricted to the person originally acquiring them, often furnish puzzling problems. Thus of nonassignable leases. The English and American rules seem to be different; the better American opinion is that a bankruptcy, even if voluntary, is not a breach of a covenant not to assign.<sup>165</sup> The trustee of a bankrupt tenant is, therefore, entitled to the leased premises for the remainder of the term.<sup>166</sup> Pensions or annuities payable to State or municipal employees after long and continued services are not in the nature of property rights, but are public bounties as awards for such services, granted as an encouragement for continuance in official positions; they are not subject to execution and are not transferable, and hence do not pass to trustees in bankruptcy.<sup>167</sup>

(II) *Personal contracts*.—A contract between a publisher and an author, whereby the former undertakes to publish and market literary productions of the latter, is not assignable;<sup>168</sup> nor is a contract with a person for the manufacture by him of a particular commodity requiring special skill of the manufacturer.<sup>169</sup> But there is a difference between an absolute assignment of a contract and an assignment of rights under a contract. Thus, under a contract between an insurance company and its agent, commissions on renewal premiums on policies written prior to the agent's adjudication as a bankrupt, but unaccrued at that time, pass to his trustee as property which the bankrupt might have assigned without the consent of the company.<sup>170</sup> The "medical and surgical practice and good will" acquired by a bankrupt physician by contract with another physician does not pass to his trustee in bankruptcy.<sup>171</sup>

(III) *Franchises and licenses*.—Whether a franchise or a license passes to the trustee on the bankruptcy of its owner depends usually on the terms of the instrument creating it, or, if that is silent, on whether in its nature it calls for personal skill or discretion.<sup>172</sup> It has been held that a franchise to construct a turnpike road, and to collect the tolls was a personal trust and did not pass to the assignee in bankruptcy since the person who had the franchise could not voluntarily assign it, the consent of the party conferring the franchise being necessary by reason of the personal character of the work to be performed.<sup>173</sup> But a franchise which gave to one the right to take tolls from persons crossing a certain bridge has been held to be assignable.<sup>174</sup> It is already well settled that a bankrupt's interest in a license to sell liquors

163. *Matter of Lingafelter* (C. C. A., 6th Cir.), 24 Am. B. R. 636.

164. *Hawk v. Hawk* (D. C., Ark.), 4 Am. B. R. 463, 102 Fed. 679; *In re Garner* (D. C., Ga.), 6 Am. B. R. 596, 110 Fed. 123; *In re Rooney* (D. C., Vt.), 6 Am. B. R. 478, 106 Fed. 601; *Matter of Tietje* (D. C., N. Y.), 44 Am. B. R. 638, 263 Fed. 917.

165. For the English rule, see *Doe v. Bevan*, 3 Maule & S. 353; *Doe v. Smith*, 5 Taunt. 795; *Dommett v. Bedford*, 3 Ves. 148. For the American, *Starkweather v. Cleveland Ins. Co.*, Fed. Cas. 13,308; *Perry v. Lorillard*, 61 N. Y. 214.

A tenant's covenant not to assign his lease without the landlord's permission in writing does not apply to an adjudication of the tenant's bankruptcy. *In re Bush* (D. C., R. I.), 11 Am. B. R. 415, 126 Fed. 878; *Matter of Frasin & Oppenbeim* (D. C., N. Y.), 23 Am. B. R. 289, 174 Fed. 713.

166. *In re Adams* (D. C., Conn.), 14 Am. B.

R. 23, 134 Fed. 142; *In re Rubel* (D. C., Wis.), 21 Am. B. R. 566, 166 Fed. 131.

167. *Matter of Hoag* (D. C., N. Y.), 36 Am. B. R. 142, 227 Fed. 478.

168. *Matter of McBride & Co.* (D. C., N. Y.), 12 Am. B. R. 81, 132 Fed. 286.

169. *Jetter Brewing Co. v. Scollan*, 15 Am. B. R. 300, 111 N. Y. App. Div. 925, 96 N. Y. Supp. 1130.

170. *Matter of Wright* (C. C. A., 2d Cir.), 19 Am. B. R. 454, 157 Fed. 544, affg. 18 Am. B. R. 198, 157 Fed. 544, revg. 16 Am. B. R. 778.

171. *In re Myers* (C. C. A., 7th Cir.), 31 Am. B. R. 24, 208 Fed. 407.

172. *Parsons on Contracts*, Part II, ch. 12, § 9; *People v. Duncan*, 41 Cal. 507; *Stewart v. Hargrove*, 23 Ala. 429.

173. *People v. Duncan*, 41 Cal. 507.

174. *Stewart v. Hargrove*, 23 Ala. 429.

175. *In re Brodbine* (D. C., Mass.), 2 Am. B. R. 53, 93 Fed. 643; *In re Fisher* (D. C., Mass.), 3 Am. B. R. 406, 98 Fed. 88, affd. as *Fisher v. Cushman* (C. C. A., 1st Cir.),

passes to his trustee;<sup>175</sup> but this question is dependent upon the statute under which the license is issued,<sup>176</sup> and whether it was granted before or after the bankrupt's adjudication.<sup>177</sup> If the law under which a liquor license is granted makes it a mere personal privilege and not a property right, it may not be mortgaged, and where it is attempted, the mortgagee's interest will not prevail as against that of the licensee's trustee in bankruptcy.<sup>178</sup> A license to occupy a city market is property passing upon the bankrupt licensee, and the court will order an assignment to the trustee of such property.<sup>179</sup> A trustee must conform in all respects to a license which comes to him upon the bankruptcy of a licensee; in respect to such license he occupies the same position as the bankrupt licensee.<sup>180</sup>

(IV) *Seat in stock exchange.*—It has been held that the bankrupt may be ordered to transfer a seat in a stock exchange to his trustee.<sup>181</sup> But the

4 Am. B. R. 646, 103 Fed. 860; *In re Becker* (D. C., Pa.), 3 Am. B. R. 412, 98 Fed. 407; *In re May* (Ref., Minn.), 5 Am. B. R. 1; *Matter of Weiss & Knaup* (D. C., Pa.), 23 Am. B. R. 59, 173 Fed. 718, holding that the right to apply for a renewal of a liquor license is an asset which passes to the trustee. Compare *In re Emrich* (D. C., Pa.), 4 Am. B. R. 99; 101 Fed. 231.

176. Assignability of liquor license under State law.—*In re McArdle* (D. C., Mass.), 11 Am. B. R. 358, 126 Fed. 442, in which case the court applied the case of *In re Fisher* (D. C., Mass.), 3 Am. B. R. 406, 98 Fed. 88, as limiting the right of a trustee to realize upon the value of a liquor license to a case where the granting authority gave its assent thereto; it was there held that a bankruptcy court should not enforce the claim of a mortgagee to the proceeds of the bankrupt's liquor license, where the granting power, on grounds of public policy and interest, declines to recognize any right in the licensee to mortgage his license, and any claim of the mortgagee therein. *In re Olewine* (D. C., Pa.), 11 Am. B. R. 40, 125 Fed. 840; *Tracy v. Ginsberg*, 16 Am. B. R. 792, 189 Mass. 260; *Snyder v. Bougher*, 16 Am. B. R. 792, 214 Pa. St. 453, holding that although a liquor license may not be sold by the trustee, yet the fixtures and furniture may be sold on condition that the license shall be transferred to the purchaser by the license court; *Matter of Keller* (Ref., Ga.), 16 Am. B. R. 727, arising under Georgia statute.

177. *Whitlock's License*, 22 Am. B. R. 262, 39 Pa. Super. Ct. 34.

Liquor license; unexpired term and right to renewal.—Where a bankrupt at the date of his adjudication holds an unexpired liquor license with the right to a renewal, the unexpired term and the right to a renewal pass to his trustee and upon their sale by the receiver the bankrupt may be ordered to join in proceedings for a renewal necessary to make the sale effective. *Matter of Doyle* (C. C. A., 3d Cir.), 31 Am. B. R. 571, 209 Fed. 1, revg. 30 Am. B. R. 58, 205 Fed. 543.

178. *Gilday v. Warren*, 69 Conn. 237, 37 Atl. 404; *Joyce on Intoxicating Liquors*, §

228. See also *Tracy v. Ginsberg*, 16 Am. B. R. 792 (note), 189 Mass. 260, 75 N. E. 637.

The statutes of Virginia provide that no license to traffic in liquors shall be granted to any person who is not a qualified voter of the county or city in which the business is to be conducted; that if the licensee is a corporation, its agent selling such liquor must be so qualified. The applicant must be a fit person and personally superintend the business. Every license is deemed to confer a personal privilege and may only be assigned to a person to whom it might originally have been granted, the validity of such assignment depending upon a certificate in favor of the assignee made by the court granting the original license. In case of the death of the licensee, his personal representative has like powers of assignment. Under such provisions, held that the trustee of a bankrupt licensee is entitled to the proceeds of such license as against a brewing company claiming the same by virtue of an attempted assignment thereof, given prior to the granting of the license, as security for a loan to the bankrupt of the greater part of the license fee. *In re Flaherty* (D. C., Va.), 25 Am. B. R. 943, 184 Fed. 962.

A stock of liquors held by a bankrupt, duly licensed under the statutes of a State, is property which passes to the trustee in bankruptcy, although under the State statute the trustee cannot sell or dispose of the same. *Strub v. Gamble* (C. C. A., 8th Cir.), 34 Am. B. R. 229, 221 Fed. 253.

179. *In re Emrich* (D. C., Pa.), 4 Am. B. R. 99, 101 Fed. 231.

180. *In re Spitzel & Co.* (D. C., N. Y.), 21 Am. B. R. 729, 168 Fed. 156.

Fountain pens under license agreement.—Where a fountain pen company, having delivered pens under a license agreement for sale at retail, fails to comply with the law of bailments of West Virginia, its patented articles pass absolutely without any limitation into the hands of the trustee in bankruptcy of the licensee. *Waterman Co. v. Kline* (C. C. A., 4th Cir.), 37 Am. B. R. 252, 234 Fed. 891.

181. *In re Page* (D. C., Pa.), 4 Am. B. R.

question as to whether a seat in a stock exchange belongs to a bankrupt and is, therefore, to be administered as part of his assets by the trustee depends upon the facts in each particular case.<sup>182</sup> The fact that the sale of a seat in a stock exchange is hindered by conditions contained in the by-laws or constitution of the exchange would not affect the question; the court may direct the bankrupt member to take such action as may be required to pass title.<sup>183</sup> Although the seat passes to the member's trustee in bankruptcy, it is not available to him as an asset of the estate, until the claims of other members of the exchange have been settled by the sole tribunal entitled to pass upon the same according to the laws of the exchange.<sup>184</sup>

(12) LIFE INSURANCE POLICIES.—(I) *In general*.—These rights are akin to those personal privileges just considered. The bankrupt is obliged to enumerate such policies in Schedule B (3) accompanying his petition. Here, also, the test is: Was the interest of the insured transferable or subject to levy? Where a policy has been pronounced valueless and turned over to the bankrupt, and the premiums thereof are paid either by himself or his wife, and the bankrupt dies soon after the policy is so turned over, the proceeds of the policy do not belong to his estate in bankruptcy.<sup>185</sup> Creditors not participating in the distribution of the estate may recover on life insurance policies of the bankrupt although they participated in the election of trustee and were represented at meetings of the creditors.<sup>185a</sup> The meaning and effect of the proviso clause in subdivision (5) is considered in a later paragraph.<sup>186</sup>

(II) *Cash surrender value*.—If the policy has an expressed cash surrender value, payable to the bankrupt, and enforceable by him, it is, of course, within

467, 102 Fed. 747; *In re Gaylord* (D. C., Mo.), 7 Am. B. R. 195, 111 Fed. 717; *Matter of Hurlbutt* (C. C. A., 2d Cir.), 13 Am. B. R. 50, 68 C. C. A. 216. See Am. Bankr. Dig. § 356.

182. *Burleigh v. Foreman* (C. C. A., 1st Cir.), 12 Am. B. R. 88, 130 Fed. 13, revg. 9 Am. B. R. 237, 118 Fed. 348; *Board of Trade v. Weston* (C. C. A., 7th Cir.), 40 Am. B. R. 263, 243 Fed. 332; *Matter of Stringer* (C. C. A., 2d Cir.), 41 Am. B. R. 510, 253 Fed. 352.

*Seat in stock exchange as property*.—In the case of *Page v. Edmunds*, 187 U. S. 506, 9 Am. B. R. 277, 47 L. Ed. 318, 23 Sup. Ct. 200, affg. 5 Am. B. R. 707, 107 Fed. 89, it was held that a seat or partnership in a stock exchange, which by its articles provided that a member may sell his partnership provided there is no unsettled contract or claim against him by any other member of the exchange, arising out of the business of the exchange, subject to the approval of the proper authorities, is property which prior to the filing of the petition the bankrupt might have transferred, and which, therefore, passes to and vests in his trustee. See also *Cohen v. Budd*, 17 Am. B. R. 329, 52 N. Y. Misc. 217, 103 N. Y. Supp. 45; *Matter of Gregory* (C. C. A., 2d Cir.), 23 Am. B. R. 270, 174 Fed. 629; *Wrede v. Clark* (Sup. Ct., N. Y.), 21 Am. B. R. 821, 132 App. Div. 293, 117 N. Y. Supp. 5, holding that a property right in a seat on the N. Y. Stock Exchange passes to a receiver in supplementary proceedings or to a trustee in bankruptcy as the case may be, but if an order in supplementary proceedings is served prior to the four months' period, the title of the receiver appointed in such proceedings relates back to the commencement thereof, and is superior to the title of the trustee.

183. *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 758, 150 Fed. 731; *In re Hurlbutt & Co.* (C. C. A., 2d Cir.), 13 Am. B. R. 50, 135 Fed. 504; *Board of Trade v. Weston* (C. C. A., 7th Cir.), 40 Am. B. R. 263, 243 Fed. 332.

184. *In re Currie* (C. C. A., 2d Cir.), 26 Am.

B. R. 345, 185 Fed. 263; *Sollinsky v. N. Y. Stock Exchange* (D. C., N. Y.), 44 Am. B. R. 58, 200 Fed. 268.

*Effect of rules of exchange*.—A stock-brokerage firm loaned stock that it had purchased for a customer to another firm as security for a deposit. The rules of the stock exchange of which both firms were members, provide that on the insolvency of a member other members shall have a lien on his seat for debts due them, and also that other members holding securities of the insolvent must close them out under the rules of the exchange. Held, that the rules of the exchange became part of the contract between the members and that the firm holding the security was bound to sell it as provided by the rules before it could establish any claim to the proceeds of the sale of the seat if the amount realized from the stock was insufficient, and consequently they had but one security for their debts, and as this was sufficient they never became entitled to a lien on the stock exchange seat and therefore the creditor had no right of subrogation against such seat. *Matter of Van Schaick & Co.* (C. C. A., 2d Cir.), 37 Am. B. R. 59, 228 Fed. 465.

185. *Meyers v. Josephson* (C. C. A., 5th Cir.), 10 Am. B. R. 687, 124 Fed. 734; *Benjamin v. Chandler* (D. C., Pa.), 15 Am. B. R. 439, 142 Fed. 217.

185a. *Andrews v. Nix & Co.* (U. S. Sup. Ct.), 41 Am. B. R. 260, 38 Sup. Ct. 249.

186. See discussion under this section, *post*, subtitle "Exempt property."

the proviso, and unless the amount thereof is paid or secured as therein provided, it passes to the trustee.<sup>187</sup> A policy may have a cash surrender value, although none be expressed in the policy; if it have a value recognized by the practice of the company so that upon a surrender of it the insured would receive a financial benefit, it has a cash surrender value.<sup>188</sup> Cash surrender value means the amount which would have been paid by the company had the policy been surrendered, even though no amount was stipulated in the policy.<sup>189</sup> If it appear that the company will pay a prescribed amount upon the surrender of the policy, the effect is the same as though there was an expressed cash surrender value, and the bankrupt may retain the policy upon paying or securing the payment of such amount.<sup>190</sup> Such a policy so passes to the trustee, even without the consent or assignment of the beneficiary, and the bankrupt may be ordered to execute any necessary papers to accomplish the transfer.<sup>191</sup> Where, however, there is no surrender value, as, for instance, in "ordinary life" policies,<sup>192</sup> nothing passes to the trustee.<sup>193</sup> It is not the policy, but the cash surrender value thereof, which passes to the trustee.<sup>194</sup> So that if the cash surrender value is paid into the estate, by or in behalf of the bankrupt, the policy, and all other rights under it, revert to the bankrupt.<sup>195</sup> And if the bankrupt has borrowed upon his policy from the com-

187. In re Diack (D. C., N. Y.), 3 Am. B. R. 723, 100 Fed. 770; In re McDonnell (D. C., Iowa), 4 Am. B. R. 92, 101 Fed. 239; In re Moore (D. C., Tenn.), 23 Am. B. R. 109, 173 Fed. 679; In re Wolff (D. C., N. Y.), 21 Am. B. R. 452, 165 Fed. 984.

No default in premium.—The trustee is entitled to the cash surrender value although no default in premium has been made at the date of bankruptcy. *Traveler's Ins. Co. v. Middlekamp* (Colo. Sup. Ct.), 44 Am. B. R. 403, 185 Pac. 835.

188. *Malone v. Cohn* (C. C. A., 5th Cir.), 38 Am. B. R. 57, 236 Fed. 882, aff'd. 43 Am. B. R. 1, 39 Sup. Ct. 141; In re Boardman (D. C., Mass.), 4 Am. B. R. 620, 103 Fed. 788; *Matter of Gannon* (C. C. A., 2d Cir.), 40 Am. B. R. 518, 247 Fed. 932.

189. *Hiscock v. Mertens*, 205 U. S. 202, 17 Am. B. R. 484, 51 L. Ed. 771, 27 Sup. Ct. 488, affg. 15 Am. B. R. 701, 142 Fed. 445, revg. 12 Am. B. R. 712, 131 Fed. 972; *Holden v. Stratton*, 198 U. S. 202, 14 Am. B. R. 94, 49 L. Ed. 1018, 25 Sup. Ct. 656, containing dicta to same effect.

The test of "surrender value" is whether the policy has a present cash value available to the insured bankrupt in accordance with fixed method, and by the exercise of his own unassisted will. *Matter of Samuels* (C. C. A., 2d Cir.), 42 Am. B. R. 434, 254 Fed. 775.

190. *Matter of Phelps* (Ref., N. Y.), 15 Am. B. R. 170; In re Coleman (C. C. A., 2d Cir.), 14 Am. B. R. 461, 136 Fed. 818; *Clark v. Equitable Life Assur. Co.* (C. C., Pa.), 16 Am. B. R. 137, 143 Fed. 175; *Gould v. New York Life Ins. Co.* (D. C., Ark.), 13 Am. B. R. 233, 132 Fed. 927; In re Buelow (D. C., Wash.), 3 Am. B. R. 389, 98 Fed. 86; In re White (C. C. A., 2d Cir.), 23 Am. B. R. 90, 174 Fed. 383; In re Hettling (C. C. A., 2d Cir.), 23 Am. B. R. 161, 175 Fed. 65; *Equitable Life Assurance Co. v. Miller* (C. C. A., 8th Cir.), 25 Am. B. R. 560, 185 Fed. 98; In re Herr (D. C., Pa.), 25 Am. B. R. 141, 182 Fed. 715; *Matter of Samuels* (C. C. A., 2d Cir.), 42 Am. B. R. 434, 254 Fed. 775. Contra: *Van Kirk v. Slate Co.* (D. C., N. Y.), 15 Am. B. R. 239, 140 Fed. 88; In re Welling (C. C. A., 7th Cir.), 7 Am. B. R. 340, 113 Fed. 189; In re Slingluff (D. C., Md.), 5 Am. B. R. 76, 106 Fed. 154, repudiating In re Hernick (Ref., Md.), 1 Am. B. R. 713, 88e also In re Becker (D. C., N. Y.), 5 Am. B. R. 438, 106 Fed. 54.

191. In re Diack (D. C., N. Y.), 3 Am. B. R.

723, 100 Fed. 770; In re Whelpley (D. C., N. Y.), 22 Am. B. R. 433, 169 Fed. 1019. For the duty of the trustee touching policies of life insurance, see In re Welling (C. C. A., 7th Cir.), 7 Am. B. R. 340, 113 Fed. 118.

192. *Gould v. New York Life Ins. Co.* (D. C., Ark.), 13 Am. B. R. 233, 132 Fed. 927.

A trustee cannot claim any more than the cash surrender value of a life insurance policy. He has no right whatever to a policy in which there is no cash surrender value. *King v. Miles* (Miss. Sup. Ct.), 34 Am. B. R. 93, 67 So. 182.

193. In re Lange (D. C., Iowa), 1 Am. B. R. 189, 91 Fed. 361; In re Buelow (D. C., Wash.), 3 Am. B. R. 389, 98 Fed. 86; In re McDonnell (D. C., Iowa), 4 Am. B. R. 92, 101 Fed. 239; In re Judson (C. C. A., 2d Cir.), 27 Am. B. R. 704, 192 Fed. 834, aff'd. 228 U. S. 459, 30 Am. B. R. 6, 57 L. Ed. 920, 33 Sup. Ct. 564; *Matter of Fetterman* (D. C., Ohio), 39 Am. B. R. 824, 243 Fed. 975.

Policy with optional benefits.—Where at the date of adjudication of a bankrupt his wife is the sole beneficiary under a life insurance policy upon which the premiums have all been paid and the bankrupt is only entitled to certain optional benefits at the maturity of the policy, such optional benefits do not pass to the trustee in bankruptcy under section 70-a. *Matter of Churchill* (C. C. A., 7th Cir.), 31 Am. B. R. 1, 209 Fed. 708, revg. 29 Am. B. R. 153, 198 Fed. 711.

194. *Burlingham v. Crouse*, 228 U. S. 459, 30 Am. B. R. 6, 57 L. Ed. 920, 33 Sup. Ct. 564; *Everett v. Judson*, 228 U. S. 474, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 8; *Matter of Hammel & Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 46, 221 Fed. 56; *Matter of Lyon* (Ref., Penn.), 32 Am. B. R. 433; *Matter of Simmons* (C. C. A., 1st Cir.), 43 Am. B. R. 3, 255 Fed. 521, revg. 42 Am. B. R. 209, 253 Fed. 468.

195. Payment of cash surrender value to trustee.—A policy of insurance, the cash surrender value of which has been paid by the bankrupt to his trustee, reverts to the bankrupt clear of the claims of all creditors who have proven their debts. *Matter of Flanigan* (D. C., Pa.), 35 Am. B. R. 807, 228 Fed. 839; *Matter of Eddy* (D. C., Vt.), 36 Am. B. R. 294, in which the referee held that the right of the trustee is measured by the amount of the cash surrender value as of the date of the filing of

pany beyond the cash value thereof, the trustee of the bankrupt has no interest therein.<sup>198</sup> Where the bankrupt dies prior to adjudication, the trustee is only vested with the cash surrender value of the policy; the balance of the proceeds passes to his executor or administrator. This is so because the trustee is vested at the time of adjudication with the property owned by the bankrupt at the time of filing the petition, and at that time his interest in the policy was represented by its cash surrender value.<sup>197</sup> And where a trustee has obtained a judgment in an action to recover premiums paid by the insured while insolvent, such judgment does not preclude recovery by an executor or administrator of the proceeds of the policy, over and above the cash surrender value at the time of the filing of the petition against the decedent.<sup>198</sup> It is the purpose of the proviso clause of subdivision (5) to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset, otherwise to leave the insured the benefit of his life insurance.<sup>199</sup> But the loan value of a policy will not be treated as a cash surrender value so as to make it a cash asset which will pass to the trustee.<sup>200</sup> The cash surrender value must be ascertained as of the date of adjudication, and where there are vested interests in the policy belonging to others, besides the bankrupt, such interests may be determined by the trustee, and distribution may be made accordingly.<sup>201</sup>

(III) *Effect of assignment.*—Where a policy is assigned within the four months' period, in payment of an antecedent debt, it is, of course, subject to avoidance as in the case of an unlawful transfer of any other property. But if it be transferred or assigned in good faith for a present consideration, the trustee in bankruptcy is only entitled to what would have been the value of the policy at the time of the adjudication,<sup>202</sup> and if after the adjudication the bankrupt die the beneficiary may redeem the policy by paying the value of the policy, to be determined as of that time.<sup>203</sup>

(IV) *Payable to wife or designated beneficiaries.*—This subsection does not include policies payable to the wife or kindred of the insured, but only applies to policies payable to the insured or his personal representatives.<sup>204</sup>

the petition,—as to all other matters the policies remain under the control of the bankrupt.

198. In re Judson (D. C., N. Y.), 26 Am. B. R. 775, 188 Fed. 702; Burlington v. Crouse (C. C. A., 2d Cir.), 24 Am. B. R. 632, 181 Fed. 479, 104 C. C. A., 227, aff'd. 228 U. S. 459, 30 Am. B. R. 6, 57 L. Ed. 920, 33 Sup. Ct. 564; Matter of Eddy D. C., Vt.), 36 Am. B. R. 294; Matter of Williams (D. C., Pa.), 41 Am. B. R. 611, 252 Fed. 924.

197. Everett v. Judson, 228 U. S. 474, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 568. See also Andrews v. Partridge, 228 U. S. 479, 30 Am. B. R. 4, 57 L. Ed. 929; Burlington v. Crouse, 228 U. S. 459, 30 Am. B. R. 6, 57 L. Ed. 920, 33 Sup. Ct. 564.

199. King v. Miles (Miss. Sup. Ct.), 34 Am. B. R. 93, 67 So. 182.

200. Burlington v. Crouse, 228 U. S. 459, 30 Am. B. R. 6, 57 L. Ed. 920, 33 Sup. Ct. 564, affg. 24 Am. B. R. 682, 181 Fed. 479, 104 C. C. A. 227. See also Everett v. Judson, 228 U. S. 474, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 568; Andrews v. Partridge, 228 U. S. 479, 30 Am. B. R. 4, 57 L. Ed. 929; Malone v. Cohn (C. C. A., 5th Cir.), 38 Am. B. R. 87, 230 Fed. 882, aff'd. 43 Am. B. R. 1, 39 Sup. Ct. 141.

201. Matter of Lyon (Ref., Pa.), 32 Am. B. R. 433; Matter of Gannon (C. C. A., 2d Cir.), 40 Am. B. R. 518, 247 Fed. 932. Contra: Richter

v. Rockhold (C. C. A., 5th Cir.), 42 Am. B. R. 384, 253 Fed. 941.

The loan value of a policy for the benefit of the bankrupt's wife, where the bankrupt has the right to change the beneficiary, will not be treated as a cash surrender value, and the bankrupt ordered to borrow the money and turn the proceeds over to the trustee. Matter of Hammel & Co. (C. C. A., 2d Cir.), 34 Am. B. R. 46, 221 Fed. 56.

201. Matter of Dreull & Co. (D. C., La.), 34 Am. B. R. 373, 221 Fed. 796.

202. Matter of Levy (D. C., N. Y.), 36 Am. B. R. 181, 227 Fed. 1011.

Duties of trustee in collecting proceeds of pledged life insurance policy.—Where a person to whom a life insurance policy has been pledged is unable to collect the surrender value, it is proper that the trustee in bankruptcy be directed on the delivery to him of the policy, to receive from the bankrupt, or collect from the insurance company such surrender value and apply the proceeds to the payment of the indebtedness of the bankrupt to the pledgee. Matter of Baird (D. C., Del.), 40 Am. B. R. 552, 245 Fed. 504.

203. Matter of Levy (D. C., N. Y.), 36 Am. B. R. 181, 227 Fed. 1011.

204. Miekman v. Arthe (C. C. A., 2d Cir.), 34 Am. B. R. 536, 223 Fed. 507, revg. 32 Am. B. R. 519, 213 Fed. 642; Matter of Hammel & Co. (C. C. A., 2d Cir.), 34 Am. B. R. 46, 221 Fed. 56;



Hence, where the cash surrender value of a policy on the life of a bankrupt is only payable upon the joint consent of the bankrupt and the beneficiary, his wife, it is not an asset passing to the trustee in bankruptcy.<sup>205</sup> But where a wife's interest in the husband's policy is contingent upon her surviving him, and in case of her predecease is payable to his estate, and he may surrender at any time and take a paid-up policy or other value, the policy is property and passes to his trustee in bankruptcy.<sup>206</sup> The rule is otherwise where the husband has no right to revoke the designation of the beneficiary and has no right to the surrender value of the policy during the life of his wife.<sup>206a</sup> In Pennsylvania a policy of insurance upon a bankrupt's life, taken out for the benefit of, or *bona fide* assigned to, his wife or children, vests in them free of all claims of the creditors of the bankrupt.<sup>207</sup> Where the policy permits the insured to change

Matter of Cohen (D. C., Ga.), 37 Am. B. R. 189, 230 Fed. 733; Matter of Arkin (C. C. A., 2d Cir.), 36 Am. B. R. 604, 231 Fed. 947; Matter of Lyon (Ref., Pa.), 32 Am. B. R. 483; Pulsifer v. Hussey, 9 Am. B. R. 657, 97 Me. 434; Matter of Hunter (D. C., N. Y.), 41 Am. B. R. 445; Matter of Williams (D. C., Pa.), 41 Am. B. R. 611, 232 Fed. 924; Matter of Simmons (C. C. A., 1st Cir.), 43 Am. B. R. 3, 255 Fed. 521, revg. 42 Am. B. R. 200, 253 Fed. 466. See Am. Bankr. Dig. § 364.

Where a policy ran to a wife if she survived her husband, and in the event of her predecease then to him or his personal representatives it has been held that, subject to such contingent interest in (the husband) the policies and the money which became due under them belonged to (the wife), and it was beyond his power to transfer them to any other person or to surrender them. *In re Holden* (C. C. A., 9th Cir.), 7 Am. B. R. 615, 113 Fed. 143, 51 C. C. A. 90 (revd. on another point 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018).

And it has also been said that "a policy taken out by the insured on his own life and expressed to be for the benefit of his wife, is . . . in the absence of any statutory provision, in the nature of an executory trust for her benefit of which she could not be deprived without her consent." *Boyd v. Massachusetts, etc., Life Ins. Co.*, 153 Mass. 544, 27 N. E. 663. See also *In re Judson* (D. C., N. Y.), 26 Am. B. R. 775, 188 Fed. 702.

**Wife beneficiary by designation or assignment; Georgia statute.**—A bankrupt at the time of adjudication held three life insurance policies with cash surrender values. Several years before bankruptcy he had made his wife the beneficiary of all three policies, in the case of one by designation assented to by the company, and in the case of the others by assignment, and in both designation and assignment he had reserved the right to change his beneficiary. The Georgia statute (Code, § 2498) provides as follows: "The assured may direct the money to be paid to his personal representatives, or to his widow, or to his children, or . . . assignees; and upon such direction given, and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent." Held that under this statute construed in connection with section 70 (a) of the Bankruptcy Act the trustee did not take title to the cash value of the policies. *Matter of Cohen* (D. C., Ga.), 37 Am. B. R. 189, 230 Fed. 733.

An industrial life insurance policy held by a bankrupt payable to his executors, administrators or assigns, subject to the right of the

insurer to pay the proceeds of the policy to any relative or to any other person entitled to same for burial expenses or for any other purpose, does not pass to the trustee in bankruptcy. *Matter of Gannon* (D. C., N. Y.), 39 Am. B. R. 783, 241 Fed. 733.

<sup>205.</sup> *Matter of Lyon* (Ref., Pa.), 32 Am. B. R. 483; *Matter of Fetterman* (D. C., Ohio), 39 Am. B. R. 834, 243 Fed. 975.

<sup>206.</sup> *Matter of White* (C. C. A., 2d Cir.), 23 Am. B. R. 90, 174 Fed. 333; *Matter of Hettling* (C. C. A., 2d Cir.), 23 Am. B. R. 161, 175 Fed. 65; *In re Loveland* (D. C., Mass.), 27 Am. B. R. 765, 192 Fed. 1005, holding that a policy payable to the wife of the insured, if he die prior to the period prescribed, or to him if he live for the period, and having a cash surrender value, passes to the trustee in bankruptcy of the insured; *Matter of Draper* (D. C., N. Y.), 32 Am. B. R. 203, 211 Fed. 230.

<sup>206a.</sup> *Matter of Majors* (D. C., Ore.), 39 Am. B. R. 642, 241 Fed. 538.

<sup>207.</sup> *In re Booss* (D. C., Pa.), 18 Am. B. R. 658, 154 Fed. 949; *Matter of Shoemaker* (D. C., Pa.), 35 Am. B. R. 22, 225 Fed. 320.

**Assignment of life insurance policy without consideration while insolvent.**—Where bankrupt holding a policy of insurance on his life payable to his own executors, administrators or assigns and having a cash surrender value then payable to him on demand, without changing the beneficiary as provided in the policy, at a time when insolvent, transferred the same by an assignment in writing to his wife who knew nothing of the transaction until after his bankruptcy and between the date of assignment and the time of bankruptcy, with the intent and effect of hindering, delaying and defrauding his creditors, unnecessarily paid the premiums on such policy two years in advance, the assignment cannot be sustained as against his trustee in bankruptcy, who may realize the surrender value of the policy for the benefit of the estate. *Kirkpatrick v. Johnson* (D. C., Pa.), 28 Am. B. R. 291, 197 Fed. 235.

Under the Pennsylvania act protecting insurance policies payable to the "wife or children or any dependent" upon the insured, it was held that a change of beneficiary, from the estate of the insured to his sister, within a month prior to his adjudication, did not operate to deprive the trustee of the proceeds of the policy since the sister was not shown to be dependent upon him. *South Side Trust Co. v. Wilmarth* (C. C. A., 3d Cir.), 29 Am. B. R. 29, 199 Fed. 418.

Nothing passes to the trustee where the wife, children or a dependent relative of the insured

the beneficiary at any time, his absolute dominion over the policy makes it property which passes to his trustee in bankruptcy, regardless of the fact that his wife is named as beneficiary in the first instance,<sup>208</sup> but this principle is subject to the control of State statutes which protect the wife's interest in such a policy.<sup>209</sup> Where a policy upon the expiration of the term gives the husband an annuity, and provides for payment of a specified sum to the wife

has been made the owner of the policy within the meaning of the Pennsylvania statutes, it having been taken out for them or bona fide assigned to them. *Matter of Jamison Bros. & Co.* (D. C., Pa.), 34 Am. B. R. 231, 222 Fed. 92.

<sup>208.</sup> *In re Dolan* (D. C., Pa.), 25 Am. B. R. 145, 182 Fed. 949; *Cohen v. Samuels* (U. S. Sup. Ct.), 40 Am. B. R. 384, 38 Sup. Ct. 36, revg. 38 Am. B. R. 251, 237 Fed. 790; *Matter of Hunter* (D. C., N. Y.), 41 Am. B. R. 445; *Rawls v. Penn Mutual Life Ins. Co.* (C. C. A., 5th Cir.), 42 Am. B. R. 612, 253 Fed. 725; *Cohn v. Malone* (U. S. Sup. Ct.), 43 Am. B. R. 1, 39 Sup. Ct. 141, affg. 38 Am. B. R. 87, 236 Fed. 882. *Contra: Matter of Jones* (D. C., Md.), 41 Am. B. R. 290, 249 Fed. 487.

**Recovery from company after payment to beneficiary.**—Where an insurance company, in good faith and without notice of any adverse claim, pays a policy, upon due proof, to the wife of the insured, named as beneficiary, the trustee in bankruptcy of the assured, who died before asserting his right to change the beneficiary, is not entitled to recover the amount of the policy from the company. *Frederick v. Metropolitan Life Ins. Co.* (C. C. A., 3d Cir.), 39 Am. B. R. 204, 239 Fed. 135.

**Effect of right to change beneficiary.**—In the case of *In re Herr* (D. C., Pa.), 25 Am. B. R. 142, 182 Fed. 718, the court said: "It is clear, under this showing, that the trustee is entitled to the policy or its surrender value. While the wife, as it stands, is the contingent beneficiary, the policy is under the complete control of the bankrupt, who may change the situation at any moment, and realize upon it, without regard to her, either giving it up and getting the surrender value, or continuing it with a newly designated beneficiary, just as he may choose. This absolute dominion over the policy makes it his, and it therefore passes with the rest of his property to his trustee, subject only to the right to redeem, as provided by the act, on paying the surrender value. This question has been considered in numerous cases, and by the decided weight of authority the right of the trustee has been sustained." See also *In re Diack* (D. C., N. Y.), 3 Am. B. R. 723, 100 Fed. 770; *In re Boardman* (D. C., Mass.), 4 Am. B. R. 620, 103 Fed. 783; *In re Coleman* (C. C. A., 2d Cir.), 14 Am. B. R. 461, 136 Fed. 818; *Matter of Phelps* (Ref., N. Y.), 15 Am. B. R. 170; *Clark v. Assur. Soc.* (C. C., Pa.), 16 Am. B. R. 137, 143 Fed. 175; *In re Wolff* (D. C., N. Y.), 21 Am. B. R. 452, 165 Fed. 984; *In re White* (C. C. A., 2d Cir.), 23 Am. B. R. 90, 174 Fed. 333; *In re Moore* (D. C., Tenn.), 23 Am. B. R. 100, 173 Fed. 609; *Matter of Hettling* (C. C. A., 2d Cir.), 23 Am. B. R. 161, 175 Fed. 65; *In re Orear* (C. C. A., 8th Cir.), 24 Am. B. R. 343, 178 Fed. 632; *Sanders v. Aetna Life Ins. Co.* (So. Car. Sup. Ct.), 31 Am. B. R. 854, 78 S. E. 532; *Matter of Young* (D. C., Ohio), 31 Am. B. R. 29, 208 Fed. 373, holding that under the Ohio statute (Code, § 9398), policies of insurance made payable to the wife of the insured do not pass to his trustee in bankruptcy, notwithstanding provisions in such policies authorizing him to change the beneficiary, or to receive a stipulated surrender value without her consent; *In re Orear* (C. C. A., 8th Cir.), 26 Am. B. R. 521, 189 Fed. 888; *Matter of Farrand* (D. C., Me.), 38 Am. B. R. 101, 235 Fed. 809; *Matter of Draper* (D. C., N. Y.), 32 Am. B. R. 203, 211 Fed. 230.

Where the bankrupt had insured his wife but had at any time the right to change the beneficiary and the policy had no cash surrender value, the loan value of the policy will not be treated as a cash surrender value, and the bankrupt compelled to make himself the beneficiary, borrow from the company the amount of the loan value and turn it over to his creditors. *Matter of Hammel & Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 46, 221 Fed. 58.

**909. Policy payable to wife exempt.**—Under the statutes in some States where the wife is a beneficiary, the policy has been held to be exempt, being protected, as it is said, against the claims of creditors, by the law of the States where the cases respectively arose. *In re Booss* (D. C., Pa.), 18 Am. B. R. 658, 154 Fed. 594; *In re Pfaffinger* (D. C., Ky.), 21 Am. B. R. 255, 134 Fed. 526; *In re Whepley* (D. C., N. H.), 22 Am. B. R. 433, 169 Fed. 1019; *In re Johnson* (D. C., Minn.), 24 Am. B. R. 277, 176 Fed. 591; *Holden v. Stratton*, 198 U. S. 202, 14 Am. B. R. 94, 49 L. Ed. 1018, 25 Sup. Ct. 656; *In re Carlon* (D. C., So. Dak.), 27 Am. B. R. 18, 189 Fed. 815.

**Exemption under State statute.**—At the end of a 20-year period, bankrupt, as insured, had exercised an option to withdraw in cash the accumulated surplus upon his life insurance policy and then made his wife instead of his executors, etc., the beneficiary thereof as a fully paid-up policy, reserving to himself, however, the right to change the beneficiary as provided in the policy. After withdrawing the accumulated surplus, the policy became entitled to certain annual dividends, payable to the beneficiary. Subsequently he was adjudicated a voluntary bankrupt. Held, that the policy was a strictly life insurance policy, the investment feature having been eliminated when the surplus was paid to the bankrupt, and being payable to the wife, it was exempt from the claims of the husband's creditors under the Wisconsin statute and not an asset of the bankrupt's estate; that even though the bankrupt had reserved the right to change the beneficiary, no such right passed to the trustee, as at the time of adjudication, the time when the trustee was vested with title, it was exempt by being then payable to the wife; and that the annual dividends, which were payable to the beneficiary and which were a mere incident of the policy, likely to vary in amount from year to year, depending upon interest rates and the cost of conducting the business, did not destroy its essential character as a purely life policy. *Allen v. Central Wisconsin Trust*

upon the husband's death, the trustee's interest is measured by the value of the annuity.<sup>210</sup> If a policy is payable to the husband at the expiration of the term, and the wife derives benefit therefrom only in case of the husband's death prior to such expiration, the husband's trustee in bankruptcy takes the cash surrender value of the policy.<sup>211</sup>

(V) *Bankrupt as beneficiary*.—Where a policy on the life of a person other than the bankrupt was in existence at the time of adjudication, and such policy named the bankrupt as beneficiary, subject to change by the insured, such bankrupt has no vested interest or property right in such policy during the life of the insured. If the insured dies subsequent to the adjudication, the proceeds of the policy should be paid to the bankrupt, and do not pass to his trustee.<sup>212</sup>

(13) *FIRE INSURANCE POLICIES*.—Fire insurance policies are rarely assets, unless a fire loss has occurred just prior to the bankruptcy.<sup>213</sup> The bankruptcy of the insured is not such a transfer of title as to nullify a policy under a clause giving that effect to a change of ownership.<sup>214</sup> An assignment of a fire insurance policy is valid and the trustee does not take title thereto in the absence of any circumstance showing that the bankruptcy act had been violated.<sup>215</sup>

Co. (Sup. Ct., Wis.), 26 Am. B. R. 126, 143 Wis. 381. See also *Matter of Churchill* (C. C. A., 7th Cir.), 31 Am. B. R. 1, 209 Fed. 766, revg. 29 Am. B. R. 153, 198 Fed. 711.

**Effect of divorce from bankrupt to give him right to change beneficiary; failure to exercise right prior to adjudication.**—Where bankrupt at the date of his adjudication was insured for the benefit of his wife and the policy of insurance was, by a statute of Missouri, declared to be for the separate benefit of the wife and exempt from claims of the husband's creditors, the fact that subsequently the wife secured a divorce from bankrupt, thereby giving him the right, both under the statute and by the terms of the policy, which he did not exercise, to change the beneficiary, does not vest the title of the policy in his trustee, as a trustee in bankruptcy, under § 70-a of the bankruptcy act, can take nothing save of the date of the adjudication of bankruptcy. *In re Orear* (C. C. A., 8th Cir.), 26 Am. B. R. 521, 189 Fed. 888.

<sup>210.</sup> *In re Schaefer* (D. C., Ohio), 26 Am. B. R. 340, 188 Fed. 187.

<sup>211.</sup> **Payment of policy to husband at maturity.**—It is not essential that the policy of insurance should expressly provide for a cash surrender value, but it is sufficient to permit a recovery by the trustee if the company has a recognized rule of paying a surrender value, and where such a policy on the life of bankrupt was payable to bankrupt at maturity, the beneficiaries to derive no benefits except in case of his death before maturity of policy, his trustee in bankruptcy was entitled to receive the cash surrender value of the policy upon default in the payment of premiums which cut off all interest of the beneficiaries and rendered unnecessary the nominating of a new bene-

ficiary by the bankrupt or trustee. *Equitable Life Assurance Co. v. Miller* (C. C. A., 6th Cir.), 26 Am. B. R. 560, 185 Fed. 98.

**When the designation of beneficiary is open to recall by the insured to whom belongs the right to cancel or surrender the policy, the beneficiary merely having been designated to receive the moneys payable on the death of the insured, the surrender value of the policy passes to the trustee upon the bankruptcy of the insured.** *Matter of Jamison Bros. & Co.* (D. C., Pa.), 34 Am. B. R. 231, 222 Fed. 92.

<sup>212.</sup> *In re Hogan* (C. C. A., 7th Cir.), 28 Am. B. R. 166, 194 Fed. 846.

<sup>213.</sup> *In re Hamilton* (D. C., Ark.), 4 Am. B. R. 543, 102 Fed. 683, 2 N. B. N. 969. See also *Long v. Farmers' State Bank* (C. C. A., 8th Cir.), 17 Am. B. R. 103, 147 Fed. 360. As to proceeds of fire insurance policy on property sold to the bankrupt on condition, see *In re Zitron* (D. C., Wis.), 30 Am. B. R. 172, 203 Fed. 79; *Matter of Lubber* (D. C., Pa.), 44 Am. B. R. 292, 261 Fed. 221.

**Property fraudulently transferred.**—A trustee cannot recover moneys received by a fraudulent transferee of property on a fire insurance policy unless he shows that the money was received to his use. *Underwood v. Winslow* (Mass. Sup. Jud. Ct.), 44 Am. B. R. 569, 125 N. E. 631.

<sup>214.</sup> *Starkweather v. Cleveland Ins. Co.*, Fed. Cas. 13,308. Compare *Gordon v. Mechanics & Traders' Ins. Co.*, 22 Am. B. R. 649, 120 La. Ann. 441, 45 So. 384; *Matter of Johnson* (D. C., Conn.), 33 Am. B. R. 104, 215 Fed. 660.

<sup>215.</sup> *Smith v. Retail Merchants' Fire Ins. Co.* (S. Dak. Sup. Ct.), 37 Am. B. R. 609, 158 N. W. 780; *Radford Grovery Co. v. Powell* (C. C. A., 5th Cir.), 35 Am. B. R. 790, 228 Fed. 1.

**An oral agreement to procure fire insurance for the benefit of the mortgagee will operate as an equitable assignment of the proceeds of policies taken out in the name of the mortgagor.** *Hanson v. Blake & Co.* (D. C., Me.), 19 Am. B. R. 325, 155 Fed. 342.

**Misapplication of proceeds of policy.**—Where a bankrupt immediately after a fire which occurred before bankruptcy, notified his creditors thereof by 'phone and letter and caused them to believe that as soon as he collected his fire insurance he would settle with them in full or in part at least, and after paying a creditor to whom he assigned a

(14) **PROPERTY SOLD TO THE BANKRUPT ON CONDITION.—(I) In general.**—Property in the possession of the bankrupt, sold to him on condition that title thereto will remain in the vendor until the purchase price is paid, will or will not pass to the trustee in bankruptcy, dependent upon the effect of such conditional sale as to the bankrupt's creditors under the law of the State.<sup>216</sup> The conditional vendor's interest is in the nature of a lien, effectual as against the vendee's creditors, if the requirements prescribed by State statute, as to filing, recording or other notice, have been fully met.<sup>217</sup> Where a conditional sale has been kept from record by a fraudulent agreement, the trustee of the vendee takes title.<sup>218</sup> If the bankrupt was in possession under a contract invalid as to creditors, as, for instance, because not filed or recorded in accordance with that law, both possession and title pass to the trustee.<sup>219</sup> Where the contract is filed between the time of filing the petition in bankruptcy and the adjudication it is void as against the trustee.<sup>219a</sup>

policy as security, used the balance for the purchase of a homestead, the creditors are entitled to have the insurance moneys applied pursuant to the bankrupt's agreement, and may follow the moneys improperly invested. Such an agreement constituted an equitable assignment or lien enforceable by the creditors. *Parlin & Orendorf Implement Co. v. Moulden* (C. C. A., 5th Cir.), 35 Am. B. R. 782, 228 Fed. 111.

216. *Potter Mfg. Co. v. Arthur* (C. C. A., 6th Cir.), 34 Am. B. R. 75, 220 Fed. 848; *John Deere Plow Co. v. Moury* (C. C. A., 6th Cir.), 34 Am. B. R. 884, 222 Fed. 1; *Matter of Pacific Elec. & Automobile Co.* (D. C., Wash.), 35 Am. B. R. 222, 224 Fed. 220; *Ward v. American Agricultural Co.* (C. C. A., 4th Cir.), 36 Am. B. R. 321; *Matter of Ledys* (C. C. A., 7th Cir.), 36 Am. B. R. 306, 229 Fed. 695; *Matter of Stoughton Wagon Co.* (C. C. A., 6th Cir.), 36 Am. B. R. 592, 231 Fed. 876; *Wood Mowing & Reaping Co. v. Croil* (C. C. A., 6th Cir.), 36 Am. B. R. 610, 231 Fed. 679; *Matter of Farmers Dairy Assn.* (D. C., Col.), 37 Am. B. R. 672, 234 Fed. 118; *Matter of Kruse* (D. C., Iowa), 37 Am. B. R. 687, 234 Fed. 470; *Matter of Eagle Ice, etc., Co.* (D. C., Pa.), 39 Am. B. R. 184, 241 Fed. 393; *Mergenthaler Linotype Co. v. Hull* (C. C. A., 1st Cir.), 39 Am. B. R. 187, 239 Fed. 26; *International Agric. Corp. v. Sparks* (D. C., S. Car.), 40 Am. B. R. 80, 250 Fed. 318; *Matter of Goyette & Lavigne* (D. C., Mass.), 40 Am. B. R. 109, 244 Fed. 638; *Park v. South Bend Chilled Plow Co.* (Tex. Civ. App.), 41 Am. B. R. 23, 199 S. W. 843; *De Laval Separator Co. v. Jones* (Me. Sup. Ct.), 41 Am. B. R. 440, 102 Atl. 968; *Matter of Am. Steel Supply Synd. Inc.* (D. C., Mich.), 43 Am. B. R. 271, 256 Fed. 876; *Smith v. Carukin* (C. C. A., 6th Cir.), 44 Am. B. R. 278, 259 Fed. 51; *Matter of Mutual Motors Co.* (D. C., Mich.), 44 Am. B. R. 337, 260 Fed. 341; *Matter of New Orleans Milling Co., Inc.* (D. C., La.), 45 Am. B. R. 364, 263 Fed. 354.

**State decisions control.**—*Matter of Sutton* (D. C., Mich.), 40 Am. B. R. 348, 244 Fed. 872.

**A verbal contract for the sale of personal property, when the seller retains the legal title, conditional upon full payment of the purchase price, is valid, if not otherwise in contravention of the statute of frauds.** *Shook v. Levi* (C. C. A., 9th Cir.), 39 Am. B. R. 549, 240 Fed. 121.

**A representation by a purchaser of cement that it was to be used in the construction of a certain building is a mere promise to be kept in the future and does not make the contract one for the conditional sale of the cement and title passes to the vendee's trustee in bankruptcy.** *Citizens Coal & Supply Co. v. Custard* (C. C. A., 4th Cir.), 40 Am. B. R. 360, 244 Fed. 425.

**Fixtures.**—Where a bankrupt has joined a set of fixtures to which he had acquired title to another set purchased from the same party

on a retained title contract so as to make it impossible to separate the two sets without great damage to the second set, the trustee in bankruptcy cannot sever the first set without compensating the seller for damage to the second set. *Matter of Dana Bros.* (D. C., Fla.), 42 Am. B. R. 95, 250 Fed. 268.

**Effect of filing general claim.**—The fact that a creditor files a general claim against a bankrupt for the purchase price of property, does not preclude him from reclaiming the property under a conditional sale contract, where, in his proof of claim he distinctly preserves his right to reclaim the property. *Smith v. Carukin* (C. C. A., 6th Cir.), 44 Am. B. R. 278, 259 Fed. 51.

217. *In re Sheets Printing, etc., Co.* (D. C., Ohio), 14 Am. B. R. 668, 136 Fed. 989. A leading case is *In re Garcewich* (C. C. A., 2d Cir.), 8 Am. B. R. 149, 118 Fed. 87, holding that where goods were sold to the bankrupt on credit, and with the understanding that the title to such of them as should not be sold by them should remain in the vendor until the payment of the purchase price, the title thereto vests in the trustee. See also *In re Burkle* (D. C., Conn.), 8 Am. B. R. 542, 116 Fed. 766, and *In re Howland* (D. C., N. Y.), 6 Am. B. R. 495, 109 Fed. 860.

**Under the law of Massachusetts, a chattel mortgage to be valid must be recorded, or the mortgagee must have taken and retained possession; and a bill of sale of personal property, unaccompanied by delivery, the grantor retaining possession, is invalid as against subsequent purchasers and attaching creditors.** *In re Harrington* (Ref., Mass.), 29 Am. B. R. 690.

**In Pennsylvania, property in the possession of a bankrupt on conditional sale can be levied upon and sold under judicial proceedings, and comes clearly within the definition of property which passes to the trustee.** *In re Burt* (D. C., Pa.), 19 Am. B. R. 123, 155 Fed. 267; *In re Rinker* (D. C., Pa.), 23 Am. B. R. 62, 174 Fed. 490.

**In Nebraska, a contract of conditional sale whereby the parties agree that the title shall remain in the vendor until the purchase price is fully paid is voidable by purchasers, attaching creditors, and judgment creditors only, if not filed in the office of the county clerk. It is valid against all other creditors, though unfilled, and hence against a trustee in bankruptcy who represents no attaching or judicial creditors.** *In re Great Western Mfg. Co.* (C. C. A., 8th Cir.), 18 Am. B. R. 259, 152 Fed. 123.

**The title reserved by a vendor in a contract of conditional sale, free from fraud, until payment of the purchase money, is good against all the world, except as to creditors of the vendee who had acquired a lien by levy or attachment, upon the property while it was in the possession of the vendee, and under § 70-a (5) his**

But creditors are not purchasers or lienors.<sup>220</sup> Independent of the statutory power conferred by § 47-a (2) as amended in 1910, the trustee in bankruptcy is neither a subsequent creditor without notice nor a purchaser or incumbrancer in good faith and for value.<sup>221</sup> In some jurisdictions the rule obtains that the delivery of goods, with the provision that the title shall not pass until the purchase price has been paid, is void as to the creditors of the party to whom they are delivered; in such case goods found in the bankrupt's possession, delivered under such conditions, pass to the trustee.<sup>222</sup> And where a statute provides that goods acquired or used by a trader in his business shall be deemed the property of such trader unless publicity is given to the fact that as to such goods he is an agent of the alleged owner, a failure to comply with such requirement as to publicity will cause the goods to pass to the trader's trustee in bankruptcy.<sup>223</sup> Where it is impossible to identify articles purchased under a conditional sale contract, either from the terms of the contract or the records of the vendor, the contract is invalid and may

trustee takes title, subject to the superior title of the vendor. *Davis v. Crompton* (C. C. A., 3d Cir.), 20 Am. B. R. 53, 158 Fed. 735.

In Georgia, a contract of conditional sale executed in good faith prior to the four months' period, but recorded within said period and without knowledge of the vendee's insolvency is valid as against the trustee in bankruptcy of the vendee. *Matter of Brown Wagon Co.* (D. C. Ga.), 35 Am. B. R. 383, 224 Fed. 266.

218. In *re Perkins* (D. C., Me.), 19 Am. B. R. 134, 155 Fed. 237.

219. In *re Yukon, etc., Co.* (D. C., Conn.), 2 Am. B. R. 805, 96 Fed. 326; In *re Frazier* (D. C., Mo.), 9 Am. B. R. 21, 117 Fed. 575; *Chesapeake Shoe Co. v. Seidner* (C. C. A., 4th Cir.), 10 Am. B. R. 466, 122 Fed. 593; In *re Press Post Publishing Co.* (D. C., Ohio), 13 Am. B. R. 797, 134 Fed. 998; In *re Smith & Shuck* (D. C., Iowa), 13 Am. B. R. 103, 132 Fed. 301; *McIlvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 169 Fed. 31; In *re Zephyr Mercantile Co.* (D. C., Tex.), 30 Am. B. R. 203, 203 Fed. 578. Compare In *re Leigh Bros.*, 96 Fed. 806, affg. 2 Am. B. R. 606; In *re Howland* (D. C., N. Y.), 6 Am. B. R. 495, 109 Fed. 869; *Citizens' Coal & Supply Co. v. Custard* (C. C. A., 4th Cir.), 40 Am. B. R. 369, 244 Fed. 425; *Matter of Mutual Motors Co.* (D. C., Mich.), 44 Am. B. R. 337, 260 Fed. 341.

219a. *Matter of Capital City Cap Co.* (D. C., N. J.), 41 Am. B. R. 604, 251 Fed. 664.

Under the Connecticut statute (§§ 4864, 4865, Conn. Stats., 1902) property sold by the bankrupt, but retained in his possession, is subject to be taken by bona fide creditors as his property, and the good faith of the parties makes no difference. In *re Fitzgerald* (D. C., Conn.), 26 Am. B. R. 710, 188 Fed. 763.

220. In *re Bozeman* (Ref., Ga.), 2 Am. B. R. 809; In *re Kellogg* (D. C., N. Y.), 7 Am. B. R. 270, 112 Fed. 52; In *re Hinsdale* (D. C., Vt.), 7 Am. B. R. 85, 111 Fed. 502; *Nauman Co. v. Bradshaw* (C. C. A., 8th Cir.), 27 Am. B. R. 565, 193 Fed. 350; *Matter of Terrell* (C. C. A., 8th Cir.), 40 Am. B. R. 713, 246 Fed. 743. Compare In *re McKay* (Ref., Ohio), 1 Am. B. R. 292.

**Reservation of title in vendor against intent of parties.**—Where a government contractor engaged in constructing a tug procured certain boilers for use therein, and all the parties contemplated that title would pass to the United States, the vendor of the boilers has no lien thereon as against the trustee in bankruptcy of the contractor, and other creditors, although there was a clause in the body of the contract reserving title. In *re Waters-Colver Co.* (D. C., N. Y.), 30 Am. B. R. 763, 206 Fed. 845.

221. In *re Pierce* (C. C. A., 8th Cir.), 19 Am.

B. R. 664, 157 Fed. 737; *American Laundry Mach. Co. v. Everybody's Laundry* (1a. Sup. Ct.), 43 Am. B. R. 294, 171 N. W. 161.

222. This is the rule in Pennsylvania.—In *re Tice* (D. C., Pa.), 15 Am. B. R. 97, 139 Fed. 52; In *re Rinker* (D. C., Pa.), 23 Am. B. R. 62, 174 Fed. 490; In *re Poore* (D. C., Pa.), 15 Am. B. R. 174, 139 Fed. 862, s. c. 15 Am. B. R. 407, 140 Fed. 786; *Matter of Rodgers & Hite* (D. C., Pa.), 16 Am. B. R. 401, 143 Fed. 594; *Matter of Hess* (D. C., Pa.), 14 Am. B. R. 635, 136 Fed. 933; In *re Beihl* (D. C., Pa.), 23 Am. B. R. 905, 176 Fed. 583.

Also in other jurisdictions, see In *re Franklin Lumber Co.* (D. C., N. J.), 17 Am. B. R. 443, 147 Fed. 852; In *re Builders Lumber Co.* (D. C., N. Car.), 17 Am. B. R. 449, 148 Fed. 244; In *re Bement* (C. C. A., 7th Cir.), 22 Am. B. R. 615, 172 Fed. 98, revg. *Mishawaka Woolen Mfg. Co. v. Smith*, 20 Am. B. R. 317, 158 Fed. 835; In *re Burke* (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994; In *re Priegle Paine Co.* (D. C., Ala.), 23 Am. B. R. 385, 175 Fed. 586; In *re Gilligan* (C. C. A., 7th Cir.), 23 Am. B. R. 668, 152 Fed. 605; *Becher Co. v. Gill* (C. C. A., 8th Cir.), 30 Am. B. R. 429, 206 Fed. 36.

The trustee of a bankrupt in the State of Connecticut takes absolute title, under § 70-a (5) of the bankruptcy act, to property in possession of the bankrupt at the time of adjudication, said property having been delivered to the bankrupt by the vendor thereof under a conditional sale agreement, which provided that the title should remain in the vendor until the price agreed upon should be fully paid, where such contract was never executed and recorded as prescribed by the statutes of Connecticut, as construed by its Supreme Court, providing that such unrecorded sales are absolute sales as to the vendee's creditors, who may take the property by attachment or execution in payment of the vendee's debts. In *re Faulkner* (D. C., Conn.), 25 Am. B. R. 416, 131 Fed. 981.

223. *Gillaspay v. International Harvester Co.* (Miss. Sup. Ct.), 38 Am. B. R. 827, 67 So. 904; *Virginia Book Co. v. Sites* (C. C. A., 4th Cir.), 41 Am. B. R. 450, 254 Fed. 46.

**Agency instead of conditional sales.**—The financial condition of a manufacturer of shoes having become impaired, it made an agreement with a wholesale dealer which provided in part as follows: "We authorize you to purchase for us \* \* \* leather, etc. \* \* \* to be used in the manufacture of shoes for us, \* \* \* all said leather, etc., to be billed to us and shipped to us in your care at Dubuque, Iowa. Title \* \* \* to remain in us until the goods are delivered to us at Chicago." Thereafter the manufacturer was adjudged bankrupt

be set aside by the trustee in bankruptcy of the purchaser.<sup>224</sup> Under a statute providing that an unrecorded contract of conditional sale is void only as against subsequent purchasers, pledgees or mortgagees in good faith, a failure to record such a contract prior to the adjudication in bankruptcy of the vendee does not affect the title of the conditional vendor as against the vendee's trustee.<sup>225</sup> Where property is sold to a vendee who subsequently becomes bankrupt upon condition that payment be made upon delivery, title does not pass to the trustee, since such payment is a condition precedent, and until made or waived the vendee had no title to such property.<sup>226</sup> The subsequent acceptance of a note for the purchase price, by the conditional vendor, does not extinguish the original claim or debt, in the absence of an agreement to that effect.<sup>227</sup>

(II) *Lease with privilege of purchase.*—A statute requiring the filing of contracts for the conditional sale of property is not to be avoided by pretext; it will not be effectual to call a contract a "lease" which provides for the payment of rent for the use of an article for a prescribed time, with the right to pay the purchase price at the end of the term, all payments of rent to be applied thereon; such a contract is for a conditional sale and, unless duly filed, the property sold will vest in the vendee's trustee in bankruptcy for the benefit of his creditors.<sup>228</sup> But if personal property was actually leased and

and the wholesale dealer made a claim against the trustee. *Held*, that the agreement did not constitute a conditional sale but merely an agency. *Smith Wallace Shoe Co. v. Ternes* (C. C. A., 8th Cir.), 37 Am. B. R. 845, 235 Fed. 282.

<sup>224</sup> *Meier & Frank Co. v. Sabin* (C. C. A., 9th Cir.), 32 Am. B. R. 595, 214 Fed. 231.

<sup>225</sup> *Hewitt v. Berlin Machine Works*, 194 U. S. 295, 11 Am. B. R. 709, 48 L. Ed. 986, 24 Sup. Ct. 690; *Matter of Cavagnard* (D. C., N. H.), 16 Am. B. R. 320, 143 Fed. 668; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 7-2, 26 Sup. Ct. 481, revg. 14 Am. B. R. 52, 185 Fed. 52. Compare *In re Tweed* (D. C., Iowa), 12 Am. B. R. 648, 131 Fed. 355; *First Nat. Bank v. Staake*, 202 U. S. 141, 15 Am. B. R. 639, 50 L. Ed. 947, 26 Sup. Ct. 580; *In re Dunlop* (C. C. A., 8th Cir.), 19 Am. B. R. 361, 156 Fed. 945, holding that § 70-a (5) was not applicable to such a contract, for a trustee in bankruptcy is not a purchaser for value; *Crucible Steel Co. v. Holt* (C. C. A., 6th Cir.), 23 Am. B. R. 302, 174 Fed. 127; *In re American Mach. Works* (C. C. A., 9th Cir.), 23 Am. B. R. 483, 174 Fed. 805, holding that where a State statute makes a contract for the conditional sale of personal property void as to subsequent creditors, unless registered, both the possession and title to property so sold pass to the trustee in bankruptcy of the vendee, in the absence of registration; *Nauman Co. v. Bradshaw* (C. C. A., 8th Cir.), 27 Am. B. R. 565, 193 Fed. 350. *In re Walsh Bros.* (D. C., Iowa), 28 Am. B. R. 243, 195 Fed. 578; *Matter of Remsen Mfg. Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 799; *Matter of Remsen Mfg. Co.* (D. C., N. Y.), 35 Am. B. R. 195, 227 Fed. 707; *Matter of White's Express Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 74, 215 Fed. 894; *Mergenthaler Linotype Co. v. Hull* (C. C. A., 1st Cir.), 39 Am. B. R. 187, 239 Fed. 26.

*Unrecorded contract for sale of goods.*—Where a bankrupt agreed in writing that certain plows and other articles purchased by him should be paid for by notes, but that title and ownership of said articles should continue and remain in the vendor until the whole purchase price was paid in cash, and it was further agreed that in the event of death, failure, insolvency, loss by fire, or disposal of the business, all obliga-

tions arising under the contract should become due and payable at once, the contract, although unrecorded, is valid as against creditors, and the vendor may reclaim property unpaid for at the date of the adjudication, there being no fraud or dishonesty of purpose. *Matter of Hamil* (D. C., N. Y.), 38 Am. B. R. 205, 236 Fed. 292.

<sup>226</sup> *In re Pittsburgh Industrial Iron Works* (D. C., Pa.), 25 Am. B. R. 221, 179 Fed. 151.

<sup>227</sup> *Matter of Wegman Piano Co.* (D. C., N. Y.), 34 Am. B. R. 490, 221 Fed. 128.

<sup>228</sup> *Unitype Co. v. Long* (C. C. A., 6th Cir.), 16 Am. B. R. 282, 143 Fed. 315, affg. 14 Am. B. R. 668, 136 Fed. 989. But if the vendor, on finding that the vendee is in financial difficulties, refuses to deliver machinery unless it be agreed that it be held under a lease, the title remaining in the vendor, the title does not vest upon delivery. *In re Naylor Mfg. Co.* (D. C., Pa.), 14 Am. B. R. 284, 135 Fed. 206; *Corbett v. Riddle* (C. C. A., 4th Cir.), 31 Am. B. R. 330, 209 Fed. 811, in which case a contract, which was in terms a lease, for the sale of a steam shovel, was held void as against the trustee because not recorded as a contract of conditional sale. Compare *McEwen v. Totten* (C. C. A., 5th Cir.), 21 Am. B. R. 336, 164 Fed. 837.

*Intent to return necessary to establish bailment.*—To constitute a valid bailment, an intention to return the property must be evidenced by the agreement; and if such intention appears from the writing but it is otherwise conclusively shown that it was not so intended, a bailment is not to be presumed. Hence, where bankrupt and claimant entered into written agreements, purporting to lease certain machinery at a specified rental and containing an option to purchase the machinery for a further sum at the end of the rental period, which contracts were in

had not in any way been used as a basis of credit, the property should be surrendered to the lessor.<sup>229</sup>

(III) *Goods consigned for sale.*—Where consigned goods are found among the assets and identified by the consignor, but not otherwise, the trustee should apply for an order permitting him to release them to the real owner. In actual practice, this is frequently done. Care should be taken to distinguish between goods sold on condition and goods consigned, and positive identification of the latter should be required.<sup>230</sup> If it is intended by the contract that the purchaser should be absolutely bound in all events to pay for the goods, the title<sup>2</sup> being reserved in the vendor, then the contract is one of conditional sale; but if the vendor merely delivers the goods to be sold by the vendee with no obligation to pay for those unsold, the contract is merely a consignment for sale.<sup>231</sup> As to the avails of goods so consigned, but sold by him before the bankruptcy, the funds being mingled with his own, title thereto passes to the trustee.<sup>232</sup> The owner of the proceeds of the goods may recover them in full, to the extent of his ability to trace them into the hands of the bankrupt's trustee.<sup>233</sup> Where seizure is necessary to establish the creditor's rights, title will not pass unless seizure is made before the bankruptcy.<sup>234</sup> Where, however, the property is merely consigned for sale, the bankrupt is not a vendee on condition.<sup>235</sup> If consigned for sale the bankrupt was a bailee

terms bailments, but it appeared that at the same time the instruments were executed, claimant accepted from bankrupt negotiable notes, not only for the respective amounts provided to be paid by bankrupt in case he exercised the options to purchase said machinery, the intention to return the property is denied by the acts of the parties, and the transaction constitutes, not a bailment or lease, but a sale. *In re Gaglione & Son* (D. C., Pa.), 28 Am. B. R. 694, 200 Fed. 81.

*Contract in terms a bailment.*—Although the mere use of words "lease" and "rental" in a written agreement relating to personality, will not convert into a bailment what must otherwise be construed as a conditional sale, yet, even in a contest in which execution creditors are concerned, if the contract by its terms is a bailment, it will be given that effect to the exclusion of the execution creditors. *Smith & Bro. Typewriter Co. v. Alleman* (C. C. A., 3d Cir.), 28 Am. B. R. 699, 199 Fed. 1.

<sup>229</sup> *Nylin v. American Trust & Sav. Bank* (C. C. A., 7th Cir.), 21 Am. B. R. 533, 166 Fed. 276; *In re Boschelli* (D. C., Pa.), 25 Am. B. R. 528, 183 Fed. 864; *In re Daterson Pub. Co.* (C. C. A., 3d Cir.), 26 Am. B. R. 582, 188 Fed. 64; *Matter of Nat. Engineering & Equipment Co.* (D. C., Wash.), 42 Am. B. R. 206, 256 Fed. 985.

*Return of amounts advanced by bankrupt.*—*Goldman v. Shreve* (C. C. A., 3d Cir.), 45 Am. B. R. 265, 263 Fed. 74.

<sup>230</sup> See Am. Bankr. Dig. § 398.

*Consignment, conditional sale and sale distinguished.*—Whether an assignment is a consignment, a conditional sale, or a sale on credit, depends less on how it is described by the parties than on the rights and liabilities created by it. *Matter of Aronson* (D. C., Mass.), 40 Am. B. R. 177, 245 Fed. 207.

*The delivery of property to be paid for when sold constitutes a consignment, and the consignor may recover such property from the trustee in bankruptcy of the consignee.* *Matter of Bondurant Hardware Co.* (D. C., Ga.), 37 Am. B. R. 308, 231 Fed. 247. And see *Gray v. Martin & Co.* (Ga. Ct. of App.), 37 Am. B. R. 500, 89 S. E. 540; *Matter of Nat. Home &*

*Hotel Supply Co.* (D. C., Mich.), 35 Am. B. R. 139, 226 Fed. 840; *Adams v. Meyers*, Fed. Cas. 62. See *In re Levin* (D. C., Pa.), 11 Am. B. R. 446, 127 Fed. 886; *Matter of Leflys* (C. C. A., 7th Cir.), 36 Am. B. R. 306, 229 Fed. 695.

*Goods mingled so as to be impossible of identification.*—A rubber company by contract made bankrupt its agent, and consigned to him goods for sale upon certain terms. It was expressly stated that the goods should be and remain the property of the company until sold and delivered by the agent to its *bona fide* customers. The agent was not only permitted to mingle the consigned goods with his own stock, but the contract expressly provided that the consignors would furnish the consignee "free of charge all samples of tires and accessories and necessary advertising matter, imprinted with the name and address of the consignee." *Held*, that, as to the creditors of the bankrupt agent, title to the consigned goods should be held to have passed to the consignee, and that they cannot be reclaimed by the consignor. *Miller Rubber Co. v. Citizens' Trust and Savings Bank* (C. C. A., 9th Cir.), 37 Am. B. R. 542, 233 Fed. 488.

<sup>231</sup> *Matter of Thomas* (D. C., Ga.), 36 Am. B. R. 600, 231 Fed. 513; *Matter of Aronson* (D. C., Mass.), 40 Am. B. R. 177, 245 Fed. 207.

<sup>232</sup> *Compare Bills v. Schliep* (C. C. A., 2d Cir.), 11 Am. B. R. 607, 127 Fed. 103.

<sup>233</sup> *In re Acheson Co.* (C. C. A., 9th Cir.), 22 Am. B. R. 338, 170 Fed. 427.

<sup>234</sup> *In re Ohio, etc., Co.* (Ref., Ohio), 2 Am. B. R. 775.

<sup>235</sup> *In re Columbus Buggy Co.* (C. C. A., 8th Cir.), 16 Am. B. R. 759, 143 Fed. 859; *Deere Plow Co. v. McDavid* (C. C. A., 8th Cir.), 14 Am. B. R. 653, 137 Fed. 902; *In re Miller* (D. C.,

or agent, and had no title.<sup>236</sup> And where a contract provides that the person to whom goods are consigned for sale shall hold the proceeds thereof in trust until all obligations of the consignee to the consignor are fully paid, the trustee in bankruptcy of the consignee does not acquire title to the proceeds of such sale in the hands of the bankrupt at the time of his adjudication.<sup>237</sup> Such an agreement is not a contract of conditional sale and need not be recorded under statutes in a number of states.<sup>238</sup> But where such an agreement was not made in good faith and the business was not carried on in accordance therewith, the bankrupt will be deemed to have held the title to the goods and to have been indebted for the same to the vendors.<sup>238a</sup> The contract under which

Pa.), 14 Am. B. R. 439, 135 Fed. 868; In re Flanders (C. C. A., 7th Cir.), 14 Am. B. R. 27, 134 Fed. 500; In re Galt (C. C. A., 7th Cir.), 13 Am. B. R. 575, 120 Fed. 64, 56 C. C. A. 470; Franklin v. Stoughton Wagon Co. (C. C. A., 8th Cir.), 22 Am. B. R. 63, 168 Fed. 857; In re Bailey (D. C., So. Car.), 23 Am. B. R. 876, 176 Fed. 623; Ludveigh v. American Woolen Co., 231 U. S. 522, 31 Am. B. R. 481, 58 L. Ed. 345, 34 Sup. Ct. 161; Bransford v. Regal Shoe Co. (C. C. A., 5th Cir.), 38 Am. B. R. 450, 237 Fed. 67; Matter of Wright & Barron Drug Co. (D. C., Ga.), 38 Am. B. R. 496, 237 Fed. 411; Matter of King (C. C. A., 9th Cir.), 45 Am. B. R. 95, 262 Fed. 318.

**Bailment for sale; right to reclaim.**—A contract under which wagons were consigned to bankrupt for sale, as agent, considered and as to the goods not already sold thereunder, held, not to be a conditional sale but a bailment for sale, so that the vendor was entitled to reclaim such goods, from bankrupt's trustee. In re Reynolds (D. C., Ky.), 29 Am. B. R. 145, 203 Fed. 162.

**Agency to sell.**—Provisions of an agreement under which chattels were delivered to a bankrupt and circumstances examined and held, that the relation between the parties was that of principal and agent, and not of seller and buyer, that the agreement was an agency to sell and not a sale, and that, since at the date of the bankruptcy, the bankrupt had not become the purchaser of the chattels then on hand, shipped under the agreement in either of the contingencies contemplated thereby, they may be recovered from the trustee in bankruptcy. Mitchell Wagon Co. v. Poole (C. C. A., 6th Cir.), 37 Am. B. R. 656; McKay v. Clark (C. C. A., 9th Cir.), 37 Am. B. R. 690, 233 Fed. 928.

**Sale to merchant in usual course of business.**—Where property is delivered to the vendee for sale in the usual course of business as a merchant, and the various provisions relating to the ownership and possession are mere contrivances to secure the purchase price to the vendor, the transactions are fraudulent in law as against other creditors of the vendee, and the trustee in bankruptcy of the vendee is entitled to the goods as against the vendor. Matter of Roellich (D. C., Ore.), 35 Am. B. R. 164, 223 Fed. 687.

<sup>236</sup> See Am. Bankr. Dig. § 395; Matter of Wright-Dana Hardware Co. (C. C. A., 2d Cir.), 31 Am. B. R. 764, 211 Fed. 908, affg. 30 Am. B. R. 582, 205 Fed. 335; In re Chalmers (D. C., Mont.), 30 Am. B. R. 521, 206 Fed. 143; Roth v. Smith & Scheffer (C. C. A., 3d Cir.), 32 Am. B. R. 772, 215 Fed. 82; Ellet-Kendall Shoe Co. v. Martin (C. C. A., 8th Cir.), 34 Am. B. R. 502, 222 Fed. 851; Matter of Reeves (D. C., N. Y.), 36 Am. B. R. 180, 227 Fed. 711; Taylor v. Fram (D. C., N. Y.), 40 Am. B. R. 377, 243 Fed. 733.

**Sale on commission; bailment.**—Where a bankrupt acquires possession of property under an agreement for purpose of sale on com-

mission, the title to remain in another until sale, the agreement is a bailment only, and is not required to be filed or recorded under section 2905 of the Iowa Code, and the trustee in bankruptcy of the bailee acquires no interest in property in the possession of the bankrupt under such agreement. Matter of Kruse (D. C., Ia.), 37 Am. B. R. 687, 234 Fed. 470; see under Kansas statute, McElwain-Barton Shoe Co. v. Bassett (C. C. A., 8th Cir.), 36 Am. B. R. 536, 231 Fed. 889.

In South Carolina, an unrecorded contract of assignment, creating the relation of bailor and bailee between the parties, is void as against the trustee in bankruptcy of the consignee. Matter of Sturkey Co. (D. C., So. Car.), 35 Am. B. R. 371, 224 Fed. 251.

In Michigan where goods are intended for resale, a reservation of title cannot stand (as a conditional sale), unless, taking the entire contract and circumstances together, it is clearly dominant over the right of resale and other inconsistent features of the contract; in other words, the facts as a whole must be consistent with the theory that the resale is made by the vendee as agent or consignee, and not as the owner. Deere Plow Co. v. Mowry (C. C. A., 6th Cir.), 34 Am. B. R. 384, 222 Fed. 1.

<sup>237</sup> Wood Co. v. Eubanks (C. C. A., 4th Cir.), 22 Am. B. R. 307, 169 Fed. 929; In re Reynolds (D. C., Ky.), 29 Am. B. R. 145, 203 Fed. 162; International Agric. Corp. v. Sparks (D. C., S. Car.), 40 Am. B. R. 80, 250 Fed. 318.

<sup>238</sup> Corbitt Buggy Co. v. Ricaud (C. C. A., 4th Cir.), 22 Am. B. R. 316, 169 Fed. 935, holding that such contract constitutes a trust, valid as against the vendee's trustee in bankruptcy; even if it were a conditional sale it would be good between the parties, without registration, and the trustee occupies the same relation to the vendor that the vendee did prior to his adjudication: John Deere Plow Co. v. Anderson (C. C. A., 5th Cir.), 23 Am. B. R. 480, 174 Fed. 815; Matter of Goldman (C. C. A., 6th Cir.), 23 Am. B. R. 497, 174 Fed. 579; Ellet-Kendall Shoe Co. v. Martin (C. C. A., 8th Cir.), 34 Am. B. R. 502, 222 Fed. 851, where it appeared that after an



goods were sold to the bankrupt contained no limitation upon the right to sell and only prescribed the method of making payment, and contained a provision to the effect that the title and ownership of the goods purchased and the proceeds of the sale thereof should remain the property of the seller; such contract was held to create a secret lien constituting a fraud upon the creditors of the bankrupt, and was invalid as against his trustee in bankruptcy.<sup>239</sup>

(IV) *Option to purchase or return.*—Goods delivered with an option to purchase or return within thirty days from delivery constitutes a contract of sale and return, and the title to goods, delivered within the thirty days immediately preceding the bankruptcy of the vendee, does not pass to the trustee.<sup>240</sup> Where machinery is sold on trial, and retained by the bankrupt vendee for a year without offer to return, expression of dissatisfaction, or demand by vendor, the sale is absolute and title is vested in the trustee.<sup>241</sup>

(15) *PROPERTY AFFECTED BY FRAUDULENT REPRESENTATIONS.*—Since the trustee takes the bankrupt's property charged with all claims and equities

order for the purchase of shoes had been cancelled a contract was made whereby the shoes were consigned to the bankrupt for sale, and it was held (under Kansas statute) that contract was not required to be recorded to protect the rights of the consignor.

<sup>239a.</sup> *Taylor v. Fram* (C. C. A., 2d Cir.), 41 Am. B. R. 831, 249 Fed. 990, affg. 40 Am. B. R. 377, 243 Fed. 733.

<sup>239.</sup> *In re Galt* (D. C., Ill.), 9 Am. B. R. 682, 120 Fed. 443; *In re Carpenter* (D. C., N. Y.), 11 Am. B. R. 147, 125 Fed. 831, in which case it was held that a similar agreement passed the title to the goods sold to the vendee, to which title the trustee in bankruptcy succeeded; that there was no purpose apparent therefrom to create an agency in the vendee, nor could such agreement be sustained as a conditional sale, a mortgage, or an instrument attempting to create a lien in behalf of the seller. See also *In re Tweed* (D. C., Iowa), 12 Am. B. R. 648, 131 Fed. 355; *In re Butterwick* (D. C., Pa.), 12 Am. B. R. 536, 131 Fed. 371; *Matter of Rasmussen* (D. C., Or.), 13 Am. B. R. 462, 136 Fed. 704; *In re Martin-Vernon Music Co.* (D. C., Mo.), 13 Am. B. R. 276, 132 Fed. 983; *Matter of Penny & Anderson* (D. C., N. Y.), 23 Am. B. R. 115, 176 Fed. 141; *In re Waite-Robbins Motor Co.*, (D. C., Mass.), 27 Am. B. R. 541, 192 Fed. 47; *Matter of Roellich* (D. C., Ore.), 36 Am. B. R. 164, 223 Fed. 687; *Flanders Motor Co. v. Reed* (C. C. A., 1st Cir.), 33 Am. B. R. 842, 220 Fed. 642.

*Contract in form a conditional sale.*—Where claimant's assignor delivered certain automobile parts to the bankrupt for sale under a contract providing that title should not pass until the same were paid for in full, and that bankrupt on all orders for parts should be allowed a discount from the list prices, but it appeared from the subsequent correspondence of the parties that they dealt with each other as vendor and purchaser, the sale was not a conditional, but an absolute sale. *In re Harrington* (Ref., Mass.), 29 Am. B. R. 690.

*Property intended for resale; reservation of title.*—Where goods are intended for resale the reservation of title cannot be sustained

as a conditional sale unless, taking the entire contract and circumstances together, the reservation of title is clearly dominant over the right of resale and other inconsistent features of the contract. Such reservation of title can be sustained only on the theory that the resale is made by the vendee as the agent or consignee of the vendor, by an agency or consignment which underlies the executory sale and which is a continuing one until it is terminated either by the resale or the vendee's personal performance of the conditions, which, then, for the first time, vest title in him. *Wood Mowing & Reaping Mach. Co. v. Crool* (C. C. A., 6th Cir.), 36 Am. B. R. 610, 231 Fed. 679; *Matter of Stoughton Wagon Co.* (C. C. A., 6th Cir.), 36 Am. B. R. 692, 231 Fed. 676.

<sup>240.</sup> *In re Schindler* (D. C., N. Y.), 19 Am. B. R. 900, 158 Fed. 458.

*Sale or return.*—Where a bankrupt, during the month prior to his adjudication, bought a pair of horses, for which he was to pay a certain price if they proved satisfactory after a trial, and, if not, to return them, and they came into the possession of the receiver, the transaction presents a case of sale or return, and the title passes to the bankrupt, subject to the exercise of the option to return. *In re Landis*, (D. C., Pa.), 18 Am. B. R. 483, 151 Fed. 896; *In re Allen* (D. C., Ark.), 25 Am. B. R. 722, 183 Fed. 172; *Parlett v. Blake* (C. C. A., 5th Cir.), 26 Am. B. R. 25, 188 Fed. 200; *Matter of Thomas* (D. C., Ga.), 36 Am. B. R. 600, 231 Fed. 513.

<sup>241.</sup> *In re Downing Paper Co.* (D. C., Pa.), 17 Am. B. R. 121, 147 Fed. 858.

Where machinery sold for cash was delivered to the buyer, a corporation, at its request, and on its promise to send a check for the price, and on his failure so to do, the agent of the seller accepts in payment for the machinery negotiable vouchers, secured by bonds, the title to the machinery vests in the trustee in bankruptcy of the buyer. *In re Cullman Assn.* (D. C., Ala.), 19 Am. B. R. 269, 155 Fed. 372.

against it, his title to the same is inferior to that of one who was induced to sell on materially false representations. In such cases, the claimant usually proceeds as in replevin.<sup>242</sup> But, where the property is in the custody of the bankruptcy court, it is immune from replevin process in the State court.<sup>243</sup> It has been held that the false representation need not be the sole and exclusive consideration for the credit, but only a material consideration;<sup>244</sup> also, that false representations to a mercantile agency are enough.<sup>245</sup> An insolvent buyer who knows when he purchases property that his financial condition is such that he cannot pay, it will be presumed that he bought the property with an intention not to pay for it.<sup>246</sup> Other cases under the present law appear in the foot-note.<sup>248</sup>

**g. Reclamation proceedings.**—(1) **IN GENERAL.**—Reclamation proceedings may be in or out of the bankruptcy proceeding. A petition to reclaim consigned goods is an instance of the former;<sup>249</sup> the proceeding in the nature of a bankruptcy replevin which, in most large trade centers, has of late been so common if not notorious, is an instance of the latter. The petition in such proceedings should contain allegations sufficient to sustain a complaint in trover and conversion, or such as are required by the strictest practice in an affidavit for replevin.<sup>250</sup> The evils resulting from so-called "reclamation proceedings" are patent and hard to overcome.<sup>251</sup> In effect, estates are often dissipated by greedy and not over-scrupulous creditors, who apply for possession, after rescission, on the ground of alleged fraudulent representations, and are granted what they ask, without adequate judicial investigation of their right to it and before there is a court officer authorized to bond back the goods reclaimed.<sup>252</sup>

(2) **TIME WITHIN WHICH PETITIONS SHOULD BE FILED.**—Most of the evils resulting from reclamation proceedings will be avoided if the claiming creditor is at least required in the first instance, always after a short notice to the receiver or creditor, to prove identity strictly, either before the judge or a referee sitting as special master.<sup>253</sup> The delay incident to such proof will

<sup>242.</sup> See next paragraph of this section.

<sup>243.</sup> In re Russell (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248; In re Mertens (D. C., N. Y.), 12 Am. B. R. 608, 131 Fed. 507; Matter of Wellmade Gas Mantle Co. (D. C., Mass.), 36 Am. B. R. 354, 230 Fed. 502.

<sup>244.</sup> In re Gany (D. C., N. Y.), 4 Am. B. R. 576, 103 Fed. 930.

<sup>245.</sup> In re Epstein (D. C., Ark.), 6 Am. B. R. 60, 109 Fed. 878; In re Roalswick (D. C., Mont.), 6 Am. B. R. 752, 110 Fed. 639; In re Weil (D. C., N. Y.), 7 Am. B. R. 90, 111 Fed. 897; Matter of Berg (Ref., Mass.), 25 Am. B. R. 170.

<sup>246.</sup> Gillespie v. Piles & Co. (C. C. A., 8th Cir.), 24 Am. B. R. 502, 178 Fed. 886; Jones v. Hobbie Grocery Co. (C. C. A., 5th Cir.), 40 Am. B. R. 415, 246 Fed. 431. Compare Matter of Golub (D. C., Mass.), 39 Am. B. R. 810, 245 Fed. 512.

<sup>248.</sup> In re Davis (D. C., N. Y.), 7 Am. B. R. 276, 112 Fed. 294; In re O'Connor (D. C., Ga.), 7 Am. B. R. 428, 114 Fed. 777; Silvey v. Tift, 17 Am. B. R. 9, 123 Ga. 804, 51 S. E. 748; Knauth, Nachod & Kuhne v. Lovell (D. C., Ala.), 32 Am. B. R. 340, 212 Fed. 337; Matter of Ferrer (D. C., Porto Rico), 40 Am. B. R. 689, 10 P. R. Fed. 262. Mulrone Mfg. Co. v. Weeks (1a. Sup. Ct.), 44 Am. B. R. 506, 171 N. W. 36.

<sup>249.</sup> See under this section, *ante*, subtitle "Property Sold to the Bankrupt on Condition."

<sup>250.</sup> Levi v. Picard (D. C., N. Y.), 17 Am. B. R. 430, 148 Fed. 654. Compare In re Hinson Bros. (Ref., Ga.), 26 Am. B. R. 754.

**Parties.**—The trustee is a proper party defendant in an action replevin to determine ownership of property in his possession. *Exler v. Wickes Bros.* (Pa. Sup. Ct.), 43 Am. B. R. 394, 106 Atl. 233.

**Right of vendee's guarantor.**—Where a claim by a conditional vendor to reclaim property from the trustee of the bankrupt vendee is denied because the vendor had accepted a guarantee of payment, said guarantor is not precluded from presenting its claim based upon its right to be subrogated to the rights which the vendor had at the time the guarantee was made. *Matter of Aboudara* (D. C., Cal.), 40 Am. B. R. 166, 246 Fed. 469.

<sup>251.</sup> These are pointed out with great distinctness in an address delivered by Charles A. Hough, Esq., of New York, printed in the proceedings of the Fourth Annual Convention of the National Association of Referees in Bankruptcy, at Milwaukee, in August, 1902. See also address on "The Merits and Defects of the Bankrupt Law," by Mr. Referee Holt, before the American Social Science Association, at Washington, April, 1902.

<sup>252.</sup> See *Matter of Murphy, etc.*, *Shoe Co.* (Ref., Mo.), 11 Am. B. R. 428, holding that the right to reclaim goods should only be granted in cases where it clearly exists, and that the burden of proof is with the creditors to establish their right clearly and by a preponderance of evidence. *Shook v. Levi* (C. C. A., 9th Cir.), 39 Am. B. R. 549, 240 Fed. 121.

check at the outset a practice which, under the State system, has fostered perjury and made "diligence" a word at which lawyer and layman were wont to blush. Nor is it thought that such a practice will be against the well-recognized principle that adverse claims to the bankrupt's assets must be settled in a plenary suit.<sup>254</sup> While promptness in rescission because of alleged fraud is essential, it is not so important where the bankruptcy precedes the discovery.<sup>255</sup> The court or referee may, upon the request of the trustee fix a reasonable time within which petitions for reclamation may be filed.<sup>256</sup> The filing of a petition before the debt is due is premature.<sup>257</sup>

(3) SALE OR BAILMENT; AGENCY.—Is the transaction whereby the bankrupt became possessed of the property, a sale or a bailment? This question enters into the determination of nearly every case.<sup>258</sup> If the property is consigned to be sold under terms and at prices fixed by the consignor the contract is not one of sale, but is a bailment and the consignor may reclaim.<sup>259</sup> Such

<sup>253.</sup> For cases where the claim was judicially investigated, see *In re Well* (D. C., N. Y.), 7 Am. B. R. 90, 111 Fed. 897; *In re Davis* (D. C., N. Y.), 7 Am. B. R. 276, 112 Fed. 294; and *Boomingdale v. Empire Rubber Mfg. Co.* (D. C., N. Y.), 8 Am. B. R. 74, 114 Fed. 1,016; *Matter of Arken Dress Co. Inc.* (C. C. A., 2d Cir.), 41 Am. B. R. 827, 253 Fed. 926. Read also *In re O'Connor* (D. C., Ga.), 7 Am. B. R. 428, 114 Fed. 777. As to proof of ownership by claimant based on bankrupt's admissions, see *In re Thompson* (D. C., N. J.), 30 Am. B. R. 64, 205 Fed. 556; *Matter of Watmough* (D. C., Ohio), 32 Am. B. R. 59, 210 Fed. 539, holding that a failure to proceed for six months after notice of bankruptcy deprived the vendor of the right to rescind.

**Reclamation of stock in possession of bankrupt broker.**—In all cases where bankrupt stockbrokers did not have free and clear in their box an amount of stock equal to the claims of all customers, none of the customers may reclaim any part of what they did have on hand, nor any part of the equity in such loans as had among their collateral the remaining shares. No presumption of ownership of stock by a customer of a bankrupt stockbroker arises unless there are enough shares "in the box" or unless the customer can actually identify his shares by certificate number. *Matter of Pierson, Jr., & Co.* (D. C., N. Y.), 35 Am. B. R. 218, 225 Fed. 889.

<sup>254.</sup> *In re Russell & Birkett* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248.

<sup>255.</sup> *Matter of Midland Motor Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 364, 224 Fed. 368.

<sup>256.</sup> *Matter of Gay & Sturges* (D. C., Mass.), 35 Am. B. R. 417, 224 Fed. 127.

<sup>257.</sup> *Matter of Wegman Piano Co.* (D. C., N. Y.), 34 Am. B. R. 490, 221 Fed. 128.

<sup>258.</sup> *Liquid Carbonic Co. v. Quick* (C. C. A., 3d Cir.), 24 Am. B. R. 394, 182 Fed. 603; *Matter of Aronson* (D. C., Mass.), 40 Am. B. R. 177, 245 Fed. 207; *Matter of Sutton* (D. C., Mich.), 40 Am. B. R. 348, 244 Fed. 892; *Matter of Devon Manor Corp.* (D. C., Pa.), 44 Am. B. R. 79, 257 Fed. 766; *Matter of Parker Co.* (D. C., Ohio), 45 Am. B. R. 34.

**Law governing.**—A contract for the sale or leasing of property is to be governed by the law of the jurisdiction where the contract was executed and if according to that law it is held to be a sale the title passes to the trustee in bankruptcy. *Matter of Eagle Ice, etc. Co.* (D. C., Pa.), 39 Am. B. R. 184, 241 Fed. 393. See also *Mergenthaler Linotype Co. v. Hull* (C. C. A., 1st Cir.), 39 Am. B. R. 187, 239 Fed. 26.

**Bailment or sale.**—In the case of *In re Gehris-Herbine Co.* (D. C., Pa.), 26 Am. B. R. 470, 188 Fed. 502, the court said: "Tested, therefore, by that law, what is the true character of the contract in question? Is it a bailment, or a conditional sale? If it is really and in good

faith, a bailment, it is valid not only between the parties but against creditors also; for a man does not lose the title to his property by hiring it to another, although he may have parted with the possession and the other may have acquired it. But, if he has really sold it and has also parted with the possession, he will find in numerous jurisdictions—in Pennsylvania, for example—that he cannot enforce against execution creditors a condition that he is to retain the title until the price is paid. These rules are too well known to need the support of citation." *In re Marx Tailoring Co.* (D. C., Ala.), 28 Am. B. R. 147, 196 Fed. 243; *Taylor v. Fram* (D. C., N. Y.), 40 Am. B. R. 377, 243 Fed. 733.

A transaction between a mill owner and a farmer constitutes a sale, where the farmer delivers wheat to the mill and accepts a certificate which contains a promise to deliver to him a certain number of pounds of flour, bran or shorts, for each bushel of wheat delivered. *Matter of Ballard* (D. C., Tex.), 44 Am. B. R. 651.

**Right of conditional vendor to reclaim.**—Where under the State law the title to chattels sold may be retained by the seller pending full payment of the purchase price, and such reservation is good as against creditors, it is also good as against the trustee in bankruptcy of the buyer, and the seller is entitled to reclaim possession from the trustee. *Matter of Farmers' Dairy Association* (D. C., Cal.), 37 Am. B. R. 672, 234 Fed. 118.

**Contract of agency and consignment; consignor permitted to reclaim.**—Negotiations and dealings between a vendor and hand-painted china bearing the words "Kaiser Art China" and the bankrupt examined and held to constitute a contract of agency and consignment and not an actual sale to the bankrupt with a reservation of title by way of security, and that the vendor is entitled to reclaim china unsold and in the possession of the trustee in bankruptcy. *Matter of National Home & Hotel Supply Co.* (D. C., Mich.), 35 Am. B. R. 139, 226 Fed. 840.

<sup>259.</sup> *In re Wells* (D. C., Pa.), 15 Am. B. R. 419, 140 Fed. 732; *In re Tice* (D. C., Pa.), 15 Am. B. R. 97, 139 Fed. 52; *In re Heckathorn* (D. C., Pa.), 16 Am. B. R. 467, 144 Fed. 499; *In re Wood* (D. C., Pa.), 15 Am. B. R. 411, 140 Fed. 964; *In re Galt* (C. C. A., 7th Cir.), 13 Am. B. R. 576, 120 Fed. 61, 56 C. C. A. 470; *In re Poore* (D. C., Pa.), 15 Am. B. R. 174, 139 Fed. 862; *Franklin v. Stroughton Wagon Co.* (C. C. A., 8th Cir.), 22 Am. B. R. 63, 168 Fed. 867; *In re Susquehanna Roofing Co.* (D. C., Pa.), 23 Am. B. R. 5, 173 Fed. 150; *Ellet-Kendall Shoe Co. v. Martin* (C. C. A. 8th Cir.), 34 Am. B. R. 502, 222 Fed. 851; *Bransford v. Regal Shoe Co.* (C. C. A., 8th Cir.), 38 Am. B. R. 450, 237 Fed. 67.

proceedings will not lie to recover possession of personal property sold under a bill of sale, but retained by the bankrupt; in such a case the transaction was not a sale and was invalid as against execution creditors and the trustee because the title was separated from the possession and no notice thereof was given.<sup>260</sup> If the contract expressly creates an agency, and the bankrupt was in possession of the property as an agent, the transaction is a bailment and the property does not pass as assets to the trustee. The transaction is not to be deemed a sale because of the agent's assumption of liability for loss, payment of certain expenses, and insurance; nor is it a contract of sale because it contained no provision that the agent should separate the proceeds of the sale and turn over such proceeds to the principal.<sup>261</sup> Where property is sold on condition that title thereto should remain in vendor, until paid for, the bankruptcy of the vendee does not affect the contract, if valid as against creditors, and the vendor may reclaim unless the trustee elects to complete the contract.<sup>262</sup>

(4) PURCHASE OF GOODS WITHOUT INTENT TO PAY.—(I) *Concealment of insolvency or false representation as to solvency.*—It is a general principle that when a person who is insolvent purchases goods with no intention of paying for the same, and conceals his insolvency and his intention not to pay, he is guilty of a fraud which entitles the vendor, if no innocent third

<sup>260.</sup> In re Grozinger (D. C., Pa.), 28 Am. B. R. 732, 199 Fed. 935; Matter of Wegman Piano Co. (D. C., N. Y.), 34 Am. B. R. 490, 221 Fed. 128.

<sup>261.</sup> Contract of agency.—In the case of General Electric Co. v. Brower (C. C. A., 9th Cir.), 34 Am. B. R. 642, 221 Fed. 597, the contract under consideration was termed "Appointment of Agent," and expressly appointed the bankrupt company its "agent to sell" and the company expressly accepted the agency. The court said: "It provides that the manufacturer shall maintain a stock of lamps in the custody of the agent; that the quantity of lamps and the length of time they shall remain in stock shall be determined by the manufacturer; that all the lamps shall be and remain the property of the manufacturer until sold; that the proceeds of all lamps sold shall be held for the benefit and for the account of the manufacturer; that the agent shall return to the manufacturer at any time, if directed, any and all lamps unsold. The agent is required to sell at prices and on terms fixed by the manufacturer, and on all bills and invoices for lamps sold he is required to state that he sells as agent. The agent guarantees to the manufacturer that all lamps sold by it will be paid for. These provisions, so far as they go, all clearly and unequivocally mark the contract as a contract strictly of agency. We will briefly consider the provisions<sup>2</sup> herein that are said to indicate a contrary intention. Those provisions are the agent's assumption for liability for loss, and for the payment of certain expenses, and for insurance. Such provisions do not change a contract of agency into a contract of sale. Nor was the contract rendered a contract of sale by reason of the fact that it contained no

provision that the agent should keep the money separate and apart from its other moneys, or that it should turn over the money received from the sale to the manufacturer, but instead was to pay for the lamps sold each month, less 29 per cent. for making the sales."

In the case of Sturm v. Baker, 150 U. S. 312, 37 L. Ed. 1093, 14 Sup. Ct. 99, the court said: "A bailee may, however, enlarge his legal responsibilities by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care; the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking."

In re Flanders (C. C. A., 7th Cir.), 14 Am. B. R. 27, 134 Fed. 580, the court said: "The objections that ordinary invoices accompanied the shipments, that such shipments were made direct to Flanders, that the leather was sold by him in his own name, that he allowed credit upon sales, that he guaranteed sales, and that he insured in his own name, do not change the nature of the transaction."

In re Columbus Buggy Co. (C. C. A., 8th Cir.), 16 Am. B. R. 759, 143 Fed. 859, it was held that a contract between a furnisher of goods and the receiver, that the latter may sell, and at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expenses of insurance, freight, storage, and handling, and that he will hold the merchandise unsold subject to the order of the furnisher, disclose only an agreement of bailment for sale, and does not evidence a conditional sale.

<sup>262.</sup> Matter of Wegman Piano Co. (D. C., N. Y.), 34 Am. B. R. 490, 221 Fed. 128.

party has acquired an interest in them, to disapprove the contract and recover the goods.<sup>263</sup> A material misrepresentation as to financial ability relied on by the vendor justifies rescission and reclamation, even if not fraudulent.<sup>264</sup> For instance, it is well settled that false representations as to the financial status of a buyer, made as a basis of credit, and but for which the sale would not have been made, was fraudulent, and entitled the seller to reclaim the goods thereby obtained.<sup>265</sup> A depositor of a bankrupt bank may institute reclamation proceedings against the bankrupt's trustee to recover money deposited in the bank on the ground of fraud if he establishes the insolvency of the bankrupt at the time the deposit was made, and that the bankrupt knew that he was insolvent and the depositor did not.<sup>266</sup>

<sup>263.</sup> *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 903; *Ash v. Putnam*, 1 Hill (N. Y.) 302; *Devoo v. Brandt*, 53 N. Y. 462; *Carter v. Lipsey*, 70 Ga. 417; *Matter of Marks & Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 275, 218 Fed. 453; *Matter of Collins* (D. C., Ala.), 39 Am. B. R. 510, 243 Fed. 975; *Jones v. Hobbie Grocery Co.* (C. C. A., 5th Cir.), 40 Am. B. R. 415, 246 Fed. 431; *Matter of Liebig and Kochman* (C. C. A., 2d Cir.), 42 Am. B. R. 535, 255 Fed. 468.

The amendment of 1910 to section 47a(2) of the Bankruptcy Act does not prevent the maintenance of reclamation proceedings against the trustee of a bankrupt by the seller of merchandise when the sale was procured through the fraud of the buyer. *Matter of Collins* (D. C., Ala.), 39 Am. B. R. 510, 242 Fed. 975.

**Purchase on verge of bankruptcy; fraudulent concealment of financial condition.**—Where, at the time of the delivery of goods purchased by a bankrupt, the bankrupt knew that he was insolvent but concealed his financial condition, and a few days after, while all the goods purchased were on hand and most of them in the original packages in which they had been delivered, the bankrupt filed his petition in bankruptcy, he was guilty of a fraud which authorized the vendors to ask for a rescission, and a delivery to them of the proceeds of the goods which had been sold by the trustee in bankruptcy. *In re Spann* (D. C., Ga.), 25 Am. B. R. 551, 183 Fed. 819.

<sup>264.</sup> *Matter of New York Commercial Co.* (C. C. A., 2d Cir.), 35 Am. B. R. 779, 228 Fed. 120.

<sup>265.</sup> *Matter of Patterson & Co.* (D. C., Tex.), 10 Am. B. R. 743, 125 Fed. 562; *In re Weil* (D. C., N. Y.), 7 Am. B. R. 90, 111 Fed. 897; *In re Epstein* (D. C., Ark.), 6 Am. B. R. 60, 109 Fed. 578; *Matter of Watmough* (D. C., Ohio), 32 Am. B. R. 59, 210 Fed. 539; *Jones v. Hobbie Grocery Co.* (C. C. A., 5th Cir.), 40 Am. B. R. 415, 246 Fed. 431; *Matter of Arkin Dress Co., Inc.* (C. C. A., 2d Cir.), 41 Am. B. R. 827, 253 Fed. 926.

**Basis of credit.**—In order that goods may be reclaimed because of false representations as to financial condition the representations must be the basis of the credit extended and therefore where the sales were induced because of the former and existing relations between the parties the goods cannot be reclaimed. *Matter of Wilson-Nobles-Barr Co.* (D. C., Wash.), 42 Am. B. R. 252, 256 Fed. 966.

**Goods obtained by fraud.**—This follows from the rule that the trustee when appointed can have no greater title than the bankrupt had. The trustee holds the goods affected with the fraud of the bankrupt. Neither law nor morals will justify the trustee in holding goods obtained by the fraud of the bankrupt for the benefit of other creditors. Creditors have no right to profit by the fraud of the bankrupt to the wrong and injury of the party who has been deceived and defrauded. *In re Hamilton Furniture, etc., Co.* (D. C., Ind.), 9 Am. B. R. 65, 117 Fed. 774.

**False representation as to solvency.**—In the case of *In re Hamilton Furniture, etc., Co.* (D. C., Ind.), 9 Am. B. R. 65, 117 Fed. 774, the rule

was laid down that where a party by fraudulently concealing his insolvency and his intent not to pay for goods, induces the owner to sell them to him on credit, the seller, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and recover the goods. *In re Hildebrandt* (D. C., N. Y.), 10 Am. B. R. 184, 120 Fed. 992; *In re O'Connor* (D. C., Ga.), 9 Am. B. R. 18, 114 Fed. 777; *Silvey v. Tift*, 17 Am. B. R. 9, 123 Ga. 804, 51 S. E. 748; *Matter of Levi* (D. C., N. Y.), 16 Am. B. R. 766, 148 Fed. 654, holding that in the absence of fraud in making the statement, reclamation should not be allowed; *In re Rose* (D. C., Pa.), 14 Am. B. R. 345, 135 Fed. 886, in which case it was held that the return of goods should not be permitted where the evidence is insufficient as to the making of a false verbal statement to a commercial agency; *Levi v. Picard* (D. C., N. Y.), 17 Am. B. R. 439, 148 Fed. 654; *Matter of Johnson* (D. C., Ohio), 30 Am. B. R. 787.

**False financial statement inducing sale to bankrupt; intent not to pay.**—In a proceeding by a creditor to reclaim from a trustee goods sold to the bankrupt as on a false and fraudulent financial statement on which the creditor relied, it is not necessary, in order to constitute fraud authorizing rescission of the sale, that the financial statement shall have been made by the bankrupt with intent not to pay, but it may be rescinded, regardless of his intent about paying if induced by his false and fraudulent representations. But where it appeared that the financial statement was incomplete rather than false and fraudulent, and the subsequent conduct of the bankrupt accorded with honesty and good faith, the bankrupt could not be said to have made a false or fraudulent financial statement upon which an action by the creditor relying thereon could be based. *Ellet-Kendall Shoe Co. v. Ward* (C. C. A., 8th Cir.), 26 Am. B. R. 114, 187 Fed. 982.

**Right to recover goods obtained by false representations innocently made.**—Where a bankrupt makes false statements inducing a sale of goods to him, it is not necessary that such statements should have been made with a fraudulent intent to entitle the vendor to reclaim the goods. *Matter of Underwood & Daniel* (D. C., Ga.), 32 Am. B. R. 779, 215 Fed. 279.

<sup>266.</sup> *In re Stewart* (D. C., N. Y.), 24 Am. B. R. 474, 178 Fed. 463; *In re Kenyon* (D. C., Ohio), 19 Am. B. R. 194, 156 Fed. 863, in which case the right to rescind a deposit

(II) *Intent not to pay.*—Knowledge of inability to pay when purchase is made is equivalent to purchase with intent not to pay, and such purchase is constructively fraudulent.<sup>267</sup> If there was no concealment of the fact of insolvency indicating that the purchaser designed to acquire the goods without paying for them, there is no fraud justifying reclamation.<sup>268</sup>

(III) *When right exercised; who may defeat right.*—He should exercise this right before he has of his own volition placed himself in the position of a creditor, for if he joins in the election of a trustee, with knowledge of the fraud perpetrated against him, he is estopped from thereafter insisting on a return of the goods.<sup>269</sup> The trustee may not prevent reclamation upon the assumption that he is in a favored position because of the amendment of 1910 to § 47-a (2) which places him in the position of a lien creditor; this amendment does not constitute the trustee a *bona fide* purchaser for value, and it is only such a purchaser of the article sought to be reclaimed who may defeat reclamation.<sup>270</sup>

(IV) *Proof of insolvency, or of intent not to pay.*—Whether or not proof of insolvency is essential depends upon the character of the representation which institutes the sale. If the representation consists of a statement as to solvency, it would be necessary to prove insolvency to justify a reclamation of the goods sold;<sup>271</sup> and also the concealment from the claimant of the fact of insolvency, and the intention on the part of the bankrupts at the time of the sale not to pay for the goods.<sup>272</sup> If, on the other hand, a solvent purchaser falsely represents the extent of his assets with the purpose of obtaining credit, and the seller, relying on this false representation, lets him have the goods when otherwise he would have declined the sale and insolvency thereafter

contract with a bank and recover the money deposited was recognized, but it was held that the depositor waived his right to rescind by retaining the certificate of deposit and making no offer to surrender it.

267. *Matter of Siegel Co. (D. C., Mass.)*, 36 Am. B. R. 130, 223 Fed. 369.

268. *In re Marengo County Mercantile Co. (D. C., Ala.)*, 29 Am. B. R. 46, 199 Fed. 474.

269. *Standard Varnish Works v. Haydock (C. C. A., 6th Cir.)*, 16 Am. B. R. 286, 143 Fed. 316; *Matter of Kaplan & Myers (D. C., Pa.)*, 37 Am. B. R. 630.

*Waiver of fraud by creditor.*—An intention of a creditor, holding a note to waive the fraud and rely on the contractual obligation for which the note was given, cannot be inferred from the presentation of the note, not yet due, after a petition in bankruptcy has been filed against the maker. The right of a vendor to reclaim property obtained by fraud is not waived by the fact that its attorney joined in a petition to set aside an order of sale, and, without authority, described the vendor as a creditor, but at the hearing stated that his client had not decided what it "is going to do yet." *Matter of Midland Motor Car Co. (C. C. A., 7th Cir.)*, 37 Am. B. R. 364, 224 Fed. 368.

270. *Matter of Collins (D. C., Ala.)*, 39 Am. B. R. 510, 242 Fed. 975; *Jones v. Hobbie Grocery Co. (C. C. A., 5th Cir.)*, 40 Am. B. R. 415, 246 Fed. 481; *In re Appel Suit & Cloak Co. (D. C., Colo.)*, 28 Am. B. R. 818, 198 Fed. 322, holding that the amendment of 1910 to Section 47a (2) does not put the trustee in the posi-

tion of a *bona fide* purchaser for value, but only gives him the right of a lien creditor, and therefore, where it appears that bankrupt made a false statement of its financial condition to a mercantile agency which communicated it to one who relying thereon extended credit to bankrupt, at a time when it was hopelessly insolvent, and it further appears that, in the circumstances, the vendor's right to rescind the sale and reclaim the property is, under the law of Colorado, superior to the lien of a judgment creditor and enforceable against all except *bona fide* purchasers for value, the vendor is entitled to reclaim the unsold part of its goods from bankrupt's trustee, notwithstanding the amendment. Compare *In re Whatley Bros. (D. C., Ga.)*, 29 Am. B. R. 64, 199 Fed. 326.

*Goods obtained by fraud; laches.*—Where about five months before bankruptcy claimant sold to bankrupt a soda fountain and appurtenances under a conditional sale contract, but made no rescission of the contract or effort at reclamation before bankruptcy intervened, it could not reclaim the property on the ground that the sale had been induced by fraud. *Becker Co. v. Gill (C. C. A., 8th Cir.)*, 30 Am. B. R. 429, 206 Fed. 36.

271. *Matter of Marks & Co. (C. C. A., 2d Cir.)*, 33 Am. B. R. 275, 218 Fed. 453; *Matter of N. Y. Commercial Co. (C. C. A., 2d Cir.)*, 35 Am. B. R. 779, 228 Fed. 120.

272. *Matter of Marks & Co. (C. C. A., 2d Cir.)*, 33 Am. B. R. 275, 218 Fed. 453,

ensues causing loss to the seller, proof of insolvency at the time of the sale is not essential.<sup>273</sup> The petitioner has the burden of showing the alleged fraud, and in the absence of affirmative proof of such fraud the property may not be reclaimed, although the buyer was insolvent and the seller was ignorant of it.<sup>274</sup>

(5) **PROPERTY SOLD SUBJECT TO APPROVAL; RENTAL CONTRACTS.**—Where machinery or other articles are sold upon the condition that if they are not satisfactory the purchaser may return them and such purchaser prior to his bankruptcy expressed himself as dissatisfied and declared that he would not accept such machinery or articles, the seller may reclaim them, and the receiver or trustee of the bankrupt purchaser will not be heard to say that the refusal of the bankrupt to accept was arbitrary or capricious, fraudulent and in bad faith.<sup>275</sup> Where goods were shipped with the proviso that they were to be paid for as soon as the goods were received provided they were satisfactory, reclamation will only be allowed where it is claimed without delay.<sup>276</sup>

<sup>273</sup> *In re Bendall* (D. C., Ala.), 25 Am. B. R. 698, 163 Fed. 816; *Matter of New York Commercial Co.* (C. C. A., 2d Cir.), 35 Am. B. R. 779, 228 Fed. 120.

**Reasonable expectation of ability to pay.**—In case of *Matter of Berg* (Ref., Mass.), 25 Am. B. R. 170, the court dismissed the petition of reclamation upon the proof that the bankrupt, when he purchased the goods, had reasonable expectations that he would be able to pay for them and did not know that he was insolvent. See also *In re Roalswick* (D. C., Mont.), 6 Am. B. R. 732, 110 Fed. 639; *In re Davis* (D. C., N. Y.), 7 Am. B. R. 276, 112 Fed. 234.

<sup>247</sup> *Schroth v. Monarch Fence Co.* (C. C. A., 6th Cir.), 36 Am. B. R. 258, 229 Fed. 549; *Matter of Farmers' Dairy Association* (D. C., Cal.), 37 Am. B. R. 673, 234 Fed. 118.

**Statements of agent.**—*Matter of Bernstein* (D. C., N. Y.), 44 Am. B. R. 359, 261 Fed. 719.

**Proof of fraud.**—To entitle a vendor to recover possession of the goods from a third person, to whom they had been assigned, the vendor must show that bankrupt was insolvent at the time of the purchase of the goods, that it concealed its insolvency from the vendor, and that it intended not to pay for the goods. *In re Aarons & Co.* (C. C. A., 2d Cir.), 29 Am. B. R. 309, 193 Fed. 646.

In order to entitle a vendor to rescind a sale and reclaim from bankrupt's trustee goods sold to the bankrupt, upon the ground that the sale was induced by fraud, it must appear that the bankrupt was insolvent at the time of the purchase of the goods, that he concealed from the vendor his insolvency which was known to him at the time of the purchase, and that false and fraudulent representations were made by bankrupt with intent to deceive and defraud the vendor and to induce the latter to deliver to him the goods in question, with the intent and design not to pay for them. *In re Marengo County Mercantile Co.* (D. C., Ala.), 29 Am. B. R. 46, 199 Fed. 474.

**Evidence of fraudulent purchase.**—In a proceeding to reclaim certain property on the ground that the purchase was fraudulent in that the purchaser, now bankrupt, was insolvent and had no reasonable expectation of

being able to make payment when due, it appeared that at the time of the purchase and delivery the bankrupt was doing a large and active business; that although insolvent, in fact, it had excellent credit at a bank which was its principal creditor; that by the bank's failure, which was not anticipated, the purchaser was forced into bankruptcy. *Held*, on all the evidence, that the bankrupt was not without reasonable expectation of paying for the property in question. *Schroth v. Monarch Fence Co.* (C. C. A., 6th Cir.), 36 Am. B. R. 258, 229 Fed. 549. See also *Matter of Baskin* (D. C., Ohio), 44 Am. B. R. 536.

Judicial notice will be taken of the papers on record in a bankruptcy case in a proceeding to reclaim property in the possession of the trustee in bankruptcy. *Matter of Siegel Co.* (D. C., Mass.), 35 Am. B. R. 130, 223 Fed. 369.

<sup>275</sup> *In re Hill Co.* (C. C. A., 7th Cir.), 12 Am. B. R. 221, note, 123 Fed. 866. Compare *In re Simpson Mfg. Co.* (C. C. A., 7th Cir.), 12 Am. B. R. 212, 130 Fed. 307, in which case the evidence was considered, and it was held that there being no complaint made that the machinery was unsatisfactory, a sale of the machinery was completed, and that the vendor upon the bankruptcy of the purchaser was not entitled to a return of the machinery upon a claim that it was never accepted; *In re Froelich Rubber Refining Co.* (D. C., Pa.), 15 Am. B. R. 72, 139 Fed. 201, holding that where the contract contained an option to purchase within a prescribed time, the title to the property only passed to the bankrupt after such time expired.

**Lease with option to purchase.**—Where a bankrupt failed to purchase machinery at the end of the term for which he had leased it with the option to purchase, but continued to pay rent therefor, the lessor may reclaim the property from the lessee's trustee. *McEwen v. Totten* (C. C. A., 5th Cir.), 21 Am. B. R. 336, 164 Fed. 837.

<sup>276</sup> *In re O'Callaghan* (Ref., Mass.), 30 Am. B. R. 97; *Becker Co. v. Gill* (C. C. A., 8th Cir.), 30 Am. B. R. 429, 206 Fed. 36.

So also reclamation should be permitted where the bankrupt was in possession of articles being manufactured by him under contracts requiring payments at stated periods which had been regularly made, it appearing that the trustee did not intend to complete the contract and deliver the completed articles.<sup>277</sup> The question frequently arises where title passes to the purchaser under a contract whereby it is agreed to pay a stipulated amount as rental for the article sold, such amount to be applied upon the purchase price. It is generally held that if the agreement provides for the surrender of the property at the expiration of a designated term, or the purchase of such article at such time, it does not operate as a conditional sale but is a bailment and therefore the "lessor" may reclaim the article upon the bankruptcy of the lessee, prior to the exercise of the option to purchase.<sup>278</sup>

(6) PAYMENT ON DELIVERY; STOPPAGE IN TRANSIT.—Goods shipped to a person who, prior to the shipment, had gone into bankruptcy, may be stopped in transit and reclaimed by the shipper; but if the goods have arrived at their destination and the charges have been paid by the receiver in bankruptcy, it is too late for the shipper to reclaim the goods.<sup>279</sup> If personal property be sold upon the express condition that payment be made on delivery, and delivery is made on the faith that the condition will be immediately performed, and payment is refused upon demand, title does not pass, and the seller may properly be permitted to reclaim the property.<sup>280</sup> If a contract of sale under which the bankrupt was in possession reserved title in the vendor and permitted him to retake the property upon failure of the vendee to pay the purchase price, the vendor may reclaim the property, provided, of course, the contract is valid as against creditors under the laws of the State where made.<sup>281</sup> If the claimant insists upon a latent or undisclosed title to the goods claimed, in the possession of the bankrupt, the burden is on him to show his title.<sup>282</sup> All of such cases will depend for their determination upon principles already declared as to the validity of contracts for the conditional sale of

<sup>277</sup>. In re McDonald (D. C., Conn.), 14 Am. B. R. 797, 139 Fed. 463.

<sup>278</sup>. Liquid Carbonic Co. v. Quiek (C. C. A., 3d Cir.), 25 Am. B. R. 394, 182 Fed. 603. The provision in the agreement that the article should be "leased" to the bankrupt for a specified term and a specified rental and that at the expiration of the term it should be surrendered to the lessor, are the *indicia* of a bailment. In re Tice (D. C., Pa.), 15 Am. B. R. 97, 139 Fed. 52; In re Morris (D. C., Pa.), 19 Am. B. R. 422, 156 Fed. 597; In re Norton (D. C., Pa.), 24 Am. B. R. 794, 181 Fed. 901.

Agreement to execute conditional sale contract.—Where a creditor delivered certain property to a bankrupt on the express understanding at the time of the delivery that a lease conditional sale contract should later be executed, such creditor is entitled to reclaim such property from the bankrupt estate, as it is of no importance that the conditional sale contract was signed by the bankrupt about six months after the property was delivered or that the sale was under a secret understanding with him, if it is true that such understanding at the time of delivery was that the property should be incumbered by the conditional contract. In re Hutchins Co. (D. C., N. Y.), 24 Am. B. R. 647, 179 Fed. 864.

<sup>279</sup>. In re Allen (D. C., Pa.), 24 Am. B. R. 574, 178 Fed. 879; Matter of Johnson (D. C., Ohio), 30 Am. B. R. 787; Matter of Nicol (D. C., N. Y.), 34 Am. B. R. 465, 221 Fed. 82, holding that where goods shipped after adjudication are received by trustee, and shipper did not attempt to stop them *in transitu* or to reclaim them, he is not entitled to payment in full but

must be treated as other creditors. Matter of Arctic Stores (D. C., N. J.), 43 Am. B. R. 543, 258 Fed. 688; Matter of Baskin (D. C., Ohio), 44 Am. B. R. 536. See also Morgan v. Chicago & N. W. Ry. Co. (Wis. Sup. Ct.), 41 Am. B. R. 422, 166 N. W. 777.

In possession of forwarding company.—A seller of goods which were bought for export to a stated point in a foreign country has the right of stoppage *in transitu* after the intervention of bankruptcy of the purchaser, though said goods were at the time in the possession of a forwarding company for the purpose of forwarding them to their point of destination where said forwarding company had no authority to receive them for any other purpose. Matter of Stork (D. C., N. Y.), 45 Am. B. R. 106, 265 Fed. 864.

<sup>280</sup>. Southern Pine Co. v. Savannah Trust Co. (C. C. A., 5th Cir.), 15 Am. B. R. 618, 141 Fed. 802; In re Cattus (C. C. A., 2d Cir.), 26 Am. B. R. 848, 183 Fed. 733.

Payment by check.—When goods are sold on condition that title is not to pass until payment is made, the receipt of a check does not operate as payment, and the title to the goods remains in the seller till the check is paid. Matter of Perpall (C. C. A., 2d Cir.), 43 Am. B. R. 33, 256 Fed. 768.

<sup>281</sup>. Reardon v. Rock Island Plow Co. (C. C. A., 7th Cir.), 22 Am. B. R. 26, 168 Fed. 654; In re Burke (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994; Franklin v. Stoughton Wagon Co. (C. C. A., 8th Cir.), 22 Am. B. R. 63, 168 Fed. 857; In re Agnew (D. C., Miss.), 23 Am. B. R. 360, 178 Fed. 478; In re King Motor Car Co. (Ref., Mich.), 31 Am. B. R. 172.



personal property.<sup>283</sup> If delivery is made without insistence upon payment and the purchaser retains possession without payment for a considerable time, title to the property will vest in the bankrupt, the right of payment as a condition precedent having been waived.<sup>284</sup> If partial payment is made upon the contract the court may, as a condition to a decree in reclamation proceedings, direct the vendor to pay the trustee of the bankrupt vendee the amount of such payment, less the expense of repossessing and the cost of deterioration.<sup>285</sup>

(7) PROOF OF IDENTITY.—Identity is the *sine qua non* of the right of possession. Proof of it is insisted on even in the far less important proceeding when a consignor creditor claims goods in the hands of the trustee. The court whose right to possession is questioned can, it is thought, nay, in the interest of that pro-rating which the bankruptcy law commands, should, insist on the claimant establishing identity by proof in open court, with right to cross-examination by the adverse party, before yielding that which in bankruptcy cases is often more than "nine points of the law." This practice is outlined in the case cited in the foot-note.<sup>286</sup> In such proceedings it is only recovery of the identified articles which may be had; as to the articles which have been sold or disposed of by the bankrupt, the vendor is left to his remedy as a general creditor.<sup>287</sup>

(8) PRACTICE.—The practice has been to refer a petition for reclamation to a special master and not to the referee in bankruptcy, although the referee may have jurisdiction of such proceedings. This practice of reference to a special master should be followed until the Supreme Court especially rules that a reference may be made to the referee.<sup>288</sup> The costs in a reclamation proceeding to recover property found in the possession of the bankrupt will be imposed upon the bankrupt's estate where the claimant is successful.<sup>289a</sup>

**h. Rights of action.**—(1) IN GENERAL.—Under subdivision 6 all "rights of actions arising upon contracts<sup>288b</sup> or from the unlawful taking or detention of, or injury to," the bankrupt's property pass to the trustee. This subdivision is declaratory of the law. It has been held that a person who has been adjudged a bankrupt and obtained his discharge cannot sue upon a claim for services upon a *quantum meruit*, which arose prior to the filing of his petition, where it appears that he did not disclose the existence of the claim or any other asset, in the bankruptcy proceedings, because of which no trustee was appointed.<sup>289</sup> It seems that, after being vested in the trustee, such rights of action may be carried to judgment by the bankrupt for his own benefit after a composition is confirmed.<sup>290</sup> It has been held that a trustee in bankruptcy does not succeed to the right which a bankrupt has under a State law to bring an action for the partition of real property held in common.<sup>291</sup> There is, however, authority to the contrary. The question depends upon the statutes of the particular States.<sup>291a</sup>

<sup>283.</sup> In re Burke (D. C., Ga.), 22 Am. B. R. 60, 168 Fed. 994.

<sup>283.</sup> See discussion under sub-title "Property sold to bankrupt on condition," *ante*, pp. 1145-47, and notes thereunder.

<sup>284.</sup> Guarantee Title & Trust Co. v. First Nat. Bank (C. C. A., 3d Cir.), 26 Am. B. R. 85, 185 Fed. 373.

**Sale of bonds between brokers.**—Where it is the custom among brokers for one who sells a bond to deliver it by messenger and later to send another messenger to collect the sale price, the fact that the first messenger does not collect the price does not amount to a waiver on the part of the seller of the condition of payment. Matter of Perpall (C. C. A., 2d Cir.), 43 Am. B. R. 33, 256 Fed. 758.

<sup>285.</sup> In re Hooven-Owens-Rentschler Co. (C. C. A., 6th Cir.), 28 Am. B. R. 135, 195 Fed. 424.

**Set-off.**—Where a vendor receives a check from his vendee, shortly before the latter's bankruptcy, in payment for more property than actually delivered, such vendor in a proceeding to reclaim from the trustee in bankruptcy the proceeds of the sale of such of the property as had not been resold by the bankrupt, need not credit to the trustee, the payment received from the bankrupt, where the amount of its claim for goods sold by the bankrupt exceeds the amount of the latter's payment. Matter of Midland Motor Car Co. (C. C. A., 7th Cir.), 37 Am. B. R. 364, 224 Fed. 368.

<sup>286.</sup> In re Coleman v. Sherman (Ref., N. Y.), 8 Am. B. R. 763.

<sup>287.</sup> In re Ellowich (D. C., N. Y.), 17 Am. B.

(2) ACTIONS FOR PERSONAL INJURIES; TORTS AFFECTING PROPERTY OF BANKRUPT.—Causes of actions for personal injuries, such as assault and battery, slander, seduction and the like, are usually not assignable.<sup>292</sup> Where the suit is to recover usurious interest paid by the bankrupt,<sup>293</sup> and money lost in gaming,<sup>294</sup> and perhaps where the gravamen is deceit or fraud,<sup>295</sup> so long as the suit pertains to the property of the bankrupt, the right of action vests in the trustee. This subdivision is limited to rights of action arising upon contract or respecting property and does not include an action of tort for personal injuries.<sup>296</sup> The cases are by no means uniform. The safe rule is that stated in the text: that the trustee is vested with the bankrupt's rights of action on contract and for the unlawful taking or detention of or injury to his property.<sup>297</sup> A trustee may sue for tortious injuries inflicted upon the property of the bankrupt between the date of the filing of the petition and the date of the adjudication.<sup>298</sup> An action for conspiracy, is an action in tort

419, 148 Fed. 464; *Matter of Arkin Dress Co., Inc.* (C. C. A., 2d Cir.), 41 Am. B. R. 827, 263 Fed. 926.

288. *In re Tracy* (C. C. A., 2d Cir.), 24 Am. B. R. 539, 179 Fed. 366.

Hearing of several petitions.—A referee may in his discretion hear together several petitions to reclaim property from the receiver. *Matter of Aronson* (D. C., Mass.), 40 Am. B. R. 177, 245 Fed. 207.

289a. *Matter of Parker Co.* (D. C., Ohio), 45 Am. B. R. 34, — Fed. —.

The storage charges paid by a receiver in bankruptcy for the preservation of property of a third person prior to the filing of a petition in reclamation proceedings and pending the determination of the court of the controversy respecting the title, should be paid by the claimant. *Matter of Parker Co.* (D. C., Ohio), 45 Am. B. R. 34, — Fed. —.

289b. *Tennison v. Hanson* (Ark. Sup. Ct.), 42 Am. B. R. 402, 206 S. W. 438.

290. *Rand v. Iowa Central Ry Co.*, 12 Am. B. R. 164, 96 N. Y. App. Div. 413, 89 N. Y. Supp. 212.

290. See *Stone v. Morris* (Sup. Jud. Ct., Mass.), 4 Am. B. R. 508, 67 N. E. 1,002.

291. *Hobbs v. Frazier* (Sup. Ct., Fla.), 22 Am. B. R. 684, 56 Fla. 796.

291a. *Harlin v. American Trust Co.* (Ind. App. Ct.), 41 Am. B. R. 401, 119 N. E. 20.

Suit by trustee for partition of real estate.—Where a bankrupt had an undivided interest with others in land, his trustee in bankruptcy may convey such interest to a purchaser who may thus become a tenant in common with the other owners; but the trustee is not a tenant in common as recognised in partition proceedings, but is a trustee of a tenant in common, and may not bring and maintain a suit for the partition of real estate in which such bankrupt was tenant in common. *Lindsay v. Runkle* (Sup. Ct., Ohio), 24 Am. B. R. 612, 92 N. E. 489.

292. *Noonan v. Orton*, 12 N. B. R. 405; *Beckham v. Drake*, 8 Mees. & W. 845; *Howard v. Crowther*, 8 Mees. & W. 601; *Brewer v. Dew*, 11 Mees. & W. 625.

Cause of action for injury to person or reputation.—Under clause six of this section a trustee in bankruptcy cannot be substituted as plaintiff and continue the prosecution in a suit to recover damages for libel which had been commenced by the bankrupt prior to his bankruptcy, although the injuries to the bankrupt resulting from such libel may have been the cause of his bankruptcy. *Epstein v. Handwerker* (Sup. Ct., Okl.), 26 Am. B. R. 712, 116 Pac. 769.

293. *Tiffany v. Boatmen's Sav. Inst.*, 18 Wall 375; *Moore v. Jones*, 23 Vt. 739.

Recovery of usury.—In *Wheelock v. Lee*, 64 N. Y. 242, the trustee in bankruptcy was held to have the right to recover money exacted usuriously, but the court based its decision upon the fact that independent of the statutory right to recovery there existed a right to recover upon principles of the common law. In

the case of *Wright v. First Nat. Bank of Greensburg*, 18 N. B. R. 87, Fed. Cas. 18,078, it was held that the right of action given by the banking act of the United States to recover back usurious interest was a claim or debt passing to the assignee in bankruptcy; that while the right of action given by that act was final, yet the exacting of the usurious interest was in its nature an injury to the property rights of the bankrupt, and that the sections of the bankrupt law must be construed as giving the trustee the right to sue for and recover such usurious interest. But in *Bromley v. Smith*, Fed. Cas. 1,922, 5 N. B. R. 152, 2 Biss. 511, and in *Nichols v. Bellows*, 22 Vt. 581, both commented upon in *Wright v. First Nat. Bank of Greensburg*, the right of a trustee in bankruptcy to recover usurious interest was denied upon the ground that the right given by the statute was in the nature of a right to redress a personal injury done to the borrower himself, and that, like rights of action for personal torts, it does not pass to the trustee.

294. *Meech v. Stoner*, 19 N. Y. 28.

295. Thus, in *re Crockett*, Fed. Cas. 3,402, 2 Ben. 514, it was held that a suit brought for fraudulently recommending a person as worthy of trust and confidence is not a claim which vests as an asset in the assignee. But in *Hyde v. Tufts*, 45 N. Y. Super. Ct. 56, where one who afterward became a bankrupt was induced by false representations to engage in a business venture in which, by reason of the false representations, he incurred great loss, it was held that the cause of action for the fraud vested in his assignee in bankruptcy.

296. *Sibley v. Nason*, 22 Am. B. R. 712, 196 Mass. 125, 81 N. E. 887, 44 L. R. A. 180, note.

297. *Hansen Mercantile Co. v. Wymann, Partridge & Co.*, 22 Am. B. R. 877, 105 Minn. 491, 117 N. W. 926; *In re Harper* (D. C., N. Y.), 23 Am. B. R. 918, 175 Fed. 412; *In re Gay* (D. C., Mass.), 25 Am. B. R. 111, 182 Fed. 260, in which case it was held that where, at the time of bankruptcy, an action of tort was pending, which the bankrupts, who were dealers in stocks and bonds, had brought to recover damages for losses resulting from the purchase of certain bonds, which they alleged they had been induced to buy by false representations materially affecting the value of the bonds, the bankrupt's right of action was one "arising from injury of the bankrupt's property" so as to pass to the trustee under clause six of this section.

298. *Arnold v. Horrigan* (C. C. A., 6th Cir.), 38 Am. B. R. 174, 238 Fed. 39; *Matter of Veler* (C. C. A., 6th Cir.), 41 Am. B. R. 736, 249 Fed. 633.

and is not included within the rule; even though such an action is pending at the time of the plaintiff's bankruptcy, the right of action does not pass to his trustee.<sup>299</sup> But it has been held otherwise as to a right of action for injuries causing the death of the bankrupt's son.<sup>300</sup> A claim for a breach of warranty by the bankrupt against a third person passes to the trustee as a part of the assets of the estate.<sup>301</sup>

(3) **ACTIONS BY CORPORATIONS, AND AGAINST STOCKHOLDERS, DIRECTORS, AND OFFICERS.**—The right of a trustee of a bankrupt corporation to sue on a contract is co-extensive with that of the corporation. So that a right of action of a corporation to recover damages accruing because of the misconduct or neglect of duty of a corporate officer passes to the trustee of the bankrupt corporation;<sup>302</sup> and so also as to recovery of unpaid stock subscriptions.<sup>303</sup> If

<sup>299.</sup> *Cleland v. Anderson*, 11 Am. B. R. 605, 66 Neb. 276.

**Actions for conspiracy.**—A trustee in bankruptcy cannot maintain an action in tort for conspiracy in assisting a bankrupt to place his property beyond the reach of his creditors against persons who are alleged to have performed their acts of conspiracy during the pendency of the bankruptcy proceedings, but before the adjudication therein, where no allegation is made that any of the defendants received any portion of the bankrupt's estate, and the sole result of the conspiracy is to turn the bankrupt's property into money in his hands, for which he, himself, failed to account to the trustee. *Friedman v. Meyers*, 19 Am. B. R. 883, 80 Ohio Cir. Ct. 308.

A cause of action by a bankrupt to recover damages under the Sherman Law for alleged conspiracy to create a monopoly does not pass to his trustee in bankruptcy. *Bonvillian v. American Sugar Ref. Co.* (D. C., La.), 41 Am. B. R. 267, 250 Fed. 641.

<sup>300.</sup> *In re Burnstine* (D. C., Mich.), 12 Am. B. R. 506, 131 Fed. 823.

<sup>301.</sup> *Crouch v. Fahl* (Ind. App. Ct.), 38 Am. B. R. 929, 113 N. E. 1009.

<sup>302.</sup> *Brent v. Simpson* (C. C. A., 5th Cir.), 38 Am. B. R. 813, 238 Fed. 235; *Floyd v. Layton* (No. Car. Sup. Ct.), 38 Am. B. R. 366, 89 S. E. 998; *Woodman v. Butterfield* (Me. Sup. Ct.), 40 Am. B. R. 40, 101 Atl. 25; *McCullam v. Buckingham Hotel Co.* (Mo. Ct. of App.), 41 Am. B. R. 104, 199 S. W. 417.

**Right of action by corporation against directors for neglect of duty.**—The right of action by a corporation against its directors for negligence or neglect of duty resulting in a loss of assets, passes to its trustee in bankruptcy. Evidence in such an action examined and held sufficient to establish the liability of directors of a mercantile or supply store who were its managing officers. *Bynum v. Scott* (D. C., N. C.), 33 Am. B. R. 436, 217 Fed. 122.

<sup>303.</sup> *Courtney v. Croxton* (C. C. A., 6th Cir.), 38 Am. B. R. 560; *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 223 Fed. 667; *Allen v. Grant*, 14 Am. B. R. 349, 122 Ga. 552; *Thrall v. Union Malt Tobacco Co.*, 22 Am. B. R. 287, 54 Ohio Law Bull. 732; *In re Eureka Furniture Co.* (D. C., Pa.), 22 Am. B. R. 395, 170 Fed. 485; *Babbitt v. Read* (C. C. N. Y.), 23 Am. B. R. 254, 173 Fed. 712; *Roney v. Crawford* (Sup. Ct., Ga.), 24 Am. B. R. 638, 68 S. E. 701; *Matter of La Jolla Lumber & Mill Co.* (D. C., Cal.), 40 Am. B. R. 273, 243 Fed. 1004. See also under section 47, *ante*, "Suits by trustees of bankrupt corporations."

**Release by corporation of stockholder's liability.**—*Benner v. Billings* (Wash. Sup. Ct.), 43 Am. B. R. 578, 181 Pac. 19.

**What law controls.**—Whether a stockholder of a bankrupt corporation is liable to the estate for the difference between the par value of the

stock held by him and the amount originally paid therefor, is to be determined by the law of the State where the company was incorporated. *Matter of Mfgs. Box & Lumber Co.* (D. C., N. J.), 41 Am. B. R. 763, 251 Fed. 957.

**Stock issued in violation of State law.**—A trustee of a bankrupt corporation is entitled to recover on a note given for subscription to its stock, although such stock was issued in violation of the constitution and laws of the State. *Smoot v. Perkins* (Tex. Civ. App.), 40 Am. B. R. 193, 195 S. W. 988.

Under the Missouri statute the right of action against officers of a corporation to compel payment by them to the corporation which they represent and to its creditors, of all property which they have acquired to themselves, or transferred to others, or lost or wasted by any violation of their duties or abuse of their powers, is a right which vests in the trustee of bankruptcy of such corporation, and which may be dealt with, disposed of, sold or compromised by him under the direction of the court. *In re Swofford Bros. Dry Goods Co.* (D. C., Miss.), 24 Am. B. R. 282, 180 Fed. 549.

**Right of trustee to levy assessment on unpaid stock under New Jersey statute.**—Section 21 of the New Jersey Corporation Act provides that "where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debts and obligations." Section 22 empowers the directors from time to time to make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof. *Held*, that upon the adjudication in bankruptcy of a New Jersey corporation, not only the title to its property vests in the trustee, but also the right to exercise the powers of the directors, under the statute, to cause an assessment to be made on all its unpaid shares of stock. *In re Newfoundland Syndicate* (D. C., N. J.), 23 Am. B. R. 119, 196 Fed. 443, *affd.* 29 Am. B. R. 868, 201 Fed. 917.

Under the law of Ohio, where a corporation upon its formation purchases the property, business and good will of a partnership and assumes its liabilities, turning over to the partners in consideration therefor shares of its capital stock, each partner will be regarded as an original subscriber for so much of the stock as is issued to him, and credited on his subscription for only the actual value of his interest in the partnership property transferred to the corporation in payment of his subscription, and the balance left, after applying this credit, will be deemed a debt due from him to the corporation, and, therefore, corporate

a right of action exists against the directors of a bankrupt corporation, and one of the three trustees is a director, the remaining trustees may sue all the directors.<sup>304</sup> The statutory right of a creditor or stockholder to sue the directors and officers for excessive indebtedness or other statutory liability does not pass as an asset to the trustee in bankruptcy of the corporation; such right is enforceable as a secondary security of the creditors or stockholders independently of the bankruptcy proceedings.<sup>305</sup> Where the right of action against officers or stockholders inures to a creditor under conditions prescribed in the statute giving such right, the trustee of the bankrupt corporation does not succeed to such right.<sup>306</sup> But where under a state statute a stockholder's liability for the unlawful issue of stock may be enforced by the corporation, its trustee in bankruptcy may sue to enforce such liability.<sup>307</sup> Where dividends were paid to stockholders out of the assets of a corporation to the impairment of its capital, a trustee in bankruptcy may recover such dividends for the benefit of the creditors who became such after the payment of such dividends.<sup>308</sup> While a corporation may not sue on a purely personal tort, it may recover damages for a malicious attachment of corporate property, and the right of action passes to the trustee in bankruptcy of the corporation.<sup>309</sup> If the corporation is a foreign corporation and because of failure to comply with the laws of a State where it was transacting business, its contracts in such State are void, the trustee of such corporation cannot sue on such contracts in the Federal courts.<sup>310</sup>

assets, recoverable by the corporation's trustee in bankruptcy in an appropriate suit brought for the benefit of the bankrupt estate. *Kis-kadden v. Steinle* (C. C. A., 6th Cir.), 29 Am. B. R. 346, 203 Fed. 375.

The rule adopted by the Federal courts in cases arising in Ohio is that a stockholder who has purchased the impaired capital stock of a going concern at less than its par value but at its fair market value, cannot be compelled by a trustee in bankruptcy to pay the difference between the purchase price and the par value. *Thomas & Brennehan v. Goodman* (C. C. A., 6th Cir.), 42 Am. B. R. 688, 254 Fed. 39.

**Assessment of stock.**—The district court has power to make a preliminary inquiry concerning the need to assess unpaid subscriptions, and may authorize the trustee to make such assessment. A mere order to assess, however, does not conclusively determine that the stockholder must pay; it does not take away his right to prove that he has already discharged the obligation, although it does prevent him from attacking the need for an assessment or the amount assessed. *Matter of Stipp Construction Co.* (C. C. A., 3d Cir.), 34 Am. B. R. 333, 221 Fed. 372.

<sup>304.</sup> *In re Syracuse Paper & Pulp Co.* (D. C., N. Y.), 21 Am. B. R. 174, 164 Fed. 275.

<sup>305.</sup> *In re Beachy & Co.* (D. C., Wis.), 22 Am. B. R. 538, 170 Fed. 825; *Seegmiller v. Day* (C. C. A., 7th Cir.), 41 Am. B. R. 317, 249 Fed. 177.

<sup>306.</sup> *Courtney v. Georger* (D. C., N. Y.), 34 Am. B. R. 517, 221 Fed. 502, *affd.* 36 Am. B. R. 228, 228 Fed. 859, arising under a Minnesota statute prohibiting the issue of stock for a less amount to be actually paid in than the par value of the stock first issued, and it was held, applying decisions under the statute, that it was for the purpose of providing a remedy against stockholders for creditors who had been misled by the issue and such remedy was not for the benefit of the creditors generally, giving to the trustee of the bankrupt corporation the right to sue.

To the same effect see *State Bank of Commerce v. Kennedy Bank Instrument Co.* (Minn. Sup. Ct.), 44 Am. B. R. 91, 173 N. W. 560; *Matter of Berler Shoe Co.* (D. C., N. Y.), 40 Am. B. R. 470, 240 Fed. 1018.

**Rule under New York statute.**—*In re Jassoy* (C. C. A., 2d Cir.), 23 Am. B. R. 622, 178 Fed. 515, 101 C. C. A. 641, it was held by Judge Lacombe that under the stock corporation law of New York, which substantially provides that holders of stock in a corporation for which par value has not been paid shall be personally liable to certain classes of creditors to the extent of the balance due on their stock, no claim or right of action is given to the corporation against such stockholder, and furthermore that under such circumstances no right of action inures to the trustee in bankruptcy of the corporation on behalf of its general creditors to compel stockholders to make payment equal to the par value of the stock.

<sup>307.</sup> *Babbitt v. Read* (C. C. A., 2d Cir.), 38 Am. B. R. 303, 236 Fed. 42.

<sup>308.</sup> *Mackall v. Pocock* (Minn. Sup. Ct.), 38 Am. B. R. 680, 161 N. W. 228. But see *Ratcliff v. Clendenin* (C. C. A., 8th Cir.), 36 Am. B. R. 561, holding in effect that if the corporation was solvent when the dividends were paid and the stockholders received them in good faith, the creditors are not entitled to recover such dividends. *Johnson v. Canfield-Swigart Co.* (Ill. Sup. Ct.), 45 Am. B. R. 234, 126 N. E. 608.

<sup>309.</sup> *Hanson Mercantile Co. v. Wyman, Partridge & Co.*, 22 Am. B. R. 877, 105 Minn. 491, 117 N. W. 926.

<sup>310.</sup> *Thomas v. Birmingham Ry., L. & P. Co.* (D. C., Ala.), 28 Am. B. R. 152, 195 Fed. 340, holding that in such case, since the statutory prohibition is directed against the performance, as well as the making of the contracts, no action can be maintained upon implied contract or upon a quantum meruit; nor does the fact that the contracts had been performed by bankrupt, prevent the interposition of the defense of illegality.

## IV. BURDENSOME AND EXEMPT PROPERTY.

a. Burdensome property and contracts.—(1) IN GENERAL.—The statute is silent respecting burdensome property. The English law goes into this subject with considerable particularity, the trustee there being given twelve months in which to elect to claim or disclaim onerous property.<sup>311</sup> The general rules phrased into that law are, however, doubtless also the law in this country. Thus, it is well settled that trustees in bankruptcy are not bound to accept property which is onerous and unprofitable, and which will burden, rather than benefit, the estate.<sup>312</sup> A trustee is not obliged nor is it his duty to accept title to property that he considers worthless, and his opinion may be based on the fact that assertion of ownership may involve a lawsuit of uncertain outcome.<sup>313</sup> The doctrine has been applied where property is mortgaged beyond its value, in which case the court may direct that the property be released and surrendered to the mortgagee upon such conditions as it may deem just.<sup>314</sup> The question is not one of jurisdiction or of right, but of discretion.<sup>315</sup> The doctrine has no application to property which the bankrupt has concealed, and of the existence of which the trustee has no knowledge, and has not therefore had the opportunity to make an election.<sup>316</sup> If the trustee files a disclaimer, and the property is rejected, the bankrupt may reassert his title to the property and take possession thereof.<sup>317</sup>

(2) EXECUTORY CONTRACTS AND LEASES.—Trustees in bankruptcy are not bound to adopt the executory contracts and the leases, or otherwise step into the shoes of the bankrupt, if, in their opinion, it would be unprofitable and undesirable to do so;<sup>317a</sup> and they are entitled to a reasonable time to elect whether to accept such contracts and leases or to repudiate them.<sup>318</sup> The fact that the bankruptcy proceedings are in effect voluntary does not amount to an anticipatory breach of the contracts by the bankrupt, so as to prevent the trustee from enforcing them without the consent of the seller.<sup>318a</sup> In the execution of their trust they are confronted at the outset with the duty of electing whether to assume an existing executory contract, continue its performance, and ultimately dispose of it for the benefit of the estate or to renounce it and leave the injured party to such legal remedies for the breach, as the case affords. If they elect to assume such a contract, they are required to take it *cum onere*, as the bankrupt enjoyed it, subject to all its provisions and conditions, in the same plight and condition that the bankrupt held it.<sup>319</sup> If a trustee fails to take title to or possession of a contract of the bankrupt, title and possession remain in the bankrupt, and he may enforce the contract the same as before bankruptcy.<sup>319a</sup>

311. Eng. Act of 1883, § 55, as amended by Act of 1890, § 13.

312. *McCarty v. Light*, 155 N. Y. App. Div. 36, 33 Am. B. R. 883, 139 N. Y. Supp. 853; *People's Nat'l Bank v. Maxson* (Sup. Ct. Iowa), 33 Am. B. R. 705, 150 N. W. 601; *Watson v. Motley* (Ala. Sup. Ct.), 39 Am. B. R. 750, 75 So. 147; *Trabue v. Ash* (Tex. Ct. of Civ. App.), 41 Am. B. R. 122, 200 S. W. 415; *Matter of Berry* (D. C. Mich.), 41 Am. B. R. 357, 247 Fed. 700; *Matter of North Star Ice & Coal Co.* (D. C. Tenn.), 42 Am. B. R. 76, 252 Fed. 301.

313. *Greenall v. Hersum* (Mass. Sup. Ct.), 34 Am. B. R. 20, 107 N. E. 941; *Hardcastle v. National Clothing Co.* (Tenn. Sup. Ct.), 38 Am. B. R. 719, 191 S. W. 524.

314. *Equitable Loan & Security Co. v. Moss & Co.* (C. C. A., 5th Cir.), 11 Am. B. R. 111, 125 Fed. 609; *In re Jersey Island Packing Co.* (C. C. A., 9th Cir.), 14 Am. B. R. 689, 138 Fed. 625; *In re Zehner* (D. C., La.), 27 Am. B. R. 536, 193 Fed. 787; *Matthews & Sons v. Webre Co.* (D. C., La.), 32 Am. B. R. 180, 213 Fed. 396.

315. *In re Cogley* (D. C., Iowa), 5 Am. B. R. 731, 107 Fed. 73; *In re Dillard*, Fed. Cas. 3,912.

316. *First Nat. Bank v. Lasater*, 196 U. S. 115, 13 Am. B. R. 698, 49 L. Ed. 408, 25 Sup. Ct. 206; *Raley v. Sullivan & Co.* (Tex. Com. of App.), 42 Am. B. R. 753, 207 S. W. 906.

317. *Smith v. Wahl* (N. J. Ct. of Errors & App.), 37 Am. B. R. 157, 97 Atl. 261.

Rejection by trustee; title reverts in bankrupt.—When a trustee in bankruptcy rejects any part of the bankrupt's assets because their acceptance would be a burden to the estate, such action is final, and the title thereto remains in the bankrupt, unless the Federal court shall compel another course, and the trustee, having rejected any part of the bankrupt's estate, is divested of any sufficient title upon which to rest an action in trover for the conversion of such assets by the bankrupt or

his assigns. *Mesirov v. Innis Speiden & Co.* (N. J. Sup. Ct.), 37 Am. B. R. 201, 97 Atl. 180.

317a. *Barr v. Youngville Sugar Factory* (La. Sup. Ct.), 40 Am. B. R. 30, 75 So. 805; *Matter of Schilling and Loller* (D. C., Ohio), 41 Am. B. R. 705, 251 Fed. 972, 966; *Planters' Oil Co. v. Gresham* (Tex. Ct. of Civ. App.), 42 Am. B. R. 29, 202 S. W. 145; *Matter of Elk Brook Coal Co.* (D. C., Pa.), 44 Am. B. R. 283, 262 Fed. 445.

318. *United States Trust Co. v. Wabash Ry.*, 150 U. S. 287, 37 L. Ed. 1085, 14 Sup. Ct. 86; *Matter of Otis*, 101 N. Y. 580, 5 N. E. 571; *Barr v. Youngville Sugar Factory* (La. Sup. Ct.), 40 Am. B. R. 30, 75 So. 805, citing *Collier on Bankruptcy* (10th ed.), 1033; *Matter of Berry* (D. C., Mich.), 41 Am. B. R. 357, 247 Fed. 700; *Rosenblum v. Uber* (C. C. A., 3d Cir.), 43 Am. B. R. 480, 256 Fed. 584; *Matter of Morris & Rice* (D. C., Mass.), 44 Am. B. R. 146, 258 Fed. 712; *Esquilagu v. Carolina* (D. C., Porto Rico), 44 Am. B. R. 125; *Matter of Pottier & Stymus Co.* (C. C. A., 2d Cir.), 44 Am. B. R. 469, 262 Fed. 955.

A seller obligated to deliver on a contract to a bankrupt purchaser cannot, in an action by the trustee in bankruptcy for failure to deliver, assert that he is not liable, simply because the trustee did not elect within a reasonable time to accept the contract. *Planters' Oil Co. v. Gresham* (Tex. Ct. of Civ. App.), 42 Am. B. R. 29, 202 S. W. 145.

318a. *Planters' Oil Co. v. Gresham* (Tex. Ct. of Civ. App.), 42 Am. B. R. 29, 202 S. W. 145.

319. *Planters' Oil Co. v. Gresham* (Tex. Ct. of Civ. App.), 42 Am. B. R. 29, 202 S. W. 145; *Matter of Barnhardt Coal & Limestone Co.* (D. C., Ohio), 44 Am. B. R. 170; *Greif Bros. v. Mullinix* (C. C. A., 8th Cir.), 45 Am. B. R. 265, 264 Fed. 391; *Atchison, etc., Railway Co. v. Hurley* (C. C. A., 8th Cir.), 18 Am. B. R. 396, 163 Fed. 503. Compare *Glenny v. Langdon*, 96 U. S. 20, 25 L. Ed. 43; *Sparhawk v. Yerkes*, 142

This doctrine is frequently applied in case of leases.<sup>320</sup> The trustee takes title to a lease only in case he elects to accept it; the property, therefore, which may be said to pass immediately to the trustee is not the lease itself but the option of accepting it.<sup>321</sup> If a lease is accepted by the trustee, he is not prevented from selling the same under an order of the court, by a clause contained in the lease providing that the tenant shall not sublet or assign without the consent of the landlord.<sup>322</sup> A trustee may, with the consent of the landlord, surrender a lease, whereupon the landlord regains possession and all unexpired obligations between the parties depending upon the continuance of the leasehold estate are terminated.<sup>323a</sup> Where a bankrupt is vendee under an executory contract for the sale of land the referee has power, at the instance of the bankrupt's creditors, to direct the trustee to execute a formal release and surrender of the bankrupt's right to performance of such contract.<sup>323</sup> But it has been ruled that a referee under the bankruptcy act is not vested with power to order the trustee to specifically perform a contract of the bankrupt. Hence, he has no power to make an order directing the trustee to make a deed of the interest of the bankrupt in certain property now in the possession of the proposed devisee.<sup>324</sup>

(3) PRACTICE.—This is simple. The trustee, if satisfied, after appraisal or even on an independent investigation, that some or all of the property, which has vested in him is of no value or will be a charge on the estate, should file a report to that effect and ask for instruction. The referee may, it is thought, act without calling a meeting of creditors or even submitting the application to a pending meeting; but safe practice suggests that the creditors be consulted and their wishes observed. If the trustee is instructed to disclaim the property as onerous, an order should be entered to that effect. This in effect reverts the title in the bankrupt.<sup>325</sup> Leases should be accepted or disclaimed promptly,<sup>326</sup> but a continuance in possession will not usually be

U. S. 1, 35 L. Ed. 915, 12 Sup. Ct. 104; In re Scheerman, 2 N. B. N. Rep. 118, and cases cited. See also "Supplementary Forms," *post*.

The trustee is not bound to take property which may involve him in litigation. *Oldmixon v. Severance*, 18 Am. B. R. 823, 117 N. Y. App. Div. 921, 104 N. Y. Supp. 1042. A trustee is not bound to accept and complete contracts made by the bankrupt, but, if he undertakes to do so, he is subject to all the conditions imposed by the contract upon the bankrupt. In re *Delong Furniture Co.* (D. C., Pa.), 26 Am. B. R. 460; In re *Davis* (D. C., N. Y.), 25 Am. B. R. 1, 180 Fed. 148.

319a. *Planters' Oil Co. v. Gresham* (Tex. Ct. of Civ. App.), 42 Am. B. R. 29, 202 S. W. 145.

320. For instance see *Baldwin on Bankruptcy* (8th ed.), pp. 281-291, and General Rule (Eng.), 320; also numerous cases in this country; *Matter of Frazin & Oppenheim* (D. C., N. Y.), 23 Am. B. R. 289, 174 Fed. 713; In re *Rubel* (D. C., Wis.), 21 Am. B. R. 566, 166 Fed. 181, holding that a trustee has a reasonable time after his appointment to determine whether he will adopt a lease as an asset of the estate, and offer the same for sale, or whether he will ignore it entirely. *Matter of Stern* (D. C., Pa.), 41 Am. B. R. 712.

Right to use premises occupied by bankrupt tenant.—A trustee or receiver has the right to use the premises occupied by the bankrupt for a reasonable period, sufficient to enable him to dispose of the bankrupt's property without unnecessary loss, and to do so by selling it there, if that be the best way. *Matter of Crawford Plummer Co.* (D. C., Mass.), 42 Am. B. R. 92, 253 Fed. 76.

Title of trustee as against landlord of bankrupt farmer.—Where the owner of a farm and the stock thereon rented the same for a term

of years at a cash rent, expressly reserving title to the earnings of the stock and to the hay and fodder, not as security for the payment of the rent, but to insure the preservation of the stock, and the tenant went into bankruptcy before the expiration of the lease, having paid the rent up to said date, and surrendered possession to the owner, who sold the stock, hay and fodder, the trustee in bankruptcy, not having assumed the lease, cannot recover the proceeds of the sale from the owner. *Matter of Place* (D. C., N. Y.), 35 Am. B. R. 426, 224 Fed. 778.

321. *Matter of Frazin & Oppenheim* (C. C. A., 2d Cir.), 24 Am. B. R. 903, 183 Fed. 28; *Matter of Roth & Appel* (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed. 667; *Matter of Sherwoods, Inc.* (C. C. A., 2d Cir.), 31 Am. B. R. 769, 210 Fed. 754; In re *Sapinsky* (D. C., Ky.), 30 Am. B. R. 416, 206 Fed. 523.

322. *Gazlay v. Williams*, 210 U. S. 41, 20 Am. B. R. 18, 28 Sup. Ct. 687, 52 L. Ed. 950; In re *Gutman* (D. C., Ga.), 28 Am. B. R. 643, 197 Fed. 472, holding that although such a lease contains the ordinary covenant against subletting or assignment, its transfer from the tenant to his trustee in bankruptcy, by operation of the bankruptcy law, does not avoid the lease, but it may be sold for the benefit of creditors.

322a. Surrender of lease.—A valid surrender consists not only in an offer by the lessee to surrender but an acceptance of that offer by the landlord. *Rosenblum v. Uber* (C. C. A., 3d Cir.), 43 Am. B. R. 480, 256 Fed. 584.

A landlord has no right to make a conditional acceptance of the surrender of a lease by the bankrupt tenant or to hold the leasehold for the benefit of the estate. *Matter of Stern* (D. C., Pa.), 41 Am. B. R. 712.

323. *Kenyon v. Mulert* (C. C. A., 3d Cir.), 26 Am. B. R. 184, 184 Fed. 825.

construed an election to accept the burdens and obligations of the lease.<sup>327</sup> Another method of disposing of burdensome property is to sell it at a meeting of creditors called for that purpose. This is often done at final meetings, and sometimes at the instance of lien creditors, who thereby get title without the usual delays and costs attending foreclosures and judicial sales.

**b. Exempt property.**—(1) **IN GENERAL.**—The trustee does not take title to property exempt by the law of the State, but, until the exempt property is set off, has possession.<sup>328</sup> The reference to exemptions in this section does not show an intent to require a claim for an exemption to be made prior to adjudication.<sup>329</sup> The trustee takes no title to exempt property; the right to exemption is to be determined as of the date of the adjudication.<sup>330</sup> This subject has been fully considered elsewhere.<sup>331</sup>

(2) **CONFLICT BETWEEN § 6 AND § 70-A (5) AS TO RIGHTS OF BENEFICIARIES UNDER LIFE INSURANCE POLICIES.**—The proviso clause in subdivision (5) has already been often considered by the courts. It was doubtless inserted to prevent the hardship which might result to beneficiaries of life insurance policies did the latter pass to the insured's trustee absolutely. In effect, the bankrupt may retain the advantage which years of premiums may have given him, provided he pays or secures to the estate the cash surrender value of the policy.<sup>332</sup> The practice is sufficiently indicated by the words of the statute. But the question generally discussed is whether, since most of the States declare life insurance policies exempt, the clause here is subject to § 6, or a limitation on it. The Supreme Court has now declared that the provisions of this section do not apply to life insurance policies which are exempt under a State law; as to such policies the State law must control regardless of whether they had a cash surrender value.<sup>333</sup> A bankrupt does not waive his

324. *Dreyer v. Perkins* (C. C. A., 5th Cir.), 33 Am. B. R. 232, 217 Fed. 889.

325. *Sesalons v. Romandka*, 145 U. S. 29, 36 L. Ed. 609, 12 Sup. Ct. 799.

326. *Kenyon v. Mulert* (C. C. A., 3d Cir.), 26 Am. B. R. 184, 184 Fed. 825; *Matter of Sherwoods, Inc.* (C. C. A., 2d Cir.), 31 Am. B. R. 769, 210 Fed. 754.

327. See discussion under Section Seventeen of this work. In *Matter of Frasin & Oppenheim* (C. C. A., 2d Cir.), 24 Am. B. R. 903, 183 Fed. 23.

328. *McKenney v. Cheney* (Sup. Ct., Ga.), 11 Am. B. R. 54, 45 S. E. 433; *In re Castleberry* (D. C., Ga.), 16 Am. B. R. 159, 143 Fed. 1018; *In re Sullivan* (D. C., Iowa), 16 Am. B. R. 87, 142 Fed. 620; *In re Bender* (Ref., Ohio), 17 Am. B. R. 895; *In re Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 628; *Pincus v. Meinhard & Bro.* (Sup. Ct., Ga.), 32 Am. B. R. 123, 77 S. E. 82, citing *Collier on Bankruptcy* (9th ed.), 1029; *Matter of Auge* (D. C., Mont.), 39 Am. B. R. 39, 238 Fed. 621; *Hughes v. Sebastian County Bank* (Ark. Sup. Ct.), 39 Am. B. R. 866, 195 S. W. 364.

The federal homestead act does not create an exemption, but merely a statutory benefit, and the title to the property passes to the trustee and the rights of the parties under the statute are to be worked out in the bankruptcy court. *Matter of Auge* (D. C., Mont.), 39 Am. B. R. 39, 238 Fed. 621.

329. *In re Fisher* (D. C., Va.), 15 Am. B. R. 652, 142 Fed. 205.

330. *In re Seydel* (D. C., Iowa), 9 Am. B. R. 255, 118 Fed. 207; *Chicago, B. & Q. R. R. Co. v. Hall*, 229 U. S. 511, 30 Am. B. R. 619, 57 L. Ed. 1304, 33 Sup. Ct. 885; *Matter of Fletcher* (Ref., Ohio), 16 Am. B. R. 491; *In re Letson* (C. C. A., 8th Cir.), 19 Am. B. R. 506, 157 Fed. 78; *In re Judson* (C. C. A., 2d Cir.), 27 Am. B. R. 704, 192 Fed. 834; *Matter of Vouhee* (D. C., Wash.).

38 Am. B. R. 799, 238 Fed. 422; *Drees v. Armstrong* (Iowa Sup. Ct.), 38 Am. B. R. 787, 161 N. E. 40; *Waters v. Hedgpeth* (No. Car. Sup. Ct.), 38 Am. B. R. 707, 90 S. E. 314.

331. See in § 6, ante. And compare §§ 2 (11) and 47-a (11); also General Order XVII.

332. *In re Moore* (D. C., Tenn.), 23 Am. B. R. 109, 173 Fed. 679.

**Necessity for notice to bankrupt.**—Notice to a bankrupt to redeem life insurance policies after ascertaining their cash surrender value, is not required by section 70-a of the Bankruptcy Act, but the burden of taking advantage of the privilege therein granted is upon the bankrupt himself. *Pittsburg, etc., Packing Co. v. Shrope* (D. C., Pa.), 33 Am. B. R. 122.

333. *Holden v. Stratton*, 198 U. S. 202, 14 Am. B. R. 94, 49 L. Ed. 1018, 25 Sup. Ct. 654, rev. 7 Am. B. R. 615, 113 Fed. 141; *Steele v. Buel* (C. C. A., 8th Cir.), 5 Am. B. R. 165, 104 Fed. 968, rev. 3 Am. B. R. 549, 98 Fed. 78. See also explaining effect of proviso, *Hiscock v. Mertens*, 205 U. S. 202, 17 Am. B. R. 484, 51 L. Ed. 771, 27 Sup. Ct. 488. The following cases are opposed to this doctrine: *In re Lange* (D. C., Iowa), 1 Am. B. R. 189, 91 Fed. 861; *In re Scheld* (C. C. A., 9th Cir.), 5 Am. B. R. 102, 104 Fed. 870; *In re Welling* (C. C. A., 7th Cir.), 7 Am. B. R. 340, 113 Fed. 189; *Matter of Fetterman* (D. C., Ohio), 39 Am. B. R. 834, 243 Fed. 975; *Matter of Hunter* (D. C., N. Y.), 41 Am. B. R. 445; *Matter of Brinson* (D. C., Miss.), 45 Am. B. R. 99, 262 Fed. 707.

The Tennessee statute which provides that life insurance effected by a husband on his own life shall inure to the benefit of his widow and next of kin, does not affect the title of his trustee in bankruptcy to the surrender value; such statute does not give an exemption to the bankrupt. *In re Moore* (D. C., Tenn.), 23 Am. B. R. 109, 173 Fed. 679.

right to exemptions of life insurance policies by listing them in his schedules, and showing that they have been assigned as security for an amount greater than their surrender value.<sup>334</sup> To policies which are so exempt § 6 applies; this is so since the opening clause of the section vests the trustee with the bankrupt's title except as to "property which is exempt." This qualification necessarily controls all the enumerations, and therefore excludes exempt property from all the provisions contained in the respective enumerations. It controls the proviso as well as other parts of the section and makes the life insurance policies which are exempt by State statute subject in all respects to the provisions of § 6.

(3) TITLE VESTS SUBJECT TO CHARGE FOR SUPPORT OF WIDOW AND MINOR CHILDREN.—The trustee's title is also subject to the condition that if the bankrupt dies during the pendency of the proceedings, the widow and children are entitled to receive the allowance given them by the laws of the State of the bankrupt's residence.<sup>335</sup>

#### V. APPRAISERS AND APPRAISAL.

a. In general.—The only reference to appraisers occurs in subsection b. The words seem to require the appointment of appraisers in every case.<sup>336</sup> At the same time, it is not thought that this is so far jurisdictional as to make defective a title sold by a trustee without appraisal. Three appraisers, not two or one, must be appointed. They must be disinterested; this excludes creditors and all other persons having an interest in the proceeding.<sup>337</sup> The appointment may be, in fact, usually is, made by the referee. Their fees are discretionary, the statute being silent, and are fixed in some districts by general rule, in others by order in each case. They are usually in the form of a *per diem*, and are moderate rather than large.<sup>338</sup> Inasmuch as the appraisal is often the key to the administration of asset cases and knowledge of the percentage of cost price used in getting at values essential to bidders and court alike, one of the appraisers should be selected and serve as the representative of the referee. Such a practice will, it is thought, check collusive bidding and inadequate prices at subsequent sales. It has been held that the prevailing cost to the trade should be adopted as the actual value.<sup>339</sup> An official appraiser of a bankrupt estate is, as a matter of law, incapable of purchasing the property of the estate prior to the filing of his appraisal.<sup>340</sup>

<sup>334.</sup> *King v. Miles* (Miss. Sup. Ct.), 34 Am. B. R. 93, 57 So. 182.

<sup>335.</sup> *Hull v. Dicks*, 235 U. S. 584, 34 Am. B. R. 1, 59 L. Ed. 372, 35 Sup. Ct. 152.

<sup>336.</sup> Necessity of appraisal.—While the want of an appraisal does not necessarily invalidate a sale by trustee of property of a bankrupt's estate, and a sale for a reasonable price without appraisal may be confirmed, yet, if the price is wholly inadequate the sale will not be allowed to stand. In such a case, the purchaser may return the property and recover the purchase price with interest. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 820, 3 U. S. Dist. Ct. Hawaii, 641. See also *Matter of Irvine* (D. C., S. Car.), 43 Am. B. R. 155, 255 Fed. 168.

The appraisement is evidence upon which the court may base a valid discretion when called upon to confirm or set aside a trustee's sale. *Jacobsohn v. Larkey* (C. A., 3d Cir.), 40 Am. B. R. 563, 245 Fed. 538.

<sup>337.</sup> *Matter of Columbia Iron Works* (D. C., Mich.), 14 Am. B. R. 528, 142 Fed. 234, in which

case it was held that the appointment of an appraiser upon the suggestion of a creditor was not necessarily void.

*Lessee of bankrupt as appraiser.*—A lessee of a portion of the property of a bankrupt under a mining lease, executed more than four months before the petition in bankruptcy was filed, and requiring work to be done and royalties to be paid, not shown to have an interest in the bankruptcy proceedings or in the sale of the property, is not disqualified as an appraiser under section 70-b of the Bankruptcy Act. *Clark Hardware Co. v. Sauve* (C. A., 8th Cir.), 33 Am. B. R. 674, 220 Fed. 102.

<sup>338.</sup> In *re Fiddler & Son* (D. C., Pa.), 23 Am. B. R. 16, 172 Fed. 632, holding that the trustee must justify by special circumstances the payment of more than \$5 per day as fees to appraisers.

<sup>339.</sup> In *re Prager* (Ref., Col.), 8 Am. B. R. 556.

<sup>340.</sup> *Matter of Frasin & Oppenheim* (C. C. A., 2d Cir.), 24 Am. B. R. 506, 181 Fed. 307.



**b. Practice.**—In no-asset cases appraisers are not needed, or often appointed. In asset cases, their appointment should be moved at the first meeting of creditors. Where possible, the wishes of the creditors should be consulted as to their choice. The appointment is evidenced by an order.<sup>341</sup> An oath of office must be taken.<sup>342</sup> The appraisal should be made as soon as possible; no notice to creditors or parties in interest is required. It has been said that an appraisal should be general rather than special, only such particularity being given as will be sufficient to reasonably identify the property in character and quantity, and give a fair idea of its value.<sup>343</sup> When made, it is reduced to writing,<sup>344</sup> signed by the appraisers, and filed with the referee. With it, should be filed affidavits of the number of days actually spent by each appraiser; this for the guidance of the referee in fixing the fees.<sup>345</sup>

## VI. SALES OF PROPERTY.

**a. In general.**—Subsection *b* also provides for the sale by the trustee of the bankrupt's real and personal property. The subject of sales is largely controlled either by rules or by the order of the court in each case. Here the present law differs materially from that of 1867. The latter, especially after the amendments of 1874, regulated sales with much particularity.<sup>346</sup> Subject to the statute and General Orders XXI and XXIII interpreting, it, the assignee (trustee) then had a large discretion as to sales. Cases under that law should, therefore, be cited with caution. The present statute, after, in general words,<sup>347</sup> conferring jurisdiction on courts of bankruptcy to convert estates into money and distribute them, and charging this duty on the trustee,<sup>348</sup> limits the latter's powers by the words "under the direction of the court," in § 70-b, and then, as to sales, provides that the same, when practicable, shall be made subject to the approval of the court; indeed, that no sale at less than 75 per cent. of the appraised value shall be made without such approval.<sup>349</sup> This subsection and the one that follows are, other than those in § 58-a (4), the only words of the present statute having to do with the reduction of a bankrupt's property into money. Thus, the only statutory check on absolute discretion is that creditors are entitled to notice of all proposed sales. This latter restriction is, as we have seen, unfortunate. The subject is, however, one of practice rather than law. This is recognized in General Order XVIII and the numerous special rules regulating sales in the different districts.

**b. Practice on sales; conduct of sales.**—(1) **IN GENERAL.**—It will be seen that a trustee has the option (1) of disclaiming the bankrupt's property, or (2) of selling it. If the latter, (a) he may sell it immediately without notice,

holding that under the rule of equity that no person can be permitted to purchase an interest in property and hold it for his own benefit where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his own individual use, an official appraiser of a bankrupt is incapable of purchasing the property which he has appraised.

<sup>341</sup> Form No. 13.

<sup>342</sup> *Id.*

<sup>343</sup> *In re Gordon Supply, etc., Co.* (D. C., Pa.), 13 Am. B. R. 352, 133 Fed. 798.

<sup>344</sup> Form No. 13.

<sup>345</sup> See generally 1 N. B. N. 179, and Rule 13, Erie Co. (N. Y.) District in 1 N. B. N. 114. Compare also *In re Grimes* (D. C., N. Car.), 2 Am. B. R. 730, 96 Fed. 529; *In re Jamieson* (Ref., R. I.), 6 Am. B. R. 601.

<sup>346</sup> See "Analogous Provisions" at head of this section.

<sup>347</sup> Bankr. Act, § 2 (7).

<sup>348</sup> Bankr. Act, § 47-a (2).

<sup>349</sup> *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 820, 3 U. S. Dist. Ct., Hawaii, 641.

if it be perishable, in which case the practice is indicated in Form No. 46;<sup>350</sup> (b) he may sell it at public auction on notice using Form No. 42;<sup>351</sup> or (c) he may sell it at private sale<sup>352</sup> under General Order XVIII (2) with or without notice, as the court shall direct,<sup>353</sup> in which case Form No. 45, modified to fit the facts, should be used; or (d) he may sell it subject to liens, when the practice is not unlike that on a sale of unincumbered property, though Form No. 44 should be used; or (e) he may sell it clear of liens, for which no form is provided but to which Form No. 44, with the additional recitals and directions indicated in the last paragraph, may be adapted, or (f) he may redeem it from liens, as provided in General Order XXVIII, in which event Form No. 43 should be used; or (g) he may sell unconverted assets as a part of the final meeting of creditors.<sup>354</sup> The bankruptcy court may order how a sale of the bankrupt's property shall be made and may order the property sold either in parcels or as a whole.<sup>355</sup>

(2) JURISDICTION OF REFEREE AS TO SALES.—A referee has power to order and confirm a sale,<sup>356</sup> but not before the adjudication.<sup>357</sup>

(3) BY WHOM CONDUCTED.—The act does not require the sale to be made by the trustee; the court may direct that the sale be conducted by an officer appointed by it,<sup>358</sup> in some districts official auctioneers are designated to conduct the sales.<sup>359</sup> It has been held that the act of March 3, 1893 (27 Stat. 75; U. S. Comp. Stats. 1901, p. 710), requiring judicial sales of land to be made upon the land itself, or at the court house in the county where it lies, and upon not less than four weeks' notice, does not apply to bankruptcy sales.<sup>360</sup>

**Sale without court order.**—A sale by a trustee in bankruptcy of personal property belonging to the estate of the bankrupt, in the absence of an order of the bankruptcy court authorizing such sale, is not absolutely void and cannot be attacked collaterally. *Trabue v. Ash* (Ct. of Civ. App., Tex.), 41 Am. B. R. 122, 200 S. W. 415.

350. This form is erroneous in so far as it recites a notice.

351. For a form of notice, see 1 N. B. N. 117.

352. The court may, under its broad powers, order a private sale of either real or personal property belonging to the estate. In re *Edes* (D. C., Me.), 14 Am. B. R. 382, 135 Fed. 595. See also *McKay v. Hamill* (C. C. A., 3d Cir.), 26 Am. B. R. 164, 185 Fed. 11; In re *Britannia Mining Co.* (D. C., Wis.), 28 Am. B. R. 651, 197 Fed. 459.

353. As to when notice to creditors and holders of a private sale should be given, see *Allair v. Fisher* (C. C. A., 3d Cir.), 16 Am. B. R. 278, 143 Fed. 962.

**Notice.**—A sale by a trustee in bankruptcy, or an offer to sell at public auction, may be made on ten days' notice. *Matter of Progressive Wall Paper Corporation* (D. C., N. Y.), 3 Am. B. R. 508, 222 Fed. 87.

**Right to object for want of notice is waived by appearing at the day of the sale and filing exceptions and objections and by attending the sale.** *Pace v. Berry* (Ky. Ct. of App.), 40 Am. B. R. 53, 195 S. W. 131.

354. See "Supplementary Forms," post; and also *Hagar & Alexander's Bankruptcy Forms* (2d ed.).

355. *Matter of Haywood Wagon Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 618, 219 Fed. 655.

**Sale of property subject to oil lease.**—Where a tract of land subject to an oil and gas lease is subdivided and sold and later the lessee produces oil on one of the subdivisions the purchaser of that particular subdivision is

entitled to the royalties under the lease. *Pittsburg & W. Va. Gas Co. v. Enkrom* (W. Va. Sup. Ct. of App.), 42 Am. B. R. 523, 97 S. E. 593.

356. In re *Matthews* (D. C., Ark.), 6 Am. B. R. 96, 109 Fed. 603; In re *Fisher & Co.* (D. C., N. J.), 14 Am. B. R. 366, 135 Fed. 223; *Matter of Schilling and Loller* (D. C., Ohio), 41 Am. B. R. 705, 251 Fed. 972, 963.

357. In re *Styer* (D. C., Pa.), 3 Am. B. R. 424, 95 Fed. 290. Compare In re *Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

358. *Sturgis v. Corbin* (C. C. A., 4th Cir.), 15 Am. B. R. 543, 141 Fed. 1, 72 C. C. A. 179.

359. In re *Benjamin* (C. C. A., 2d Cir.), 14 Am. B. R. 481, 136 Fed. 175, affd. 13 Am. B. R. 18.

**Sale by auctioneer.**—An order directing a sale is not invalid, which dispenses with the requirements of a local rule providing that sale of a bankrupt's property shall be made by the official auctioneer, and that a conspicuous notice shall be posted, at least two days before the sale, in front of the premises where the property is to be sold, since such matters are not jurisdictional. In re *Nevada-Utah Mines & Smelters Corporation* (D. C., N. Y.), 28 Am. B. R. 409, 198 Fed. 497, affd. 29 Am. B. R. 754, 202 Fed. 126.

360. In re *Britannia Mining Co.* (C. C. A., 7th Cir.), 29 Am. B. R. 472, 203 Fed. 450, revd. 28 Am. B. R. 651, 197 Fed. 459.

Act March 3, 1893, providing that all sales of real estate or any interest in land, made under any order or decree of any United States court, shall be upon the property itself or at the court house of the county in which it is situated and upon at least four weeks' notice by publication, has no application to sales in bankruptcy. In re *La France Copper Co.* (D. C., Mont.), 30 Am. B. R. 381, 205 Fed. 207.

Where the property sold was destroyed by "Act of God," for and without the negligence of the purchaser, prior to confirmation, the purchaser may not be compelled to complete the purchase. It would be inequitable to require the purchaser to stand the loss. In such a case the court, in the exercise of a fair discretion, should refuse to confirm the sale.<sup>379</sup>

(6) **CONFIRMATION OR APPROVAL OF SALES.**—Upon a true construction of this subsection, a sale of the bankrupt's property is in all circumstances subject to the approval of the court when practicable, and any sale for which an approval was unquestionably practicable, conveys no title until it is confirmed, and a setting aside of the sale is equivalent to a refusal to confirm.<sup>380</sup> But it has been held that a sale by a trustee of personal property belonging to the estate of the bankrupt, is not absolutely void and subject to collateral attack, although there was no order of the bankruptcy court authorizing such sale.<sup>380a</sup> The confirmation is a matter of discretion,<sup>380b</sup> it should not be refused where the sale was properly conducted, although one of the bidders, upon a hearing of the objections to confirmation, offers considerable more than the amount for which the property was sold.<sup>381</sup> Confirmation of a sale will depend upon the sufficiency of notice and a compliance with proper requirements as to the conduct of the sale in respect to the treatment of bidders, and honesty and fair dealing.<sup>382</sup> Before confirmation a sale is not in a technical and legal sense a sale. But a confirmation has the effect of completing the sale, and while it does not pass the legal title it vests the full equitable title to the property in the purchaser, even though the deed executed in pursuance thereof is irregular, and even if no deed is given.<sup>383</sup> Although the terms of sale state plainly that the trustee is selling only the right, title and interest of the bankrupt in real estate, a person who bids off a parcel that has been sold by the bankrupt a long time before bankruptcy should be relieved from his obligation to carry out the bid.<sup>384</sup> The order of confirmation takes effect as of the date of its entry, and cannot be

without appraisal and without the order of the court, and which has not been approved by the court, vests no title in the buyer. *Matter of Monarrat* (D. C., Hawaii), 25 Am. B. R. 815.

**Sale without leave of bankruptcy court.**—Where a bankrupt more than four months prior to his bankruptcy executed a security deed upon lands which remained in his possession through tenants, and several months after the appointment of the trustee in bankruptcy the holders of the deed, with the knowledge of the bankruptcy, but without notice to the trustee or permission from the bankruptcy court, or State court, duly exercised the power of sale contained in the deed and offered the lands at public sale, purchasing them themselves, both the Bankruptcy Act and public policy require that such sale should be set aside, although the holders of the deed acted in good faith. *Cohen v. Nixon & Wright* (D. C., Ga.), 37 Am. B. R. 646.

The approval of the court is unnecessary if the property is sold for seventy-five per cent. of the appraisement. *Matter of American Beaver Co.* (D. C., N. J.), 39 Am. B. R. 603, 242 Fed. 599.

<sup>380a.</sup> *Trabue v. Ash* (Tex. Ct. of Civ. App.), 41 Am. B. R. 122, 200 S. W. 416.

<sup>380b.</sup> *Matter of American Beaver Co.* (D. C., N. J.), 39 Am. B. R. 603, 242 Fed. 599; *Jacobsohn v. Larkey* (C. C. A., 3d Cir.), 40 Am. B. R. 563, 245 Fed. 538.

<sup>381.</sup> *Matter of Mitchell* (Ref., Mass.), 15 Am. B. R. 735; *Jacobsohn v. Larkey* (C. C. A., 3d Cir.), 40 Am. B. R. 563, 245 Fed. 538.

**Burden of proof.**—A trustee who brings the report of a sale for less than seventy-five per cent. of the appraised value to the court for confirmation has the burden of establishing

good reasons why a better price cannot be obtained on a resale. *Matter of American Beaver Co.* (D. C., N. J.), 39 Am. B. R. 603, 242 Fed. 599.

<sup>382.</sup> **Confirmation of sale.**—While a sale of the assets of a bankrupt's estate at public auction is subject in all things to the confirmation of the court, that confirmation must depend upon the sufficiency of the notice, the complying with all the necessary or proper requirements in holding the sale, honesty and fair dealing and a proper treatment of the bidder in considering his right after the property is knocked down to him, which generally involves merely the possibility of his completing the purchase and of the adequacy of his bid. In re *Kronrot* (D. C., N. Y.), 25 Am. B. R. 738, 183 Fed. 653. See also *Sturgiss v. Corbin* (C. C. A., 4th Cir.), 15 Am. B. R. 543, 41 Fed. 1. As to notice of application to confirm, see In re *Nevada-Utah Mines and Smelters Corporation* (D. C., N. Y.), 28 Am. B. R. 409, 198 Fed. 497, *affd.* (C. C. A., 2d Cir.), 29 Am. B. R. 754, 202 Fed. 126. If the property has increased greatly in price since the sale and there was only one bidder, the sale should not be confirmed. *Matter of Ohio Copper Mining Co.* (D. C., N. Y.), 38 Am. B. R. 548, 237 Fed. 490. See also *Matter of Irvine* (D. C., S. Car.), 43 Am. B. R. 155, 235 Fed. 168.

The appraisement is evidence upon which the court may base a valid discretion when called upon to confirm or set aside a trustee's sale. *Jacobsohn v. Larkey* (C. C. A., 3d Cir.), 40 Am. B. R. 563, 245 Fed. 538.

<sup>383.</sup> *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 22 Am. B. R. 708, 217 Fed. 16.

<sup>384.</sup> *Matter of Capenri* (C. C. A., 2d Cir.), 32 Am. B. R. 158, 210 Fed. 897.

treated as in effect on the day of the sale.<sup>385</sup> The fact that all the secured and most of the unsecured creditors of a bankrupt are satisfied with a judicial sale of the assets subject to incumbrances affords some indication that the good faith of the trustee ought not to be impugned. But a single objecting creditor, if actually wronged by a sale of the assets, is entitled to protection by the court.<sup>386</sup> The successful bidders may appear and urge the acceptance of their bids and the confirmation of the sale.<sup>386a</sup>

c. Sales at public auction or by private sale under General Order XVIII.—General Order XVIII limits the discretion of the district and the referee courts. Its third paragraph applies the same rules to perishable property as were stated in the statute under the former law;<sup>387</sup> and the cases then decided are thought still applicable; those under the present law are considered elsewhere.<sup>388</sup> Its first paragraph compels sales at public auction, unless otherwise ordered by the court.<sup>388</sup> The term "perishable property" includes property which may deteriorate in value and price if not sold at a certain time, as well as property which deteriorates physically.<sup>389</sup> The second paragraph is by far the most important. In seeming to dispense with notice to creditors, it is of doubtful validity, yet, as a way out of many an awkward situation, it is very generally availed of where the interests of creditors will be best subserved by an immediate sale at a specified bid. By its means, much larger prices are often obtained than could be at public auction. At the same time, in the face of the mandatory provision of § 58-a (4), this rule will be cautiously applied, and only where the moving papers show clearly either a necessity for immediate sale or a fair and adequate offer.<sup>391</sup>

d. Sales of inumbered property.—(1) IN GENERAL.—Sales free of incumbrances were authorized by the statute of 1867.<sup>392</sup> The present law has no such provision. This has cast doubt on the power of the court to authorize such a sale. The cases are quite uniform, however, in declaring that such sales can be authorized, and by the referee<sup>393</sup> as well as by the judge.<sup>394</sup> But

<sup>385</sup> Matter of Finks (C. C. A., 6th Cir.), 34 Am. B. R. 749, 224 Fed. 92.

<sup>386</sup> Matter of Haywood Wagon Co. (C. C. A., 2d Cir.), 33 Am. B. R. 618, 219 Fed. 655.

<sup>386a</sup> Jacobsohn v. Larkey (C. C. A., 3d Cir.), 40 Am. B. R. 563, 245 Fed. 538.

<sup>387</sup> Act of 1867, § 25, R. S., § 5068.

<sup>388</sup> See discussion under Section Fifty-eight of this work.

<sup>389</sup> Public sale.—A sale of bankrupt's assets is not a public sale, when it is made at a meeting advertised by a notice addressed only to "creditors, stockholders and other parties in interest," wherein the meeting to be held was stated to be a meeting of such persons, since the essential feature of a public sale is lacking, viz., that the public be invited to attend and bid. In re Nevada-Utah Mines & Smelters Corporation (C. C. A., 2d Cir.), 29 Am. B. R. 754, 202 Fed. 126, affg. 28 Am. B. R. 408, 198 Fed. 497.

<sup>390</sup> Sufficiency of advertisement.—The court may refuse to confirm a sale by trustees of land in another State of a deceased bankrupt where it appears that such land was not appraised or sufficiently described in the advertisement. Matter of Irvine (D. C., S. Car.), 43 Am. B. R. 155, 255 Fed. 168.

<sup>391</sup> Matter of Pedlow (C. C. A., 2d Cir.), 31 Am. B. R. 761, 209 Fed. 841.

<sup>392</sup> Facts justifying sale of entire plant.—Where prior to adjudication, a sale at private sale of the entire plant of an alleged bankrupt corporation, a bid of 75 per cent. of the appraised value having been received therefor,

but one-tenth in amount of the stockholders objecting and of the creditors all but one-twelfth or less in value either openly advocating the sale or by silence, acquiescing therein, is justified. In re Peerless Finishing Company (D. C., N. Y.), 2 Am. B. R. 429, 199 Fed. 350.

<sup>393</sup> Act of 1867, § 20, R. S., § 5075.

<sup>394</sup> As to sale free of liens by order of referee, see In re Waterloo Organ Co. (D. C., N. Y.), 9 Am. B. R. 427, 118 Fed. 904; Citizens' Savings Bank v. Paducah (Ct. of App. Ky.), 32 Am. B. R. 508, 167 S. W. 870; Shinn v. Kemp & Herbert (Sup. Ct., Wash.), 32 Am. B. R. 852, 131 Pac. 822.

<sup>395</sup> In re Pittelkow (D. C., Wis.), 1 Am. B. R. 472, 92 Fed. 901; In re Etheridge Furniture Co. (D. C., Ky.), 1 Am. B. R. 112, 92 Fed. 329; In re Worland (D. C., Iowa), 1 Am. B. R. 450, 92 Fed. 893; In re Sanborn (D. C., Vt.), 3 Am. B. R. 54, 96 Fed. 507; In re Southern, etc., Co. v. Benbow (D. C., N. Car.), 3 Am. B. R. 9, 96 Fed. 514; Matter of New England Piano Co. (C. C. A., 1st Cir.), 9 Am. B. R. 767, 122 Fed. 937; In re Keet (D. C., Pa.), 11 Am. B. R. 117, 123 Fed. 651; In re Shoe & Leather Reporter (C. C. A., 1st Cir.), 12 Am. B. R. 248, 129 Fed. 588; In re Prince & Walter (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546. See also In re Barber (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547; In re Utt (C. C. A., 7th Cir.), 5 Am. B. R. 383, 105 Fed. 754; In re Keller (D. C., Iowa), 6 Am. B. R. 351, 100 Fed. 131. See In re Wilks (D. C., Iowa), 12 Am. B. R. 727, 131 Fed. 1001, where it was held that a referee may order personal property to be sold free of liens, upon

they should not be ordered where it does not appear that they will be to the advantage of the bankrupt's estate,<sup>395</sup> as where the right to a lien is disputed and its determination will involve a controversy resulting in delay,<sup>395a</sup> or where there is no equity of redemption, or a State court has already been invoked to foreclose the lien,<sup>396</sup> or the lien of a conditional sale is void as against the trustee as the representative of the creditors.<sup>397</sup> An order merely directing the sale of property, without mentioning liens, will be taken as a sale subject to any existing liens.<sup>398</sup> A sale of assets may be directed free of liens without regard to the objections of lienors,<sup>399</sup> provided such liens are amply protected by being transferred to the proceeds of the sale.<sup>400</sup>

notice to lienors, although the property, and a creditor having a mortgage thereon, are without the territorial jurisdiction of the court: *In re Zehner* (D. C., La.), 27 Am. B. R. 536, 193 Fed. 787; *In re Freedman* (D. C., Pa.), 31 Am. B. R. 53; *Citizens' Sav. Bank v. Paducah* (Ky. Ct. of App.), 32 Am. B. R. 508, 167 S. W. 870; *Matter of Haywood Wagon Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 618, 219 Fed. 655; *Matter of Progressive Wall Paper Corp.* (D. C., N. Y.), 35 Am. B. R. 508, 222 Fed. 87; *Matter of West* (D. C., Pa.), 37 Am. B. R. 421, 232 Fed. 903; *Foler v. Crowder* (Ark. Sup. Ct.), 39 Am. B. R. 215, 192 S. W. 905; *Matter of Franklin Brewing Co.* (C. C. A., 2d Cir.), 41 Am. B. R. 51, 249 Fed. 333; *Matter of North Star Ice & Coal Co.* (D. C., Tenn.), 42 Am. B. R. 76, 252 Fed. 301. See also Am. B. R. Dig. § 602.

A clause in a mortgage giving the right to bid on bonds does not in any way limit the power of the court to order a sale free and clear from the mortgage lien, however much it may influence its discretion. *Matter of Franklin Brewing Co.* (C. C. A., 2d Cir.), 41 Am. B. R. 51, 249 Fed. 333.

<sup>395.</sup> *In re Styer* (D. C., Pa.), 3 Am. B. R. 424, 98 Fed. 290; *In re Shaeffer*, 5 Am. B. R. 248, 105 Fed. 352; *In re Goldsmith* (D. C., Tex.), 9 Am. B. R. 419, 118 Fed. 763; *In re Alden* (Ref., Ohio), 16 Am. B. R. 362; *In re Holmes Lumber Co.* (D. C., Ala.), 26 Am. B. R. 119, 189 Fed. 178; *Matter of Progressive Wall Paper Corp.* (D. C., N. Y.), 35 Am. B. R. 508, 222 Fed. 87; *Citizens' Sav. Bank v. Paducah* (Ky. Ct. of App.), 32 Am. B. R. 508, 167 S. W. 870; *Matter of Franklin Brewing Co.* (C. C. A., 2d Cir.), 41 Am. B. R. 51, 249 Fed. 333.

<sup>395a.</sup> *Matter of North Star Ice & Coal Co.* (D. C., Tenn.), 42 Am. B. R. 76, 252 Fed. 301.

<sup>396.</sup> Free of lien of mortgage; when not justified. —Property of a bankrupt, incumbered by mortgage liens given in good faith and duly recorded more than four months before the filing of the petition in bankruptcy, which, by virtue of section 67-d of the bankruptcy act, are not affected by the act, should not be ordered sold free of such liens unless it appears that such liens will not be affected by the sale and that the bankrupt estate will be benefited thereby. *In re Foster* (D. C., Vt.), 25 Am. B. R. 96, 181 Fed. 703; *Matter of Huggins* (C. C. A., 8th Cir.), 24 Am. B. R. 715, 179 Fed. 490.

<sup>396a.</sup> When sale free from liens not ordered. —The holder and legal owner of bonds secured by a mortgage on the real estate and machinery of a bankrupt corporation should, if such obligations are legal, be permitted to use them in the purchase of the property at a sale thereof; and where it appears that the holder of such bonds has brought suit in a State court to foreclose the mortgage, wherein the ownership and validity of the bonds and mortgage are being contested by bankrupt's trustee, so that its right to so use them depends on the result of the foreclosure suit, and it further appears that

the mortgage property will not bring enough to pay the bonds, a sale of such property free from liens will not be ordered. *In re Fayetteville Wagon-Wood & Lumber Co.* (D. C., Ark.), 28 Am. B. R. 307, 197 Fed. 180. A trustee in bankruptcy may be authorized to sell mortgaged property of the bankrupt free from liens, if there are reasonable grounds for believing that more can be realized from such sale than the amount of the incumbrance. *In re Brown & Company* (C. C. A., 8th Cir.), 23 Am. B. R. 336, 196 Fed. 758.

<sup>397.</sup> Consideration of estimate of appraisers in determining advisability of sale of encumbered property. —The bankruptcy court may consider the sworn estimate of the appraisers in bankruptcy, although at variance with the opinions of value given by witnesses, in determining whether the estate of a bankrupt will be benefited by a sale of encumbered property. *Clark Hardware Co. v. Sauve* (C. C. A., 8th Cir.), 33 Am. B. R. 674, 220 Fed. 102.

<sup>398.</sup> Compare *In re Gerdes* (D. C., Ohio), 4 Am. B. R. 346, 102 Fed. 318.

<sup>397.</sup> Sale free from lien of conditional sale. —Where a bankrupt, while in the possession of certain property but before the execution and record of a conditional bill of sale thereof, is indebted to certain creditors, the trustee in bankruptcy may sell the property free from the lien of the conditional sale, which is void as to the trustee under section 47-a (2) of the Bankruptcy Act, as amended in 1910. *Matter of Thompson* (Ref., N. J.), 37 Am. B. R. 434.

<sup>398.</sup> *In re Platteville Foundry & Machine Co.* (D. C., Wis.), 17 Am. B. R. 291, 147 Fed. 828.

<sup>399.</sup> But see *Matter of Fite* (D. C., Pa.), 31 Am. B. R. 308, 61 Pittsburgh Leg. J. 169, holding that in Pennsylvania a trustee in bankruptcy should not be ordered to sell a bankrupt's real property so as to divest or in any way affect the lien of a first mortgage without the consent of the mortgagee.

<sup>400.</sup> *Matter of The American Architects' Tube Co.* (C. C. A., 6th Cir.), 25 Am. B. R. 651, 184 Fed. 694, in which the text is quoted with approval; *Citizens' Sav. Bank v. Paducah* (Ky. Ct. of App.), 32 Am. B. R.

(2) **SALES FREE OF DOWER.**—It is appropriate to sell the bankrupt's real estate free from the wife's inchoate right of dower, if she consents, in which case compensation to her should be made from the proceeds of the sale,<sup>401</sup> and in at least one State, by the weight of authority, a sale of the bankrupt's real property may be made free from the wife's inchoate right of dower without her consent.<sup>402</sup>

(3) **PROCEEDS OF SALE SUBJECT TO LIENS; RIGHTS OF LIENORS.**—The effect of a sale free of incumbrances is to vest a purchaser with good title and to transfer all existing liens to the fund derived from the sale to which a lien holder must resort.<sup>403</sup> Provisions should be made for the protection of the rights of the several lien creditors in the fund derived from the sale, and such creditors may prosecute their claims to preference against such fund, even if they did not file exceptions to the return of sale.<sup>404</sup> Upon the confirmation of a sale of a bankrupt's property free of liens, the court may allow a credit to the purchaser, if the holder of a valid lien, of the amount that

508, 167 S. W. 870; *Matter of Dick Co.* (D. C., Pa.), 33 Am. B. R. 341, 62 Pittsburgh Leg. J. 522; *Toler v. Crowder* (Ark. Sup. Ct.), 39 Am. B. R. 215, 192 S. W. 906; *Matter of U. S. Chrysotile Asbestos Co.* (D. C., N. Y.), 41 Am. B. R. 294, 253 Fed. 294.

**Conditional consent.**—Where the wife's consent to a sale of the land free from dower is conditional and the condition is not complied with, and no provision is made for her protection, she is not estopped to assert her dower as a lien against the land. *Carver v. Ward* (W. Va. Sup. Ct. of App.), 41 Am. B. R. 557, 95 S. E. 828.

401. *Savage v. Savage* (C. C. A., 4th Cir.), 15 Am. B. R. 599, 141 Fed. 348, 72 C. C. A. 494; *Matter of Acretelli* (D. C., N. Y.), 21 Am. B. R. 537, 173 Fed. 121.

In Ohio, where a trustee in bankruptcy sold the bankrupt's real property, and out of the proceeds paid a purchase-money mortgage, the contingent right of dower of the bankrupt's wife extends merely to the surplus remaining after the payment of such mortgage indebtedness and not to the whole proceeds, as against the husband's creditors, except such mortgagee and his privies. *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 669, 181 Fed. 674.

Where a bankrupt, a resident of Ohio, before marriage, executed mortgages upon his real estate in that State, and judgment liens were secured thereon subsequent to his marriage, and the property is afterwards sold by his trustee in bankruptcy, his wife is dowerable only in the surplus of the proceeds of the sale, after payment of such claims as preclude her right to dower therein. *In re Forbes* (Ref., Ohio), 7 Am. B. R. 42.

402. *Matter of Freedman* (D. C., Pa.), 31 Am. B. R. 53. See also *In re Codori* (D. C., Pa.), 30 Am. B. R. 43, 207 Fed. 784; *Matter of Strauch* (D. C., Pa.), 31 Am. B. R. 86, 208 Fed. 892; *Matter of Kilgerman* (D. C., Pa.), 42 Am. B. R. 670, 253 Fed. 778. Contra: *Matter of Chotiner* (D. C., Pa.), 32 Am. B. R. 760, 216 Fed. 916.

403. *Shinn v. Kemp & Herbert* (Sup. Ct., Wash.), 32 Am. B. R. 852, 131 Pac. 822.

**Substitute for property sold.**—A fund derived from the sale of property free of liens will stand as a substitute for the property sold, and will be held by the trustee in bankruptcy for the benefit of those holding *bona fide* claims and liens to the extent of their respective interests. *Matter of National Boat & Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208.

404. *In re Benz* (D. C., Pa.), 33 Am. B. R. 357, 62 Pittsburgh Leg. J. 529; *Matter of National Boat & Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208, citing *Collier on Bankruptcy* (9th ed.), 1034; *Matter of Schou* (D. C., Conn.), 39 Am. B. R. 494, 213 Fed. 514; *Carroll & Bro. Co. v. Young* (C. C. A., 3d Cir.), 9 Am. B. R. 643, 119 Fed. 576. Compare *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1; *In re Goldsmith* (D. C., Tex.), 9 Am. B. R. 419, 118 Fed. 763; *In re Shoe & Leather Reporter* (C. C. A., 1st Cir.), 12 Am. B. R. 248, 129 Fed. 588; *In re Prince & Walter* (D. C., Minn.), 12 Am. B. R. 675, 131 Fed. 546; *In re Saxton Furnace Co.* (D. C., Pa.), 14 Am. B. R. 483, 136 Fed. 697; *In re Forse & Roseboom* (D. C., N. Y.), 25 Am. B. R. 134, 182 Fed. 212. As to right of judgment creditor, whose judgment is unaffected by the bankruptcy, to have his lien satisfied out of the proceeds of the sale, see *In re Vastbinder* (D. C., Pa.), 13 Am. B. R. 148, 132 Fed. 718.

**Bankrupt's remainder interest in real property.**—A court of bankruptcy has power, by virtue of section 2 of the bankruptcy act, to sell a bankrupt's remainder interest in real estate and pay off a judgment or mortgage lien on said interest, if the proceeds be sufficient for that purpose, so as to preserve the equity in the property for the benefit of general creditors, but the lien and all rights accruing therefrom must be respected by the court. *In re Arden* (D. C., N. Y.), 26 Am. B. R. 684, 188 Fed. 475.

**Exercise of equity power to protect lien holders.**—In the case of *McKay v. Hamill* (C. C. A., 3d Cir.), 26 Am. B. R. 164, 185 Fed. 11, the court said: "Undoubtedly, the general rule is that the property of the bankrupt is taken by the trustee in the situation in which it was held by the bankrupt, and that any disposition of said property made

otherwise would accrue to him by reason of his lien.<sup>405</sup> Where a trustee sells mortgaged property of the bankrupt free of the mortgage, and the proceeds thereof are sufficient for that purpose, the mortgagee is entitled to the payment of the interest upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage.<sup>406</sup> The proceeds stand in place of the property mortgaged, and the mortgagee is entitled to distribution in full, without deduction of expenses of the sale or of administration of the bankrupt estate.<sup>407</sup>

(4) **PAYMENT OF TAXES.**—Where the trustee is directed to sell real property free from incumbrances, taxes which became a lien subsequent to the order directing the sale may not be paid out of the proceeds of the sale;<sup>408</sup> but accrued taxes due when the sale takes place are liens and transferred by the sale to the proceeds thereof.<sup>409</sup> If taxes are liens against the property, perfected by authoritative levy, at the time of the sale, the property must be sold subject to such taxes, unless divested by order of the court, in which case the taxes should be paid out of the proceeds of the sale.<sup>410</sup>

(5) **PAYMENT OF EXPENSES OF SALE.**—The sale of incumbered property is for the benefit of the estate and the general creditors interested therein. The lien creditor is not usually benefited by the sale. It is therefore equitable to charge the expenses of the sale to the estate and not to the proceeds of the sale.<sup>411</sup> Where, however, the sale was had at the instance of the lien creditors,

by the trustee must be made with reference to the superior rights of lien holders when legally ascertained. But the court of bankruptcy, in the exercise of its equitable powers, in selling and disposing of the proceeds of the bankrupt's estate, will take care of and protect the legal and equitable interests of third parties attaching thereto. It is true, that ordinarily a sale made without any specific reference to liens on the property to be sold will be considered a sale subject to such liens. So a direction to sell free from specific liens will be considered ordinarily subject to a superior lien not mentioned. But it does not follow that in case of a direction to sell free from first or superior liens, the latter would not be also protected in accordance with the ordinary rule governing judicial sales. No instance of such a direction has been brought to our attention, and it would seem that the result of such a sale must depend upon the circumstances of the case, the intention of the parties, and the equities arising therefrom."

**Claim by lienor for deficiency; estoppel.**—The failure of a mortgage creditor to respond to a referee's order to show cause why the property of the bankrupt should not be sold free, clear, and discharged of all encumbrances thereon, does not estop him from making a claim for deficiency, which had only a potential existence at the date of said order. *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

<sup>405.</sup> *Clark Hardware Co. v. Sauve* (C. C. A., 8th Cir.), 33 Am. B. R. 674, 220 Fed. 102.

<sup>406.</sup> *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 152 Fed. 943, modg. 16 Am. B. R. 583, 145 Fed. 202, affd. 213 U. S. 223, 22 Am. B. R.

1, 53 L. Ed. 772, 29 Sup. Ct. 436; *In re Stevens* (D. C., Oreg.), 23 Am. B. R. 239, 173 Fed. 843; *In re Allert* (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 691.

<sup>407.</sup> *In re Clark Coal & Coke Co.* (D. C., Pa.), 23 Am. B. R. 273, 173 Fed. 658; *In re Brown & Co.* (C. C. A., 8th Cir.), 28 Am. B. R. 336, 196 Fed. 758; *Norton Jewelry Co. v. Hinds* (C. C. A., 8th Cir.), 40 Am. B. R. 320, 245 Fed. 341. Compare *Matter of Bradley* (D. C., Conn.), 45 Am. B. R. 30, 263 Fed. 446.

Expenses of prior receivership should be allowed out of proceeds. *Norton Jewelry Co. v. Hinds* (C. C. A., 8th Cir.), 40 Am. B. R. 320, 245 Fed. 341.

**Payment of commission of trustee and referee out of proceeds.**—Where a bankrupt owns property which was subject to a mortgage securing a note for \$1,640, the validity of which was unquestioned and the property was sold by the trustee free of the mortgage, the mortgagee, who purchased the incumbered property at such sale for \$1,500, was entitled to have the purchase price credited on his allowed claim without deduction for the commissions of the trustee and referee, there being a general estate of the bankrupt out of which the commissions could be paid. *Matter of Huggins* (C. C. A., 8th Cir.), 24 Am. B. R. 715, 179 Fed. 490; *In re Howard* (D. C., N. Y.), 31 Am. B. R. 251, 207 Fed. 402; *Norton Jewelry Co. v. Hinds* (C. C. A., 8th Cir.), 40 Am. B. R. 320, 245 Fed. 341.

<sup>408.</sup> *In re Crowell* (D. C., Mass.), 29 Am. B. R. 308, 199 Fed. 659; *Matter of Reading Hat Mfg. Co.* (D. C., Pa.), 39 Am. B. R. 207, 239 Fed. 257.

<sup>409.</sup> *Matter of New York and Philadelphia Package Co.* (D. C., N. J.), 35 Am. B. R. 94, 225 Fed. 219; *Norton Jewelry Co. v. Hinds* (C. C. A., 8th Cir.), 40 Am. B. R. 320, 245 Fed. 341.

<sup>410.</sup> *Matter of Reading Hat Mfg. Co.* (D. C., Pa.), 34 Am. B. R. 884, 224 Fed. 786.

<sup>411.</sup> *In re Vulcan Foundry & Machine Co.* (C. C. A., 3d Cir.), 24 Am. B. R. 825, 180 Fed. 671; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 426, 217 Fed. 808. Compare *Matter of Tietje* (D. C., N. Y.), 44 Am. B. R. 638, 263 Fed. 917.

**Sale where trustee had no equity.**—Where a trustee sold property free from liens, in

who invoked the aid of the bankruptcy court to secure a sale of the incumbered property without the expense and delay of foreclosure proceedings, the costs of the sale may be charged against the proceeds.<sup>412</sup> Where a sale is had free from incumbrances, and the appraisal of the property and the proceeds of the sale were less than the amount of the incumbrances, it will nevertheless be assumed on petition to revise that the court in ordering the sale expected some benefit to accrue to the estate.<sup>413</sup>

(6) DETERMINATION OF VALIDITY, PRIORITIES OR AMOUNTS OF LIENS.—A court of bankruptcy has jurisdiction to order a sale of the property of a bankrupt upon which a lien is asserted, without first determining either the validity or amount of the lien,<sup>414</sup> and where the petition to sell does not attack the validity of a mortgage, and the mortgagee has no notice that such an attack would be made, the referee has no authority, in the proceedings for the sale, to declare the mortgage invalid.<sup>415</sup> The property being sold free of all liens, the court having lawful custody of the property to which liens attached may determine the relative priorities of conflicting claims to the fund realized from the sale.<sup>416</sup> The trustee should appear and protect the rights

which he had no equity, without the consent of the lien holder, and the proceeds of the sale fell far short of the amount of the lien, there is *prima facie* evidence that there should have been no sale by the trustee, and the commissions for services upon such sale of the referee and trustee should be paid out of the estate and not out of the proceeds of the sale. *In re Holmes Lumber Co.* (D. C., Ala., 26 Am. B. R. 119, 189 Fed. 178; *In re Howard* (D. C., N. Y.), 31 Am. B. R. 251, 207 Fed. 402; *Matter of New York and Philadelphia Package Co.* (D. C., N. J.), 35 Am. B. R. 94, 225 Fed. 219.

<sup>412</sup> *In re Chambersburg Mfg. Co.* (D. C., Pa.), 26 Am. B. R. 107, 190 Fed. 411; *In re Barber* (D. C., Minn.), 3 Am. B. R. 303, 97 Fed. 547; *Matter of Mais* (Ref., Ky.), 18 Am. B. R. 104.

**Implied consent to payment of expenses out of proceeds.**—Where creditors having liens upon the real estate of a bankrupt have received notice of an application for an order to sell such real estate free from liens but make no objection thereto and permit the referee to go on with the execution of the order and the distribution of the proceeds of such sale, they will be deemed to have consented by "necessary implication" to all that was done, and cannot thereafter object to allowances, made for expenses incurred in the administration of the estate, because payable out of the funds derived from the sale. *In re Torchia* (C. C. A., 3d Cir.), 26 Am. B. R. 579, 188 Fed. 207, revg. 26 Am. B. R. 188, 185 Fed. 576; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 426, 217 Fed. 808.

**Where lienors become the purchasers of a bankrupt's property discharged of liens,** it will be presumed that they intended that reasonable and necessary costs incurred in the sale should be paid out of the proceeds realized, even though their liens be postponed thereby; but costs incurred by a receiver

should be disallowed, in the absence of good reason why the lienors should bear the same. *Matter of West* (D. C., Pa.), 37 Am. B. R. 421, 232 Fed. 903.

<sup>413</sup> *In re Throckmorton* (C. C. A., 6th Cir.), 28 Am. B. R. 487, 196 Fed. 656.

<sup>414</sup> *In re Littlefield* (C. C. A., 1st Cir.), 19 Am. B. R. 18, 155 Fed. 838; *Matter of Franklin Brewing Co.* (C. C. A., 2d Cir.), 41 Am. B. R. 51, 249 Fed. 333.

<sup>415</sup> *Matter of Martin* (C. C. A., 3d Cir.), 32 Am. B. R. 29, 210 Fed. 620.

<sup>416</sup> *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1; *In re Goldsmith* (D. C., N. Y.), 21 Am. B. R. 845, 168 Fed. 770; *Matter of National Boat & Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208; *Matter of Atkinson-Kreece Grocery Co.* (D. C., Ga.), 39 Am. B. R. 819, 245 Fed. 181; *Danville Benefit & Bldg. Assn. v. Huff* (C. C. A., 7th Cir.), 45 Am. B. R. 124, 262 Fed. 403.

**Bids on property as evidence of value.**—Where the amount of bids for property sold free from liens is the only direct evidence of value, the referee may rely thereon in distributing the proceeds among the lienors. *Matter of Benz* (C. C. A., 3d Cir.), 33 Am. B. R. 363, 218 Fed. 50.

**Enforcement of liens originating prior to bankruptcy.**—Bankruptcy courts are invested with power to adjust and ultimately to allow and enforce liens, originating prior to bankruptcy and presented within the proving period, according to their merits and at any time before but not after the estates have been closed. *Courtney v. Fidelity Trust Co.* (C. C. A., 6th Cir.), 33 Am. B. R. 400, 219 Fed. 57.

**Rights of lienors after sale of assets as an entirety.**—Where creditors claim liens on separate portions of a bankrupt's property and the property, against their objection, is sold as an entirety, they are entitled to show what portion of the purchase price represents the value of the property on which they had their respective liens. *Matter of Benz* (D. C., Pa.), 33 Am. B. R. 114, 62 Pittsburgh Leg. J. 305.

**Effect of approval of court.**—A bankruptcy court, by approving a trustee's sale of claims



of the estate in proceedings for the distribution of the fund derived from such sale.<sup>417</sup> There was doubt as to the jurisdiction of the court, prior to the amendatory act of 1903, to determine the validity or priority of a lien.<sup>418</sup>

(7) **SALES SUBJECT TO INCUMBRANCES.**—Sales can, of course, be made subject to incumbrances, and the purchaser then takes the property charged therewith.<sup>419</sup> The practice is not different from that on sales of unincumbered property, and is sometimes regulated by local rules. If the order of sale contains no special direction as to incumbrances, the purchaser under the rule of *caveat emptor* acquires only the rights of the bankrupt in the property, and the rights of those claiming an adverse interest therein are not affected.<sup>420</sup> Unless it is directed that the property be sold divested of liens, the purchaser takes title subject to all existing liens, and must pay such liens or otherwise arrange with the lien creditors in order to retain the property.<sup>421</sup>

(8) **PRACTICE ON SALES OF INCUMBERED PROPERTY.**—Equity requires that the order should provide that the notice to the lienors be ample, and personal rather than by mail,<sup>422</sup> and that a lienor, if the purchaser at the sale, may give a receipt to the amount of his lien in lieu of cash. It is proper for the court to bring in a creditor claiming a lien on the property by a rule to show cause.<sup>423</sup> It has been held that where real property of the bankrupt is sold under a mortgage foreclosure in a State court, such court has jurisdiction to appoint an auditor to distribute the fund realized upon the sale.<sup>424</sup>

c. **Resale; when granted.**—After the confirmation of a judicial sale neither mere inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake or some other cause for which equity would void a like sale between private parties will warrant a court in avoiding the confirmation of a sale between private parties will warrant a court in avoiding the confirmation of the sale, or in opening the latter and receiving subsequent bids.<sup>425</sup> However where the inadequacy is so great as in itself to raise a presumption

belonging to the bankrupt, does not thereby warrant the priority of the claims over adverse claims so as to make it judicial bad faith for the same court to afterwards, in another case, decide against the priority of the claims. *Taylor v. Kimerle* (C. C. A., 6th Cir.), 37 Am. B. R. 34, 232 Fed. 134.

417. *Matter of National Boat & Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208.

418. Compare *In re San Gabriel, etc., Co.* (C. C. A., 9th Cir.), 7 Am. B. R. 206, 111 Fed. 892. On reconsideration of s. c., 4 Am. B. R. 197, 102 Fed. 310; *In re Muhlihauser* (C. C. A., 6th Cir.), 10 Am. B. R. 236, 121 Fed. 669. And see also in §§ 11 and 23, *ante*.

419. *In re Gerry* (D. C., Pa.), 7 Am. B. R. 459, 112 Fed. 595, 597; *Matter of North Star Ice & Coal Co.* (D. C., Tenn.), 42 Am. B. R. 76, 252 Fed. 301.

**Rights of mortgagee.**—*Matter of North Star Ice & Coal Co.* (D. C., Tenn.), 42 Am. B. R. 76, 252 Fed. 301.

420. *In re Muhlihauser Co.* (C. C. A., 6th Cir.), 10 Am. B. R. 236, 121 Fed. 669; *In re Platteville F. & M. Co.* (D. C., Wis.), 17 Am. B. R. 291, 147 Fed. 828; *Citizens' Savings Bank v. Paducah* (Ky. Ct. of App.), 32 Am. B. R. 508, 167 S. W. 870.

421. *Matter of Reading Hat Mfg. Co.* (D. C., Pa.), 34 Am. B. R. 884, 224 Fed. 786.

422. *Ray v. Norseworthy*, 90 U. S. 128, 23 L. Ed. 116; *In re Tallafiero*, Fed. Cas. 13,736; *In re Drewry*, Fed. Cas. 4,081. The record should disclose affirmatively that every

creditor whose lien will be discharged by the sale has received due notice of the application for an order of sale. *In re Saxton Furnace Co.* (D. C., Pa.), 14 Am. B. R. 483, 136 Fed. 697.

**Notice.**—It seems to be settled that notice to the lien creditors of the application for sale must not only be given, but the record must disclose affirmatively that every creditor whose lien will be discharged by the sale has received due notice of the application. *In re Platteville Foundry & Machine Co.* (D. C., Wis.), 17 Am. B. R. 291, 147 Fed. 828.

**Necessity of notice where sale subject to liens.**—Where a bankrupt's property is sold subject to any liens which may be on the property, mortgagees are not entitled to have the sale vacated because they were not given notice of the sale or its confirmation, or because the order of sale was not correct in form. *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 708, 217 Fed. 16.

423. *Matter of American Architects' Tube Co.* (C. C. A., 6th Cir.), 25 Am. B. R. 651, 184 Fed. 604.

424. *Furth v. Stahl*, 10 Am. B. R. 442, 205 Pa. St. 439.

425. *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 708, 217 Fed. 16; *Jacobsohn v. Larkey* (C. C. A., 3d Cir.), 40 Am. B. R. 563, 245 Fed. 538.

of fraud or to shock the conscience of the court the sale may be set aside.<sup>426</sup> Where a trustee himself is a purchaser, and the land subsequent to the sale increases in value, the sale should be set aside and resold, compensation to be made to the trustee for the price paid by him for the land and for the cost of improvements made thereon.<sup>427</sup> A sale of property may be set aside where it appears that there were irregularities which prejudiced the rights of interested parties.<sup>428</sup> A sale which has been confirmed, the purchaser having been permitted to take possession of the goods and sell part of them, should not be summarily set aside, for inadequacy or alleged collusion; the creditors remedy in such case, if any, is by suit against the purchaser and the guilty parties for an accounting.<sup>429</sup> In ordering a resale the court may impose the condition that the creditors secure a higher bid which they claim the property will bring.<sup>430a</sup>

#### VII. TRANSFER OF TRUSTEE'S TITLE TO PURCHASER.

Subsection c, relative to the transfer of title to the purchaser, is expressive of the law. On the report of sale being confirmed, an order is usually entered directing the trustee to make the transfer on receipt of the consideration. The instrument of transfer should always recite what interest, as, for instance, the bankrupt's or the latter's free of liens, is transferred, and as to covenants, should be adapted to the forms used by the assignee or receivers under State laws.<sup>430</sup> Where a business corporation has been adjudged a bankrupt and its assets, including its goodwill and corporate name, has been sold by order of the court, the purchaser will be protected in the ownership of the property purchased, and the former bankrupt will not be permitted by using the old corporation name to interfere with the good will of the business.<sup>431</sup> A sale by a trustee under order of the court, of a note payable to the bankrupt, passes the legal title to the purchaser, who may sue thereon with all the right the trustee had.<sup>432</sup> A trustee's sale is a judicial sale and the rule of *caveat emptor* applies so that the sale passes only such interest as the trustee possesses.<sup>432a</sup>

#### VIII. TITLE OF TRUSTEE WHERE COMPOSITION IS SET ASIDE, DISCHARGED OR REVOKED; EFFECT OF CONFIRMATION.

a. **Setting aside discharging or revoking composition.**—Subsection d, relative to vesting title of bankrupt's property in the trustee upon a composition being set aside or a discharge being revoked, has been considered in appropriate places, *ante*. It constitutes the single exception to the American doctrine that the cleavage day as to a bankrupt's property shall be the day the petition is filed by or against him. When a composition is set aside or a discharge revoked, property of the bankrupt which would otherwise be "after-acquired,"

426. *Matter of Reinstein* (D. C., Mass.), 39 Am. B. R. 856, 247 Fed. 126; *Jacobson v. Larkey* (C. C. A., 3d Cir.), 40 Am. B. R. 563, 245 Fed. 538; *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 708, 217 Fed. 18; *In re Shapiro* (D. C., Pa.), 19 Am. B. R. 125, 154 Fed. 673, holding that where \$3,400 has been realized upon the sale of a stock of goods appraised at \$5,000, an offer to pay \$3,800 is not enough to warrant setting aside the sale and ordering a resale. As to the construction of an order of resale, see *In re Wylie* (C. C. A., 3d Cir.), 18 Am. B. R. 503, 153 Fed. 281, affg. 17 Am. B. R. 404, 148 Fed. 907.

**Refusal of bid; right to resale.**—A bidder at a public sale of bankrupt's real estate who, upon being told that his bid in a representative capacity would not be accepted, announces that he will thereafter bid for himself upon his own responsibility, is entitled to have a bid made in his own behalf accepted; and where the trustee directs the bidding to be closed upon the receipt of the bid of a third person, after the refusal of a bid made by such bidder in his own behalf, which is twenty-five dollars higher than the bid of such third person, the referee has no right to impose as a condition precedent to reopening the bidding that such bidder make an "upset bid" greater by three thousand dollars than the amount at which the bidding was closed, but a resale should be ordered, starting the bidding at the amount of the rejected bid. *Coal City House Furnishing Co. v. Hogue* (C.

C. A., 4th Cir.), 28 Am. B. R. 258, 197 Fed. 1; *Matter of Ohio Copper Mining Co.* (D. C., N. Y.), 38 Am. B. R. 548, 237 Fed. 490.

427. *In re Hawley* (D. C., Iowa), 9 Am. B. R. 61, 117 Fed. 364.

428. *Matter of Burr Mfg. Co.* (D. C., N. Y.), 32 Am. B. R. 686, 209 Fed. 138.

429. *In re Knosher & Co.* (C. C. A., 9th Cir.), 28 Am. B. R. 747, 197 Fed. 136.

429a. *Jacobson v. Larkey* (C. C. A., 3d Cir.), 40 Am. B. R. 563, 245 Fed. 538.

430. Section 15, act of 1841, required the insertion in the deed of a copy of the adjudication and order appointing trustee. The dates of these steps in the proceedings should be inserted now. Compare also section 47-c, added by the amendatory act of 1903. *Ollitsky v. Estersohn* (N. J. Ct. of Ch.), 44 Am. B. R. 350, 108 Atl. 88.

**Release by mortgagee.**—Where a mortgagee consents to a sale of property by a trustee in bankruptcy free from incumbrances, he waives all right to his mortgage lien, and a purchaser is not entitled to a release. *Toler v. Crowder* (Ark. Sup. Ct.), 39 Am. B. R. 215, 192 S. W. 905.

431. *Myers Co. v. Tuttle* (C. C., N. Y.), 26 Am. B. R. 541, 188 Fed. 532.

432. *Bailey v. Anderson* (Ga. Sup. Ct.), 32 Am. B. R. 863, 82 S. E. 290.

432a. *American Bottle Co. v. Finney* (Ala. Sup. Ct.), 43 Am. B. R. 685, 82 So. 106.

vests in the trustee as of the date of the decree so setting aside or revoking. Thus far there are no cases construing this subsection.<sup>433</sup>

b. *Effect of confirmation of composition.*—Subsection *f* of this section declares that "upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him."<sup>434</sup> The result of the confirmation is to take the estate out of the jurisdiction of the bankruptcy court and restore it to the bankrupt.<sup>435</sup>

#### IX. TRANSFERS FRAUDULENT UNDER STATE LAWS MAY BE AVOIDED BY TRUSTEE.

a. *In general.*—Subsection *e*, relative to the powers of the trustee in respect to fraudulent transfers, has been referred to elsewhere.<sup>436</sup> It is the corollary of § 67-b, and means simply that if a creditor could have avoided any transfer (not merely a lien) under the laws of the State, the trustee can do the same,<sup>437</sup> and it is immaterial that the creditors of the bankrupt were not in a position to attack the transfer.<sup>438</sup> The trustee is subrogated to the rights of creditors, and may sue to avoid any conveyance, which a creditor could have avoided, although made more than four months prior to the adjudication of bankruptcy,<sup>439</sup> and irrespective of the financial condition of the bankrupt at the time it was made.<sup>440</sup> In a proper case he may intervene in behalf of all the creditors in an action brought by one creditor for that purpose.<sup>439b</sup> Such trustee may proceed for such purpose by bill in equity, and will not be required to seek his remedy at law.<sup>440</sup> Such a suit may be maintained, although neither the trustee nor any creditor has reduced the claim against the bankrupt to a judgment.<sup>441</sup> The fact that the transfer was made by the husband to his wife does not prevent it from being genuine and free from fraud.<sup>442</sup> To hold that a trustee cannot attack a fraudulent conveyance made by the bankrupt more than four months before the filing of the petition, without showing that some creditor had obtained a judgment and issued execution thereon, so that he could maintain a similar action, would be simply to provide an easy and convenient method for a dishonest debtor to dispose of his property.<sup>443</sup> The presumption is that the trustee has complied with the provisions of the bankruptcy act, and is qualified to act.<sup>444</sup> When a trustee seeks to enforce rights or to recover property in another district outside of the territorial jurisdiction of the court which appointed him, he stands in the position of those whose rights he has acquired and can resort only to the same courts, State or Federal, and is confined to the same remedies.<sup>445</sup> In many cases, the trustee will be able

<sup>433</sup> See discussion under Sections Thirteen and Fifteen of this work.

<sup>434</sup> See Bankr. Act, § 21-g, *ante*, as to evidence of order of confirmation, and the recording thereof.

<sup>435</sup> *Matter of Hollins* (C. C. A., 2d Cir.), 36 Am. B. R. 168, 229 Fed. 349; *Am. Improvement Co. v. Lillenthal* (Cal. Dist. Ct. of App.), 44 Am. B. R. 365, 184 Pac. 692.

This subdivision does not apply where no adjudication was made and no trustee appointed, as in such case title never left the bankrupt. *Houston v. Shear* (Tex. Ct. of Civ. App.), 43 Am. B. R. 462, 210 S. W. 976.

Liens which would be valid and unassailable in the ordinary course of bankruptcy proceedings are protected in composition arrangements and are not affected or discharged. *Oilfields Syndicate v. American Improvement Co.* (C. C. A., 9th Cir.), 44 Am. B. R. 490, 260 Fed. 905, affg. 43 Am. B. R. 325, 256 Fed. 979.

A liquidating trustee to whom the assets of a bankrupt are transferred pursuant to a composition agreement duly approved by the Federal court is a trustee for creditors and authorized by section 19 of the New York State Personal Property Law to maintain an action to set aside a fraudulent transfer by the alleged bankrupt. *Kobre Assets Corp. v. Baker* (N. Y. Sup. Ct.), 39 Am. B. R. 276, 178 App. Div. 62.

*Effect of confirmation.*—Upon the confirmation of a composition the title of a bankrupt to his property "shall thereupon revert in him," and his receiver has no right thereafter to receive any property as the property of the bankrupt, and, hence, a bank has no right to turn over stocks, bonds or other property which the bankrupt had pledged with it prior to bankruptcy, and the bankruptcy court is without jurisdiction to pass upon claims made by third parties to such property turned over to the receiver. *Matter of Hollins* (C. C. A., 2d Cir.), 36 Am. B. R. 432, 238 Fed. 787.

<sup>436</sup> See discussion under Sections Sixty and Sixty-seven of this work. Compare also in this section, subtitle "Property Fraudulently Transferred."

<sup>437</sup> *Mueller v. Bruss*, 8 Am. B. R. 443, 118 Wis. 406; *McMahon v. Pithan* (Iowa Sup. Ct.), 33 Am. B. R. 125, 147 N. W. 920; *Woodman v. Butterfield* (Me. Sup. Ct.), 40 Am. B. R. 40, 101 Atl. 25; *Baldwin v. Kingston* (D. C., N. J.), 40 Am. B. R. 641, 247 Fed. 163; *Stellwagen v. Cium* (U. S. Sup. Ct.), 41 Am. B. R. 1, 245 U. S. 605, citing *Collier on Bankruptcy* (11th ed.), 1178; *McCabe v. Guldo* (Miss. Sup. Ct.), 41 Am. B. R. 173, 77 So. 801; *Irwin v. Maple* (C. C. A., 6th Cir.), 41 Am. B. R. 532, 252 Fed. 10; *Williams v. Davidson* (Wash. Sup. Ct.), 42 Am. B. R. 596, 176 Pac. 334; *Kimbrough v. Alred* (Ala. Sup. Ct.), 43 Am. B. R. 116, 80 So. 617; *Googins v. Skillings* (Me. Sup. Jud. Ct.), 44 Am. B. R. 378, 106 Atl. 50.

A trustee on behalf of creditors, may attack bills of sale or trust agreements which are void as to the bankrupt's creditors because they have not been filed, and because possession of the property has not been changed. *Matter of Gerstman and Bandman* (C. C. A., 2d Cir.), 19 Am. B. R. 145, 157 Fed. 550. In *Manning v. Evans* (D. C., N. Y.), 19 Am. B. R. 217, 223, 156 Fed. 106, Judge Lanning said: "It will be observed that in this section there is no four months' limitation as in the other sections above referred to (60 and 70). Its effect is to subrogate the trustee to the rights of creditors. Its distinguishing feature is that it authorizes a trustee in bankruptcy to invoke the relief furnished by State laws to creditors for annulling transfers of property by their debtors."

<sup>438</sup> *Sheldon v. Parker*, 11 Am. B. R. 152, 66 Neb. 610; *McKey v. Emanuel* (Ill. Sup. Ct.), 32 Am. B. R. 350, 104 N. E. 1051; *Barrett v. Kaigler* (Ala. Sup. Ct.), 40 Am. B. R. 161, 76 So. 320.

<sup>439</sup> In *re Mullen* (D. C., Mass.), 4 Am. B. R. 224, 101 Fed. 413; *Lewis v. Bishop*, 47 N. Y.

to sue under § 67-e or § 70-e. If under the latter, he must bring himself within the elements of pleading and proof recognized by the statutes and decisions of his State.<sup>446</sup> The important difference is that, if the suit is based on the State law, the State statute of limitation applies.<sup>446a</sup> Thus, many fraudulent transactions, which could not be brought under § 67-e, will be timely if resting on § 70-e. The trustee should allege that the property of the

App. Div. 554, 62 N. Y. Supp. 618; *Beasley v. Coggins*, 12 Am. B. R. 355, 48 Fla. 215, 57 So. 213; *Bush v. Export Storage Co.* (C. C., Tenn.), 14 Am. B. R. 138, 136 Fed. 918; *in re Gray*, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, 62 N. Y. Supp. 618; *Ruhl-Koblegard Co. v. Gillespie*, 22 Am. B. R. 643, 61 W. Va. 554, 56 S. E. 898; *Hull v. Hudson* (Ch. Ct., Del.), 26 Am. B. R. 725, 80 Atl. 674; *Hobbs v. Frasier* (Fla. Sup. Ct.), 26 Am. B. R. 887, 55 So. 848; *Blick v. Nimmo* (Md. Ct. of App.) 30 Am. B. R. 770, 88 Atl. 116; *Holbrook v. International Trust Co.* (Mass. Sup. Ct.), 33 Am. B. R. 808, 107 N. E. 665; *Manders v. Wilson* (D. C., Cal.), 36 Am. B. R. 739, 230 Fed. 536; *Cooper Grocery Co. v. Penland* (C. C. A., 5th Cir.), 40 Am. B. R. 589, 247 Fed. 480; *Baldwin v. Kingston* (D. C., N. J.), 40 Am. B. R. 641, 247 Fed. 163; *Stellwagen v. Clum* (U. S. Sup. Ct.), 41 Am. B. R. 1, 245 U. S. 605, citing *Collier on Bankruptcy* (11th Ed.), 1178; *Riggs v. Price* (Mo. Sup. Ct.), 43 Am. B. R. 413, 210 S. W. 420; *Neuberger v. Fellis* (Ala. Sup. Ct.), 43 Am. B. R. 703, 82 So. 172; *Scales v. Holje* (Cal. Ct. of App.), 44 Am. B. R. 127, 183 Pac. 306.

**Real property.**—The law of the state where real property is located and where a transfer thereof is recorded determines whether said transfer is one "which any creditor of such bankrupt might have avoided." *Hall v. Glenn* (D. C., Cal.), 39 Am. B. R. 54, 247 Fed. 997.

**Trustee as representative of creditors.**—In a suit to set aside a conveyance made by the bankrupt in fraud of his creditors, the trustee in bankruptcy represents the interests of the creditors alone; in an action to recover property fraudulently conveyed the defendants may allege that any recovery had in the action would not be for the benefit of creditors but for the benefit of the bankrupt himself. *Cartwright v. West* (Sup. Ct., Ala.), 26 Am. B. R. 831, 55 So. 917.

A bill filed by a trustee in bankruptcy generally for the benefit of all creditors who may be entitled to impeach a transfer, for the purpose of enforcing a constructive trust, is maintainable although there is only one creditor entitled to benefit under the bill. *Duncan v. Lum* (Sup. Ct., Ala.), 41 Am. B. R. 145, 77 So. 718, *Bergen v. Blackwood* (Minn. Sup. Ct.), 42 Am. B. R. 746, 170 N. W. 506.

The amount recovered by the trustee less costs, belongs to the creditor whose right was enforced by the decree, and should not be held by the trustee as part of the bankrupt's estate for the common benefit of his creditors. *Am. Trust & Savings Bank v. Duncan* (C. C. A., 5th Cir.), 43 Am. B. R. 7, 254 Fed. 870.

In an action in a State court to set aside a fraudulent transfer, the court should decree the fee simple title to the trustee without ascertaining the amount due the respective creditors. *McCrory v. Donald* (Miss. Sup. Ct.), 43 Am. B. R. 181, 80 So. 643.

A fraudulent transfer by a bankrupt will not be set aside at the instance of his trustee in bankruptcy, where said trustee does not represent any creditor entitled to avoid the transfer. *Martin v. Commercial Nat. Bank*, 40 Am. B. R. 765, 38 Sup. Ct. 176; *Cobb v. First Nat. Bank of Livonia* (D. C., Ga.), 45 Am. B. R. 48, 263 Fed. 1000.

**Statute of limitations.**—The trustee in a suit to set aside a fraudulent transfer was barred by the three-year statute of limitations where it appeared that the creditor in whose right the action was brought had acquired knowledge of facts showing the fraud more than three years before the action was instituted. *Davis v. Willey* (D. C., Cal.), 45 Am. B. R. 348, 263 Fed. 588.

**Purchase by corporation of its own stock while insolvent.**—A trustee in bankruptcy of a corporation may bring a suit in equity against stockholders to set aside as fraudulent and void transactions whereby said stockholders sold their stocks to the corporation and received payment therefor from the funds of the corporation with knowledge of its insolvency. *Sherrill v. Mutson* (Ala. Sup. Ct.), 32 Am. B. R. 532, 65 So. 538; *Henderson v. Garner* (Ala. Sup. Ct.), 39 Am. B. R. 792, 76 So. 387.

<sup>439a</sup> *Baldwin v. Kingston* (D. C., N. J.), 40 Am. B. R. 641, 247 Fed. 163.

<sup>439b</sup> *Googins v. Skillings* (Me. Sup. Jud. Ct.), 44 Am. B. R. 378 108 Atl. 50.

<sup>440</sup> *Wall v. Cox* (C. C. A., 4th Cir.), 4 Am. B. R. 659, 101 Fed. 403; *Beasley v. Coggins*, 12 Am. B. R. 355, 48 Fla. 215, 57 So. 213; *Davis v. Gates* (D. C., Pa.), 37 Am. B. R. 818, 235 Fed. 192; *McCabe v. Guido* (Miss. Sup. Ct.), 41 Am. B. R. 178, 77 So. 801; *Biggs v. Price* (Mo. Sup. Ct.), 43 Am. B. R. 413, 210 S. W. 420.

<sup>441</sup> *Mueller v. Bruns*, 8 Am. B. R. 442, 11 Wis. 406; *Beasley v. Coggins*, 12 Am. B. R. 355, 48 Fla. 215, 57 So. 213; *Thomas v. Roddy*, 19 Am. B. R. 873, 122 N. Y. App. Div. 851, 107 N. Y. Supp. 473; *Ryker v. Gwynne* (N. Y. Sp. T. Sup. Ct.), 21 Am. B. R. 95. The trustee in bankruptcy of a mortgagor may attack the validity of a chattel mortgage although the claims of creditors are not in judgment. *Mitchell v. Mitchell* (D. C., N. Car.), 17 Am. B. R. 382, 147 Fed. 280; *Sherwood v. Holbrook* (N. Y. App. Div.), 40 Am. B. R. 100, 165 N. Y. Supp. 514. *Baldwin v. Kingston* (D. C., N. J.), 40 Am. B. R. 641, 247 Fed. 163.

**Unfiled chattel mortgage.**—The Court of Appeals of New York have held that the present bankruptcy act arms the trustee in bankruptcy with the right to assert the invalidity of an unfiled chattel mortgage in favor of the creditors of the mortgagor, even though their claims are not in judgment. *Skilton v. Coddington*, 15 Am. B. R. 810, 185 N. Y. 80, 77 N. E. 790, cited in *Dunn Salmon Co. v. Pillmore*, 19 Am. B. R. 172, 55 N. Y. Misc. 546, 106 N. Y. Supp. 88.

**Effect of discharge.**—The discharge of a debtor in bankruptcy is personal to the bankrupt and does not release his fraudulent grantees from liability for the fraud committed by them nor in any way preclude the trustee from recovering property of the estate which had been fraudulently transferred. *Stevenson v. Bird* (Ala. Sup. Ct.), 25 Am. B. R. 909, 53 So. 92.

**Judgment not required.**—A trustee in bankruptcy, before bringing suit to set aside an alleged fraudulent transfer by the bankrupt, need not procure judgment, issue execution thereon, and have it returned unsatisfied. A trustee in bankruptcy may under section 70-e of the Bankruptcy Act recover all the property transferred by the bankrupt in fraud of creditors, although such recovery may result in the possession by the trustee of property in excess of the entire indebtedness of the bankrupt. *Davis v. Gates* (D. C., Pa.), 37 Am. B. R. 818, 235 Fed. 192.

<sup>442</sup> *Lyon v. Wallace* (Mass. Sup. Ct.), 35 Am. B. R. 688, 108 N. E. 1075; *Baldwin v. Kingston* (D. C., N. J.), 40 Am. B. R. 641, 247 Fed. 163.

**Burden of proof.**—The rule that where a married woman claims property acquired by her during coverture, the burden is upon her as against her husband's creditors to substantiate her claim by proof that is clear, full and satisfactory, relates only to creditors whose rights had accrued at the time she acquired title and not those whose rights accrued many

bankrupt is not sufficient to pay his creditors in full.<sup>447</sup> A mortgagee who knows that the mortgagor is selling mortgaged chattels for his own use, and who consents to his doing so, is not a *bona fide* holder and the mortgagor's trustee in bankruptcy may avoid the chattel mortgage, and recover the property transferred thereby or its value.<sup>448</sup> A trustee in bankruptcy of a mortgagor has the same rights as a creditor armed with an attachment or execution.<sup>449</sup> Where the alleged fraudulent transfer is a mortgage, the bill, upon the issue of its priority of lien, should alleged the names of the bankrupt's creditors other than the defendant, the amount of their debts, the character of the same and when created.<sup>450</sup> A trustee in bankruptcy may sue in trover for a conversion of goods occurring either before or after bankruptcy, and in a declaration may join a count upon the bankrupt's title, and a count upon the trustee's title.<sup>451</sup> The complaint in an action by a trustee is not demurrable as being multifarious and inconsistent because it alleges an unlawful preference and a fraudulent transfer,<sup>452</sup> or because the separate transactions alleged had no connection with each other.<sup>452a</sup> The merger of the identity of the creditors in the estate renders their specific designation in the complaint unnecessary.<sup>452b</sup> In a suit by a trustee in bankruptcy to set aside a conveyance of land by a bankrupt alleged to have been made in fraud of creditors, the grantee may invoke the statute of limitations in respect of the antecedent liabilities of the grantor, as a defense.<sup>453</sup> The burden of proving fraud by full, clear and convincing evidence, is upon the trustee.<sup>453a</sup> The cases turn on the law of the State and a summary of their doctrines would be useless; they are, therefore, merely cited in the foot-note.<sup>454</sup>

years thereafter. *Longbottom v. Emery* (Pa. Sup. Ct.), 42 Am. B. R. 248, 104 Atl. 561.

Where a husband and wife exchange businesses and the transfer is void under State laws, the husband is not liable to pay to the trustee in bankruptcy of the wife in an action to recover the property transferred, the amount of money which the wife has paid in satisfying debts against the business transferred to her by the husband. *McCabe v. Guido* (Miss. Sup. Ct.), 41 Am. B. R. 178, 77 So. 801.

Mere relationship not a badge of fraud.—In considering an alleged fraudulent conveyance by a debtor to his wife, their relationship is not a badge of fraud, but is a mere circumstance, dependent for its value upon other circumstances. *McCrary v. Donald* (Ala. Sup. Ct.), 35 Am. B. R. 696, 68 So. 306.

In Kentucky a conveyance by a bankrupt to his wife, without consideration but not actually fraudulent, is voidable only as against debts which the bankrupt owed at the time of the conveyance. *Pace's Trustee v. Pace* (Ky. Ct. of App.), 33 Am. B. R. 834, 172 S. W. 925.

443. *Thomas v. Roddy*, 19 Am. B. R. 873, 122 N. Y. App. Div. 851, 107 N. Y. Supp. 473; *McKey v. Emanuel* (Ill. Sup. Ct.), 32 Am. B. R. 360, 104 N. E. 1061; *Barrett v. Kaigler* (Ala. Sup. Ct.), 40 Am. B. R. 161, 76 So. 820; *Cooper Grocery Co. v. Penland* (C. C. A., 5th Cir.), 40 Am. B. R. 589, 247 Fed. 480.

Property transferred more than four months prior to bankruptcy.—A district Court has jurisdiction, under section 70e of the Bankruptcy Act, without the consent of the defendant, of an action by a trustee in bankruptcy to recover property fraudulently transferred by the bankrupt more than four months prior to the filing of the petition in bankruptcy. An objection that there is an adequate remedy at law is without merit. *Davis v. Gates* (D. C., Pa.), 37 Am. B. R. 818, 235 Fed. 102.

444. *Breckons v. Snyder*, 15 Am. B. R. 112, 211 Pa. St. 176, 60 Atl. 575.

445. *Hull v. Burr* (C. C. A., 5th Cir.), 18 Am. B. R. 541, 550, 153 Fed. 945; *Prescott v. Galluccio* (D. C., N. Y.), 21 Am. B. R. 229, 235, 164 Fed. 618.

Suit by trustee is in equity.—The bankruptcy act does not prescribe the form of action by which the trustee is to set aside a transfer alleged to have been made by the bankrupt in fraud of his creditors prior to the four months' period. The bankrupt is therefore limited to the form of action by which creditors are entitled to enforce such right, and as creditors'

suit avoiding the transfer would have been in equity, so the suit of a trustee is in equity and he is not entitled to a trial by jury. *Allen v. Gray*, 24 Am. B. R. 642, 139 N. Y. App. Div. 428, 124 N. Y. Supp. 137.

446. In re *Gray*, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, 62 N. Y. Supp. 618; *Mueller v. Bruss*, 8 Am. B. R. 442, 112 Wis. 406; *Halbert v. Franke*, 11 Am. B. R. 629, 81 Minn. 204, 97 N. W. 976; *Woodman v. Butterfield* (Me. Sup. Ct.), 40 Am. B. R. 40, 101 Atl. 23. See Am. Bankr. Dig. § 673.

Complaint in an action by a trustee in bankruptcy to set aside a deed for fraud, to recover the possession of land, and to partition the land, examined and held good on motion to compel plaintiff to separately and distinctly state what he wanted the court to exact from the defendants. *O'Farrell v. Poston* (S. Car. Sup. Ct.), 37 Am. B. R. 470, 89 S. E. 463.

446a. *Matter of Salm Baking Co.* (D. C., Tex.), 43 Am. B. R. 511.

447. *Prescott v. Galluccio* (D. C., N. Y.), Am. B. R. 229, 235, 164 Fed. 618.

448. *Skillen v. Endelman*, 11 Am. B. R. 766, 39 N. Y. Misc. 261, 79 N. Y. Supp. 413.

449. *Zartman v. First Nat. Bank*, 19 Am. B. R. 27, 189 N. Y. 267, 82 N. E. 127.

450. *Teague v. Anderson Hardware Co.* (D. C., Ga.), 20 Am. B. R. 424, 161 Fed. 765.

451. *Burns v. O'Gorman* (Cir. Ct., R. I.), 17 Am. B. R. 815, 150 Fed. 226.

452. *Kraver v. Abrahams* (D. C., Pa.), 29 Am. B. R. 365, 203 Fed. 782.

452a. *Kimbrough v. Alred* (Ala. Sup. Ct.), 43 Am. B. R. 116, 80 So. 617.

452b. *Barrett v. Kargler* (Ala. Sup. Ct.), 40 Am. B. R. 161, 76 So. 320; *Riggs v. Price* (Mo. Sup. Ct.), 43 Am. B. R. 413, 210 S. W. 420.

453. *Pace's Trustee v. Pace* (Ky. Ct. of App.), 33 Am. B. R. 834, 172 S. W. 925.

453a. *Jones v. Shiro* (Me. Sup. Ct.), 40 Am. B. R. 357, 102 Atl. 76.

454. In re *Brown* (D. C., Oreg.), 1 Am. B. R. 107, 91 Fed. 358; In re *Grahs* (Ref., Ohio), 1 Am. B. R. 465; In re *Phelps* (Ref., N. Y.), 3 Am. B. R. 396; In re *Mullen* (D. C., Mass.), 4 Am. B. R. 224, 101 Fed. 413; *Mueller v. Bruss*, 8 Am. B. R. 442, 112 Wis. 406; *Barber v. Colt* (C. C. A., 6th Cir.), 16 Am. B. R. 419, 144 Fed. 381, holding that under the Ohio statute declaring that a creditor may sue to set aside fraudulent transfers, actual fraud need not be shown; *Cohen v. Wagar*, 16 Am. B. R. 381, 153 N. Y. 33, 75 N. E. 691; *Lesser v. Bradford Realty Co.*, 15 Am.

b. **The saving clause.**—That clause in this subsection is similar to those found in § 67-e and § 67-f, and is for the same purpose. What has already been said of them will not be repeated here. This saving of the rights of *bona fide* holders for value is also merely expressive of the law.<sup>455</sup> But, after adjudication, the filing of the petition amounting to constructive notice, there can be no *bona fide* holder.<sup>456</sup>

c. **The amendment of 1903.**—Here the words added are the same as those added to § 60-b and § 67-e.<sup>457</sup> Their purpose and effect have been considered in the discussion of those sections.<sup>458</sup> The effect of the omission from § 23-b of all reference to § 70-e has been questioned. It has been held, however, that such omission operates to bring actions under § 70-e within the general rule as laid down in § 23-b, and that while a bankruptcy court has general jurisdiction over the subject-matter it can only be exercised under the conditions imposed by § 23-b, that is, by the consent of the proposed defendants.<sup>459</sup> The effect of this omission has been nullified by the amendment of § 23-b by the amendatory act of 1910, which enlarged the jurisdiction of the bankruptcy court to entertain suits under § 70-e as well as under §§ 60-b and 67-e.<sup>460</sup>

B. R. 123, 47 N. Y. Misc. 463, 95 N. Y. Supp. 933, as to sufficiency of complaint in action to set aside chattel mortgage made within four months' period; Breckons v. Snyder, 15 Am. B. R. 112, 211 Pa. St. 176, as to sufficiency of evidence in action to recover preferential payment; Durham v. Wick, 14 Am. B. R. 385, 210 Pa. St. 128; Wright v. Skinner (D. C., N. Y.), 14 Am. B. R. 500, 136 Fed. 694, as to allegations as to citizenship in bill where jurisdiction depends upon diverse citizenship; Horskins v. Sanderson (D. C., Vt.), 13 Am. B. R. 101, 132 Fed. 415, as to jurisdiction over property within the district where the defendant resides elsewhere; Union Trust Co. v. Amery (Wash. Sup. Ct.), 27 Am. B. R. 499, 120 Pac. 539; Holbrook v. International Trust Co. (Mass. Sup. Ct.), 33 Am. B. R. 808, 107 N. E. 665, citing text; Woodman v. Butterfield (Me. Sup. Ct.), 40 Am. B. R. 40, 101 Atl. 25; Sherwood v. Holbrook (N. Y. App. Div.), 40 Am. B. R. 100, 165 N. Y. Supp. 514; Matter of Franklin Brewing Co. (D. C., N. Y.), 43 Am. B. R. 111, 254 Fed. 910; Kimbrough v. Alred (Ala. Sup. Ct.), 43 Am. B. R. 116, 80 So. 617; McCrory v. Donald (Miss. Sup. Ct.), 43 Am. B. R. 181, 80 So. 643; Smith v. Powers (D. C., N. Y.), 43 Am. B. R. 303, 255 Fed. 582; Garland v. Arrowood (N. Car. Sup. Ct.), 43 Am. B. R. 549, 99 S. E. 100; Commonwealth v. Leventhal (Pa. Quarter Sess.), 44 Am. B. R. 84, 67 Pittsb. L. J. 553; Markham v. Waterman (Kan. Sup. Ct.), 44 Am. B. R. 108, 182 Pac. 546; Scales v. Holje (Cal. Ct. of App.), 44 Am. B. R. 127, 183 Pac. 308; Simpson v. Combs (Wash. Sup. Ct.), 44 Am. B. R. 152, 182 Pac. 566, as to setting aside foreclosure of chattel mortgage and sale thereunder; Moran v. Moran (C. C. A., 2d Cir.), 44 Am. B. R. 178, 258 Fed. 234; French v. Cunningham (C. C. A., 8th Cir.), 44 Am. B. R. 534, 261 Fed. 909; Willman v. Peterson, (Neb. Sup. Ct.), 44 Am. B. R. 568, 175 N. W. 644; Cohen v. George (Ga. Sup. Ct.), 44 Am. B. R. 617, 101 S. E. 808; Termini v. Huth (N. Y. App. Div.), 45 Am. B. R. 283, 191 App. Div. 218.

In New Jersey an insolvent debtor may pre-

fer any creditor either by a mortgage securing an antecedent debt or by a conveyance of property in satisfaction of such indebtedness, provided that the transaction is in good faith and for an adequate consideration, and the trustee in bankruptcy of the debtor may not avoid such transfer under section 70-e. Manning v. Evans (D. C., N. Y.), 19 Am. B. R. 217, 223, 156 Fed. 106.

455. In re Mullen (D. C., Mass.), 4 Am. B. R. 224, 101 Fed. 413.

456. Harrell v. Beale, 17 Wall. 590. Compare In re Lake, Fed. Cas. 7,002.

457. For the time when this amendment became operative, see "Supplementary Section to Amendatory Act," *post*.

458. See in sections 60 and 67.

459. Gregory v. Atkinson (D. C., Mo.), 11 Am. B. R. 495, 127 Fed. 183, disapproved in Hurley v. Devlin (D. C., Kan.), 17 Am. B. R. 793, 149 Fed. 268, holding that the bankruptcy court, without the consent of the defendant, has jurisdiction of a suit by the trustee to set aside an alleged fraudulent transfer of property made by the bankrupt anterior to the four months' period. Sheppard v. Lincoln (D. C., N. Y.), 25 Am. B. R. 804, 184 Fed. 182.

A suit by the trustee cannot be brought under section 70-e without the consent of the defendant. Skewis v. Barthell (D. C., Iowa), 18 Am. B. R. 429, 152 Fed. 534.

**Consent of defendant.**—"Construing section 70-e in connection with section 23-b, it appears that the former conferred jurisdiction on courts of bankruptcy of suits to avoid transfers of his property made by the bankrupts which any creditor of the bankrupt might have avoided, but that, although jurisdiction of the subject-matter is conferred, it can only be exercised over the persons of the defendants by their consent." Hull v. Burr (C. C. A., 5th Cir.), 18 Am. B. R. 541, 547, 153 Fed. 945.

460. See discussion under section 23 of this work; and see Milkman v. Arthe (C. C. A., 3d Cir.), 34 Am. B. R. 536, 223 Fed. 507, *rev'd*. 32 Am. B. R. 519, 213 Fed. 642.

## SECTION SEVENTY-ONE.

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### INDEXES AND SEARCHES OF CLERKS.

§ 71. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, that said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.\*

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#### I. ADDITIONAL DUTIES OF CLERKS.

This section was added by the amendatory act of 1903. It was not in the bill as introduced, but was originally inserted by the Judiciary Committee of the House of Representatives. The only explanation of it is found in the report<sup>1</sup> accompanying the bill. The Senate Judiciary Committee modified it, but not in any important particulars. Clearly the section should be a subdivision of § 51. Indeed, its necessity may be doubted. The chief purpose seems to be to require clerks to keep bankruptcy indices; this was already the practice in most of the districts. The provisions for certificates as to petitions and discharges seem to duplicate general provisions of law long enforced. The proviso clause is perhaps aimed at the practice of excluding the public from the clerk's files and records in vogue in some quarters. The provisions of the section are all new. They are carefully phrased, and do not require further comment. Under the rule phrased in § 19 of the amendatory act of 1903, this section affects only cases begun on or after February 5, 1903.

\* This section was added by the amendatory act of 1903.

1. See House Report, No. 1,698, 57th Congress, first session.

The last amendment is one generally demanded, and is in the interest of all persons who deal with property. It requires the clerks to prepare and keep indexes of all petitions and discharges in bankruptcy and

to issue certificates in relation thereto when required. It also requires that these be kept open to inspection and examination. It is frequently desirable to know whether a person has filed a petition in bankruptcy, and also whether he has been discharged, and it is many times impossible within a reasonable time to ascertain these facts in the absence of convenient indexes.

## SECTION SEVENTY-TWO.

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### LIMITATION ON FEES OF CERTAIN OFFICERS.

§ 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act.\*

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**Analogous provisions:** In U. S.: As to property in general passing to the trustee, Act of 1867, § 14, R. S., § 5044; Act of 1841, § 3; Act of 1800, §§ 10, 11, 17, 27, 50; As to patents, copyrights, rights of action and the like, Act of 1867, § 14, R. S., § 5046; Act of 1841, § 3; Act of 1800, §§ 13, 17; As to sales by the trustee, Act of 1867, §§ 15, 25, R. S., §§ 5062, 5062B, 5063, 5064, 5065, 5066; As to sales of incumbered property, Act of 1867, § 20, R. S., § 5075.

In Eng.: As to property passing to the trustee, Act of 1883, §§ 43, 44, 59; As to burdensome property, Act of 1883, § 55; Act of 1890, § 13; As to sales by the trustee, Act of 1883, §§ 56(1), 70.

In Can.: Act of 1919, §§ 40, 67.

**Cross-references:** To the law: §§ 1(13), 2(3) (7) (15), 3-e, 7(4) (5), 12, 13, 14, 15, 47-a(2), 48, 60-b, 67-e, 69.

To the General Orders: XVIII, XXVIII.

To the Forms: Nos. 13, 43, 43, 44, 45, 46.

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### SYNOPSIS OF SECTION.

#### I. Limitation on Referees' and Trustees' Fees, 1183.

a. *Scope of section*, 1183.

b. *Its effect*, 1184.

c. *Additional compensation for conducting business*, 1184.

d. *Fees of special masters*, 1184.

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#### . LIMITATION ON REFEREES' AND TRUSTEES' FEES.

a. *Scope of section.*—This section was added by the amendatory bill of 1903. It should be read in connection with §§ 40 and 48, and General Order XXXV (2) (3). It is a statutory ratification of the rule promulgated by the Supreme Court in the General Order just mentioned, which was perhaps too liberally interpreted in some districts and in others ran counter with antagonistic rules already in force at the time and Supreme Court orders became operative.

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\* This section was added by the amendatory act of 1903, and amended by the Amendatory Act of 1910.



**b. Its effect.**—The purpose of the law-making power in enacting this section was to forestall any of those scandals due to the fee system for compensating the officers mentioned which first made the law of 1867 odorous and then pointed the way to its repeal. Under the present law, the practice had grown up, and even in certain districts been ratified by rules, of permitting the referee to charge for specified services, as, for instance, a small sum for mailing each notice or a *per diem* for hearings and continuances, in addition to the fees allowed by the law; while devices to increase the trustee's compensation, either through larger allowance to his attorney or by a *per diem* for extra work, as, for instance, in managing a going business, were often resorted to and have been frequently defended as essential to the proper administration of the law. Doubtless with knowledge of these practices, and surely of the reasons for them, the law-making power has both increased the compensation of these officers<sup>1</sup> and to guard against similar local rules in the future, has, in this section, riveted the rule that the same shall be full compensation. Clearly, hereafter, neither a referee nor a trustee can receive any compensation as such, save that "expressly authorized and prescribed in this act."<sup>1a</sup> Thus, the court is without power to allow special compensation to the referee, where a contested application for a discharge is refused under General Order 12,<sup>2</sup> or to the trustee for services in investigating the bankrupt's disposition of property and the loss of his stock by fire.<sup>3</sup>

**c. Additional compensation for conducting business.**—"Additional compensation" can only be construed in relation to the fact that where a trustee is authorized to conduct the bankrupt business as a going concern he thereby receives extra compensation because he receives the commissions on all moneys disbursed by him in the conduct of such going concern, which includes moneys paid out for salaries and material necessary to the conduct of such business. This was not allowed to trustees previous to the amendment of 1903, the trustees then being only allowed compensations on sums paid out as dividends and commissions. It, therefore, appears that Congress, in the amendment referred to, by allowing commissions on all moneys disbursed, intended to provide additional compensation to a trustee for conducting the bankrupt business as a going concern.<sup>4</sup>

**d. Fees of special masters.**—Although this section does not allow the referee to receive any further compensation for his services than as expressly authorized in the act, yet it has been the practice to allow compensation for services in the nature of masters' services outside of the duties of the referee.<sup>5</sup> Here

1. See Bankr. Act, §§ 40 and 48, also § 2 (3), all as amended by the Act of 1903.

1a. Matter of Webster Loose Leaf Filing Co. (D. C., N. J.), 42 Am. B. R. 125, 252 Fed. 959; United States v. Ward (C. C. A., 8th Cir.), 43 Am. B. R. 711, 257 Fed. 352.

2. In re Wilcox (D. C., Mich.), 19 Am. B. R. 241, 156 Fed. 685; In re Coventry-Evans Furniture Co. (D. C., N. Y.), 22 Am. B. R. 623, 171 Fed. 673.

A contract for extra compensation has been held void as against public policy. Devries v. Orem (Ct. Appeals, Md.), 17 Am. B. R. 876, 65 Atl. 430.

3. In re Screws (D. C., Ga.), 17 Am. B. R. 269, 147 Fed. 989.

4. Matter of Hart & Co. (D. C., Hawaii), 17 Am. B. R. 480.

Compensation of referee for conduct of business.—A referee who, without the express sanction of the court, authorizes the trustees, by order, to continue the bankrupt's business, for the purpose of completing partly executed contracts of the bankrupt, is not entitled to a commission of one per cent. upon all funds paid out by the trustees in the conduct and administration of the business ordered to be continued, though in all that he did the referee was supported by the creditors and trustees and their counsel, and expended much time and performed great labor, showing the

the rule of *Fellows v. Freudenthal*<sup>6</sup> still pertains. References to the referee as such may, of course, be made under the authority of General Order XII (3). Such references are rare, for the reason that, the judicial service performed being by the statute limited to the judge, there is no provision for compensating the junior officer. References are, therefore, usually made, not under this order, but under the general power of the court to call to its assistance a master in chancery. While serving as such, the referee does not sit as referee, and would seem to have the same right to compensation as when appointed by the judge while sitting on any of the other sides of his court. The referee is in this simply an individual practitioner, who from experience and training is best qualified to pass on bankruptcy questions. The cases under the original law are, therefore, most of them still in point.<sup>7</sup>

utmost fidelity to his trust throughout. *Bray v. Johnson*, 21 Am. B. R. 383, 166 Fed. 57.

5. *Matter of Hart & Co.* (D. C., Hawaii), 18 Am. B. R. 137; *United States v. Ward* (C. C. A., 8th Cir.), 43 Am. B. R. 711, 257 Fed. 352, citing *Collier on Bankruptcy* (11th ed.), 1184.

Rules of court.—Where, in a reclamation proceeding, the parties, through attorneys orally agreed, in the presence of the special master, that the fees and expenses of the master should be paid by the party to whom the property should be awarded, but did not fix the master's compensation, the amount is limited by the rules of the District Court which cannot be changed *nunc pro tunc* so as to grant a greater allowance. *Matter of Growe Const. Co.* (D. C., N. Y.), 42 Am. B. R. 654, 253 Fed. 981.

6. *Fellows v. Freudenthal*, 4 Am. B. R. 490, 102 Fed. 731.

7. *Fellows v. Freudenthal*, *supra*; *In re McDuff*, 4 Am. B. R. 110, 101 Fed. 241; *Bragassa v. St. Louis Cycle*, 5 Am. B. R. 700, 107 Fed. 77; *In re Grossman*, 6 Am. B. R. 510, 111 Fed. 507. See also *In re Todd*, 6 Am. B. R. 88, 109 Fed. 265.

Upon the bankruptcy of a stockbroker, the allowance to the special master and the expenses for stenographic minutes must come primarily out of the estate. If that is not sufficient, then they should come pro rata out of the securities or their proceeds available to claimants of a lesser class. If not satisfied out of such class of securities or proceeds, then the balance, if any, should be apportioned pro rata among claimants holding the highest claims. *Matter of Wilson & Co.* (D. C., N. Y.), 42 Am. B. R. 350, 252 Fed. 631.

## TIME OF TAKING EFFECT

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**The Time When Act of 1898 Went into Effect.**—*a* This act shall go into full force and effect upon its passage: Provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

*b* Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.

**The Time When Amendatory Act of 1903 Took Effect.**—(§ 19 of Amendatory Act of 1903.—That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.

**The Time When Amendatory Act of 1910 Took Effect.**—(§ 14 of Amendatory Act of 1910).—That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said act approved July first, eighteen hundred and ninety-eight, as amended by said act approved February fifth, nineteen hundred and three, and as further amended by said act approved June fifteenth, nineteen hundred and six.

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### WHEN THE ACT OF 1898 WENT INTO EFFECT.

Subsection *a* is different from the corresponding provisions of previous laws. The operation of each was postponed to a day certain some time after the approval of the act. Not so of the present statute.<sup>1</sup> It went into full operation on July 1, 1898—which means the whole of that day<sup>2</sup>—save that no petitions could be filed until August 1, 1898, if voluntary; or until November 1, 1898, if involuntary. “Passage” here means the same as “approval.” Thus, the courts had power on July 1, 1898, to appoint referees and promulgate rules, and from and including that day all State insolvency laws were suspended.<sup>3</sup> It has even been held that the rights of

1. For the reason, see cases like: *In re Horton*, Fed. Cas. 6,708; *Day v. Bardwell*, 97 Mass. 246, and *Judd v. Ives*, 4 Metc. 401, are no longer of value.

2. Compare *Leidigh Carriage Co. v. Stengel*, 2 Am. B. R. 383, 95 Fed. 637. And see *In re Tonawanda St. Pl. Mill*, 6 Am. B. R. 38.

3. *Palmer Mfg. Co. v. Hamilton*, 1 Am. B. R. 39; *re Bruss-Ritter Co.*, 1 Am. B. R. 58, 90 Fed. 651; *In re Etheridge Furniture Co.*, 1 Am. B. R. 112, 92 Fed. 329; *In re Curtis*, 1 Am. B. R. 440, 91 Fed. 737; *Littlefield v. Gray*, 8 Am. B. R. 409. Also cases cited in foot-note 13, *post*.

creditors fixed by the law accrued on that day, the exercise of them only being suspended until a petition could be filed.<sup>4</sup> On the other hand, a State court sustained a demurrer to a bill in equity, the apparent purpose of which was to keep the debtor's property intact until a bankruptcy petition could be filed.<sup>5</sup> The amendatory act of 1903 went into effect February 5, 1903, that of 1910 went into effect June 25, 1910.

4. *Westcott v. Berry*, 4 Am. B. R. 264.  
Compare *Kosches v. Libowitz*, 4 Am. B. R. 265, in note; *Blake v. Valentine Co.*, 1 Am. B. R. 372, 89 Fed. 601.

5. *Ideal Clo. Co. v. Hazle*, 6 Am. B. R. 265.  
See also *Ellis v. Hays, etc., Co.*, 8 Am. B. R. 109.



**GENERAL ORDERS IN BANKRUPTCY**  
ADOPTED BY THE  
**SUPREME COURT OF THE UNITED STATES**  
**At the October Term, 1898.**

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**PREFATORY NOTE.**—The General Orders in Bankruptcy were adopted by the Supreme Court of the United States in conformity with the power conferred by section 30 of the bankruptcy act. The cross-references inserted after each General Order are to sections of the act, to the official and supplementary forms, and to the equity rules. Cases construing and applying the several orders are digested and classified. These orders are supposed to explain, amplify and apply the provisions of the bankruptcy act, and have the full force of law except as they conflict with that act. They are, therefore, an essential part of the law of bankruptcy.

**PREAMBLE.**

- Gen. Order*
- I. Docket, 1190.*
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  - VI. Petitions in different districts, 1192.*
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  - XX. Papers filed after reference, 1206.*
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  - XXX. Imprisoned debtor, 1216.*
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## PREAMBLE.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States, it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

Cross-references: To the law: § 30.

To the General Orders: XXXVII, XXXVIII.

To the Equity Rules: LXXXIX, XC. (See also Revised Statutes, §§ 913, 914.)

**Effect and construction of the general orders.**—The general orders of the Supreme Court and the rules of the district courts in accordance therewith are as obligatory on officers of the court as the bankruptcy act itself. In *re Cobb* (D. C., N. C.), 7 Am. B. R. 202, 112 Fed. 655. These general orders have the same force as a provision of the statute. They are made under an express delegation of power, both constitutional and statutory. In *re Hoyt & Mitchell* (D. C., N. Car.), 11 Am. B. R. 784, 127 Fed. 968. Though controlling, so far as not inconsistent with the act, they must yield to the act and cannot operate to prevent or alter its operation. *Matter of Ingalls Bros.* (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517. The Supreme Court, when it made the general orders, intended to direct a much simpler mode of procedure. *Matter of Daugherty* (D. C., Ky.), 26 Am. B. R. 550, 553, 190 Fed. 299.

The general orders are an amplification of the law with respect to procedure. *Orcutt Co. v. Green*, 17 Am. B. R. 72, 204 U. S. 96, revg. 13 Am. B. R. 512; *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463. As has been stated in respect to the use and application of the general orders: "Seek the meaning and intent of the law first and follow that rather than the order or the form; and if the latter are not harmonious each with the other, seek the meaning and intent of the order and follow it rather than the form." In *re Soper and Slada* (Ref., N. Y.), 1 Am. B. R. 193, 196. The rules and forms so prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law. In *re Gerber* (C. C. A., 9th Cir.), 26 Am. B. R. 608, 617, 186 Fed. 693.

As to the furnishing and delivering of subpoenas, see In *re Hemstreet* (D. C., Ia.), 8 Am. B. R. 760, 117 Fed. 568; *Matter of the Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51.

## I. DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

[Latter part of General Order I, 1867, with changes specifying more fully the entries to be made in the docket.]

**Cross-references:** To the law: As to commencement of proceedings, § 1(10); As to duties of the clerk, §§ 51, 71; As to duties of the referee, §§ 29-c, 30-a(7), 42; As to duties of the trustees, §§ 29-c, 49.  
 To the General Orders: II, IV.  
 To the Equity Rules: I-VI, inclusive.

## II. FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

[Part of General Order I, 1867, but not so full.]

**Cross-references:** To the law: §§ 18-a, 59-a-b.

To the General Orders: VI, IX, XX.

To the Official Forms: None, both the clerk and the referee usually have filing stamps.

**Cases citing this order:** *Matter of Lacey & Company*, (Sup. Ct., D. C.) 35 Am. B. R. 231, 43 Wash. Law Rep. 434.

## III. PROCESS.

All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

[General Order II, 1867, except the word "referees" is substituted herein for the word "registers."]

**Cross-references:** To the law: As to process in involuntary proceedings, § 18-a (and also under §§ 4 and 5); As to process to witnesses, § 21-a.

To the General Orders: VIII.

To the Official Forms: Nos. 5, 30.

To the Equity Rules: VII to XVI, inclusive.

**Illustrative cases:** *Matter of the Abbey Press* (C. C. A.), 13 Am. B. R. 11, 134 Fed. 51; *In re Norton* (D. C., N. Y.), 17 Am. B. R. 504, 148 Fed. 301. See those cited under Sections Eighteen and Twenty-one of this work.

## IV. CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the circuit court or district court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

[General Order III, 1867, without substantial change, except that the old rule required the entry of the attorney's place of residence as well as his place of business.]

**Cross-references:** To the law: As to who may file voluntary petitions, §§ 4-a, 59-a; As to who may file involuntary petitions, § 59-b; As to partnership petitions, § 5; As to petitions against corporations, § 4-b; As to where petitions must be filed, § 2(1); As to appearances, §§ 18-b, 59-f; As to answer and other pleas, §§ 18-d, 59; As to notices, § 58.

To the Equity Rules: IV, XVII, and, as to pleadings, generally

**The Supplementary Forms:** For those in involuntary cases, Nos. 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130; for appearances Nos. 99, 110, 120, 121. See also, generally "Supplementary Forms," *post*.

To the Equity Rules: IV, XVII, and, as to pleadings, generally.

**Power of bankrupt to represent himself.**—This general order gives the bankrupt the right to represent himself, and being an attorney he may raise any question of law which could have



been raised had he been represented by another. In re Shaffer (D. C., N. Car.), 4 Am. B. R. 723, 104 Fed. 962.

**Powers of attorneys.**—This order seems to give to the attorney of a bankrupt or creditor power to do any act in the bankruptcy matter which the bankrupt or creditor might do personally, and requires no other evidence of his authority than the fact of his admission to practice in the circuit or district court. Matter of Herskopf (D. C., Col.), 9 Am. B. R. 90, 118 Fed. 1016; In re Gaseer (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537. "The petition in an involuntary bankruptcy proceeding may be made by the attorney in fact of the petitioning creditors." Rogers v. De Sota Placer Mining Co. (C. C. A., 9th Cir.), 14 Am. B. R. 252, 136 Fed. 407. But it has been held that this power of an attorney does not extend to the creditor's choice of a trustee nor to the making of an affidavit to the schedules of a petitioning debtor. In re Blankfeld (D. C., N. Y.), 3 Am. B. R. 165, 97 Fed. 191.

An attorney in fact who is not an attorney at law may not examine the bankrupt at the first meeting of creditors. Matter of Looney (D. C., Tex.), 44 Am. B. R. 542, 262 Fed. 209.

A creditor and a bankrupt may, with knowledge of the full situation, employ the same counsel. Matter of Prussian (D. C., Mich.), 43 Am. B. R. 13, 255 Fed. 837.

### V. FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

[First part of General Order XIV, 1867, without change.]

**Cross-references:** To the law: As to petitions, § 18-a-c; As to schedules, § 7(8); As to referee's duty to examine schedules, etc., § 39-a(2); As to referee's duty to prepare schedules in certain cases, § 39-a(6).

To the General Orders: IX, XI.

To the Official Forms: Nos. 1, 2, 3, with the schedules.

To the Supplementary Forms: Nos. 117, 118.

To the Equity Rules: XX to XXV.

**Use of ditto marks and abbreviations.**—This order precludes the use of dots to indicate anything necessary to be stated. In re Orne, Fed. Cas. 10,582. And the use of ditto marks, in attempting to indicate a creditor's residence, is in violation of this order. Haach v. Theise, 16 Am. B. R. 600, 5 N. Y. Misc. 3, 99 N. Y. Supp. 905. The abbreviation of the residence of a creditor as "135 Bway" violates this rule. Sutherland v. Lasher, 11 Am. B. R. 780, 41 N. Y. Misc. 249.

**Use of printed blanks.**—In the eastern district of North Carolina a written or typewritten schedule will not be accepted. The printed blank containing forms prescribed by the rules of the court must be used, otherwise the schedules will be returned to the parties without action. Mahoney v. Ward (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278.

A mistake as to a creditor's name in the schedules will prevent the discharge of a debt. Liesum v. Kraus, 35 N. Y. Misc. 376, 71 N. Y. Supp. 1022. If a petition in involuntary bankruptcy contains the name of the judge such name must be given correctly. Anon., Fed. Cas. 459.

See, generally, Matter of Harrell (D. C., N. Car.), 34 Am. B. R. 829, 222 Fed. 160.

### VI. PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceed-

ings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

[General Order XVI, 1867, without change, except that the last sentence of Rule VI under consideration, is new.]

**Cross-references:** To the law: As to where petitions may be filed, § 1(2); As to partnership petitions, § 5; As to transfer of cases, §§ 2(19), 32; Also generally to §§ 2(19), 18.

To the General Orders: IV, VII, VIII.

The true meaning of this general order is that where petitions are filed in different districts, the court whose ground of jurisdiction is that the bankrupt's domicile has been in that district during the greater portion of the six months next preceding the filing of the petitions is the court in which the first hearing should be had. In *re Isaacson* (D. C., N. Y.), 20 Am. B. R. 437, 161 Fed. 777. This rule contemplates a case in which each court has jurisdiction of the cause, and that question, when raised, must be first determined. In *re Waxelbaum* (D. C., N. Y.), 3 Am. B. R. 392, 395, 98 Fed. 599. The letter as well as the spirit of this general order confers exclusive jurisdiction upon that court in which the petition is first filed, subject to the provision for the transfer of cases from one to another district court where the convenience of parties in interest demands it. As between two district courts of United States, it is the duty of the other court to yield jurisdiction and the control and direction of the entire proceeding to the one whose jurisdiction was first invoked. In *re Sterne & Levi* (D. C., Tex.), 26 Am. B. R. 259.

It may be assumed that General Order No. 6 is subject to the provisions of section 32 of the bankruptcy law, and that the case may be transferred and consolidated for the convenience of the parties, if brought within the provisions of section 32, in spite of the direction in the general order that the court first adjudicating shall retain jurisdiction until the proceedings are closed. In *re Isaacson* (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 779. This order leaves no room for doubt, but that the court taking and retaining jurisdiction shall have exclusive jurisdiction to determine the question of a transfer under section 32, for it expressly provides that the court "so retaining jurisdiction (because the petition was first filed therein) shall, if satisfied that it is for the greatest convenience of parties in interest, that another of said courts shall proceed with the case, order them transferred to that court." In *re Sterne & Levi* (D. C., Tex.), 26 Am. B. R. 259, 262.

Under this general order, in the case of petitions against an individual, the first hearing shall be in the district of the domicile, while in the case of petitions filed against a partnership that first filed shall have priority of hearing, and the court acquiring the whole jurisdiction shall determine whether the greater convenience of parties requires that one of the other courts should proceed with the cases. *Matter of United Button Co.* (D. C., N. Y.), 12 Am. B. R. 761, 132 Fed. 378; *Matter of New Era Novelty Co.* (D. C., N. J.), 39 Am. B. R. 80, 241 Fed. 298.

General Orders VI and VII are designed to relate simply to the consideration of proceedings. In *re Strait* (Ref., N. Y.), 2 Am. B. R. 308.

"Greatest convenience" of "parties in interest" meaning of terms.—Neither the act nor the general order attempts to define the terms "greatest convenience" of "parties in interest." The interpretation placed upon them by the court in the *Matter of United Button Co.*, 13 Am. B. R. 454, 132 Fed. 378—that the term "parties in interest," covers every party having any interest in or connection with the case, including priority, secured and unsecured creditors, as well as the bankrupts themselves, and that the term "greatest convenience," depends upon all the circumstances—proximity of a majority of creditors and the place of business of the bankrupts to the court, proximity of witnesses whose attendance is desired in any hearing, and perhaps numerous other factors—would seem to be the correct view. In *re Sterne & Levi* (D. C., Tex.), 26 Am. B. R. 259, 263.

Corporations are within the provisions of this order.—In *re Elmira Steel Co.* (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456. The word "individual," as used in the clause providing that "in case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile," is equivalent to "person," and as such includes a corporation. *Matter of United Button Co.* (D. C., Del.), 13 Am. B. R. 454, 132 Fed. 378.

District of bankrupt's domicile definition.—The district in which an alleged bankrupt has resided during the greater portion of the six months next preceding the filing of a petition against him is the "district of his domicile" within the meaning of this general order, and the first hearing should be had therein unless, under the provisions of section 32 of the bankruptcy law, the proceeding is transferred and consolidated with a proceeding instituted in a district to which the alleged bankrupt had recently removed and established a residence. In *re Isaacson* (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 779.

An application for the transfer of a case under this order may be denied in the discretion of the court. In *re* Sears (D. C., N. Y.), 7 Am. B. R. 279, 112 Fed. 58. Thus, where a petition has been filed against a corporation in the district of its domicile, and thereafter a petition is filed against it in a district in another State, the court in which the first petition is filed, unless satisfied that it is for the greatest convenience of all parties in interest that the case should be transferred, is required, under the provisions of this order, to retain jurisdiction until the proceedings are closed. In *re* Tybo Mining & Reduction Co. (D. C., Me.), 13 Am. B. R. 68, 72, 132 Fed. 697.

**Power of amendment; limitation of.**—The provisions of this order by implication limit the power of amendment to the single case in which an earlier act of bankruptcy has been sought to be incorporated into the petition. In *re* Sears (C. C. A., 2d Cir.), 8 Am. B. R. 713, 117 Fed. 294; *Wilder v. Watts* (D. C., S. C.), 15 Am. B. R. 57, 68, 138 Fed. 426; *Gleason v. Smith, Perkins & Co.* (C. C. A., 3d Cir.), 16 Am. B. R. 602, 145 Fed. 895; *Matter of Riggs Restaurant Co.* (C. C. A., 2d Cir.), 11 Am. B. R. 508, 130 Fed. 601. A bankruptcy petition may be amended so as to allege grounds of bankruptcy subsequently occurring notwithstanding the provisions of this order. In *re* Hamrick (D. C., Ga.), 23 Am. B. R. 721, 175 Fed. 279.

**Other cases citing this order.**—*Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 332, 121 Fed. 779, affg. 9 Am. B. R. 441; *Matter of R. H. Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388; *Matter of Vanascope Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 778.

## VII. PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

[General Order XV, 1867, without change other than that "four months" appears in the new rule in place of "six months."]

**Cross-reference:** See those to General Order VI, immediately *ante*.

**Meaning and construction of order.**—This order contemplates independent proceedings and provides for their disposition. *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 362, 135 Fed. 742. It must be strictly construed, and can be put in motion only by acts of the creditors and debtors combined. The mere filing of two or more petitions, one of which avers a prior act of bankruptcy, cannot put in action the enforcement of this rule. There are two things absolutely necessary.

First. Two or more petitions must be filed by creditors against a common debtor alleging several acts of bankruptcy committed by said debtor; and

Second. The debtor shall appear and show cause against an adjudication in bankruptcy against him on the petitions.

Thus, where two petitions are filed, each alleging different acts of bankruptcy, and the debtor answers only the one which alleges the earlier act of bankruptcy, this rule has no application. Had there been three petitions, it would have been equally necessary for the debtor to have answered all three. In *re* G. W. Harris (D. C., Ala.), 19 Am. B. R. 204, 155 Fed. 216.

**Other cases citing this order.**—In *re* Strait (Ref., N. Y.), 2 Am. B. R. 308; In *re* Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456; *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 333, 121 Fed. 779, affg. 9 Am. B. R. 441.

## VIII. PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor

of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

[General Order XVIII, 1867, with no substantial change.]

Cross-references: To the law: §§ 5, 18.

To the General Orders: VI, VII.

To the Official Forms: Nos. 2, 30.

To the Supplementary Forms: No. 117.

**Meaning and application of order.**—This order provides the only method of procedure in partnership cases. Its provisions are plain, specific and easily understood. They mean that whenever a person who is a member of an existing partnership, or who was a member of a defunct partnership, desires to go into a court of bankruptcy, he must bring the firm and the other partners into court with him. *Matter of Freund* (Ref., Ia.), 1 Am. B. R. 25. It has no other purpose than to prescribe the practice for the class of cases where less than all the partners file a petition to have the partnership adjudged bankrupt. In *re Ceballos* (D. C., N. Y.), 20 Am. B. R. 459, 464, 161 Fed. 445. Although the bankruptcy law contains no provision expressly authorizing a partner to file a petition against his copartners, such power must be implied from this general order and § 8 of the act. In *re Caballos & Co.* (D. C., N. Y.), 20 Am. B. R. 459, 465, 161 Fed. 445.

It is manifest that this order has no application to a petition by an individual who is a member of a firm to have himself and not the firm adjudicated a bankrupt. *N. Y. Deaf and Dumb Institute v. Crockett*, 17 Am. B. R. 233, 240, 117 App. Div. 269, 102 N. Y. Supp. 412. Since there should only be partnership bankruptcies in cases which show assets, this order refers only to such cases. In *re Altman* (Ref., N. Y.), 1 Am. B. R. 689.

The Supreme Court in this general order seems to recognize the same distinction as it does in the prescribed forms, between an adjudication of a bankrupt and of an individual partner. In *re Barden* (D. C., N. Car.), 4 Am. B. R. 31, 101 Fed. 553. See, generally, In *re Carleton* (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246.

**Notice of hearing how given.**—Under the provisions of this order due notice must be given of the time fixed for a hearing upon a petition to declare a partnership a bankrupt. If the non-joining member or members of the firm can be found, in the district or out of it, personal service must be made; but if personal service cannot be had, then, upon filing before the judge (or the referee, if the case has been referred by the clerk) an affidavit showing that personal service cannot be made, an order of publication will be granted. In *re Murray* (D. C., Ia.), 3 Am. B. R. 601, 96 Fed. 600; In *re Murray and Winters* (D. C., Ia.), 3 Am. B. R. 90.

Where one of the members of a copartnership petitions for an adjudication of bankruptcy against the firm as well as the members of it, this must be clearly shown in the petition and notice of the hearing of the petition must be given to the non-joining partners before the firm can be adjudged bankrupt. In *re Russell* (D. C., Ia.), 3 Am. B. R. 91, 97 Fed. 32.

**Objecting partners; filing schedules.**—The objecting partners, though they have committed no act of bankruptcy and cannot be adjudicated individual bankrupts, must file a schedule of their individual debts and inventory their property, upon the adjudication of the partnership and the petitioning partner. In *re Ceballos & Co.* (D. C., N. Y.), 20 Am. B. R. 467, 161 Fed. 451; *Matter of Lenoir-Cross Co.* (D. C., Tenn.), 35 Am. B. R. 774, 226 Fed. 227. This general order provides for the filing of schedules on the part of a solvent partner. *Matter of Solomon & Carvel* (D. C., N. Y.), 20 Am. B. R. 488, 163 Fed. 140. The non-assenting partner must file schedules of his individual estate and debts, as any surplus remaining after the discharge of his individual liabilities is an asset of the firm applicable to the payment of the liabilities of the partnership. In *re Junk & Balthazard* (D. C., Wis.), 22 Am. B. R. 298, 169 Fed. 481; *Armstrong v. Fisher* (C. C. A., 8th Cir.), 34 Am. B. R. 701, 224 Fed. 97.

The fact that, without complying with general order 23, a referee made an order on an unadjudicated member of a partnership, after it, and the other member had been adjudicated bankrupt, to file a schedule of his debts and an inventory of his property on or before nineteen days after the adjudication, was not fatal to the order of the court confirming such an order, because the unadjudicated member was required by the bankruptcy law and

general order 8 to make these finding within ten days after that adjudication. *Armstrong v. Fisher* (C. C. A., 8th Cir.), 34 Am. B. R. 701, 224 Fed. 97.

**Defense of non-joining partners.**—All that a non-joining partner may do under this general order is to resist adjudication against the partnership as a separate entity. In doing so he can defend only against the allegations contained in the petition. If he considers the petition demurrable, he may demur. If not, he may answer. In *re Ceballos & Co.* (D. C., N. Y.), 20 Am. B. R. 459, 465, 161 Fed. 455. The non-assenting partner cannot set up the want of an act of bankruptcy as a defense to the petition, but he may set up the defense of solvency, and upon that issue he is entitled to a jury trial. In *re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137.

Under the provisions of this general order, it is open to any one of the partners to contest an adjudication against the firm, and to defeat it by showing that the firm is not insolvent, or, if insolvent, that it has not committed an act of bankruptcy. In *re Laughlin* (D. C., Ia.), 8 Am. B. R. 1, 96 Fed. 599.

**Assets of individual partners.**—The individual assets of each partner are subject to the payment of partnership liabilities, and an order may be made that the trustee of the partnership take possession of such assets and administer them, unless, upon proper procedure, such partner is declared a bankrupt, and his creditors elect a trustee. General Order 8 provides for this. *Matter of Hansley & Adams* (D. C., Cal.), 36 Am. B. R. 1, 228 Fed. 564.

**Service of petition on special partner.**—In a voluntary proceeding in bankruptcy by general partners, a copy of the petition should be served with the usual subpoena upon a special partner, but a failure to serve the petition may be supplied after service of the subpoena. *Matter of Carrion & Co.* (D. C., Porto Rico), 41 Am. B. R. 304, 10 P. R. Fed. 332.

### IX. SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

[This general order is new.]

**Cross-references:** To the law: As to bankrupt's duty to file schedules, § 7(8); As to referee's, § 39-a(6).

To the General Orders: V.

To the Official Forms: No. 1, with the schedules.

To the Supplementary Forms: No. 84; and by analogy, No. 117.

**Filing schedules by bankrupt.**—After an adjudication in bankruptcy all the creditors have a vested interest in the proceeding, and, pursuant to this order, the bankrupt can be compelled to file a schedule of his creditors, or if he is absent or cannot be found, it is the duty of the petitioning creditors to do so. The petition cannot be dismissed except with the consent of all the creditors. *Matter of Levi & Klauber* (C. C. A., 2d Cir.), 15 Am. B. R. 294, 142 Fed. 962.

### X. INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purposes by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

[This general order is new.]

**Cross-references:** To the law: As to publishing and mailing notices, § 58; As to examinations of the bankrupt or others, §§ 7(9), 21-a; As to marshal's expenses, § 52; As to clerk's expenses, §§ 24, 25, 52, 71; In general, §§ 62, 64-b(3).

To the General Orders: IX, XII, XXII, XXVI, XXXV.

To the Supplementary Forms: By analogy, No. 169.

**Purpose and application of order.**—The provisions of this order are intended to cover money which the bankrupt or some third party may be called upon to furnish after the initiation of the proceedings in order to meet expenses incurred by the officer for the purposes specially recited in the order, which purposes do not include the money deposited with the clerk to meet the fees (not expenses) of the clerk, referee and trustee. The purpose of the order is to protect the officers from personal loss in the performance of their duties under the

bankrupt act, but it is not the intent of the order that the bankrupt shall be repaid the money which presumably he took out of his estate to pay the fees of officers before he filed his petition in bankruptcy. In *re Matthews* (D. C., Iowa), 3 Am. B. R. 265, 97 Fed. 772.

Under this order a bankrupt is entitled to be reimbursed for the amount advanced by him for the issuance, publication and mailing of necessary notices to creditors of an application for his discharge. In *re Hatcher* (D. C., Tex.), 16 Am. B. R. 722, 145 Fed. 658.

The referee is not authorized to require the bankrupt to pay the statutory fee before he is given his discharge where such bankrupt has filed an affidavit of inability. In *re Plimpton* (D. C., Va.), 4 Am. B. R. 614, 103 Fed. 775. See, generally, *Sellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 552, 94 Fed. 801.

In reimbursing the bankrupt or a creditor for money advanced under this general order to defray the expenses of the referee, marshal or clerk, such reimbursement has the same priority that the expenses themselves would have had; the one making the advancement being subrogated to the rights of the officer whose expenses are advanced. *Matter of Burke* (D. C., Ohio), 6 Am. B. R. 502, 155 Fed. 703.

Other cases citing this order.—In *re Smith* (D. C., N. Car.), 5 Am. B. R. 559, 564, 108 Fed. 39; *Matter of McCubbin Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277, 42 Wash. Law Rep. 774; *Matter of Longhney* (D. C., Wash.), 34 Am. B. R. 206, 218 Fed. 980; *Matter of Wester* (C. C. A., 3d Cir.), 40 Am. B. R. 89, 242 Fed. 465.

## XI. AMENDMENTS.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

[The last sentence is new. The rest of the general order is substantially the same as a part of General Order XIV, 1867.]

Cross-references: To the law: §§ 2(6) (15), 39-a(2).

To the Supplementary Forms: Nos. 81, 82, 83.

To the Equity Rules: XXVIII to XXX.

As to amendments to petitions, see discussion under § 18; as to amendments of schedules, see under § 7; and as to intervention by other creditors, see under § 59.

**Purpose and application of order.**—The purpose of this order is to authorize the court to allow corrections to be made of errors, insufficiencies and uncertainty in the petition or schedules, but not practically to repeal the legislative declarations that petitions must be filed in duplicate within the four months specified. In *re Stevenson* (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 110. This power of amendment is substantial and conferred for effecting the broad purposes of the act, and is not confined to niceties of diction or other immaterial or merely formal matters. To hold that it does not embrace the insertion of material and essential averments in any stage of the proceedings before judgment would reduce it to a shadow. In *re Mackey* (D. C., Del.), 6 Am. B. R. 577, 586, 110 Fed. 355. It deals with amendments to a petition and schedules, but was not intended to abrogate or restrict the general power of amendment in other respects vested in the court. In *re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 49. See also *Gleason v. Smith, Perkins & Co.* (C. C. A., 3d Cir.), 16 Am. B. R. 602, 145 Fed. 895.

An application for leave to amend matters must set forth the allegations required by this order, and if such allegations are not set forth time may be granted to insert the same. In *re Portner* (D. C., Pa.), 18 Am. B. R. 89, 149 Fed. 799. See also *In re Pure Milk Co.*, of Mobile (D. C., Ala.), 18 Am. B. R. 735, 154 Fed. 682. No time is specified within which amendments may be allowed under this order. *Columbia Bank v. Birkett* (Ct. App., N. Y.), 9 Am. B. R. 481, 486, affg. 65 App. Div. 615. The application must state the cause of the error in the paper originally filed. *Matter of Brincat* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

**Amendment of exemption claim.**—A bankrupt, making an imperfect claim to exemptions in his schedules, may be allowed to amend, but such amendment must relate to conditions existing at the time the imperfect claim was formulated. *Matter of Crum* (D. C., Ohio), 34 Am. B. R. 586, 221 Fed. 729.

**Verification of amendment.**—Failure to verify an amendment to an involuntary petition, as required by this general order, may be subsequently corrected. *International Silver Co. v. N. Y. Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

Other cases citing this order.—In *re Strait* (Ref., N. Y.), 2 Am. B. R. 308; In *re Meyers* (D. C., N. Y.), 3 Am. B. R. 260, 97 Fed. 757; In *re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982; *White v. Bradley Timber Co.* (D. C., Ala.), 8 Am. B. R. 671, 116 Fed. 768; In *re Duffy* (D. C., Pa.), 9 Am. B. R. 356, 118 Fed. 926; *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 362, 366, 135 Fed. 742; *Burke v. Guarantee Title & Trust Co.* (C. C. A., 3d Cir.),

14 Am. B. R. 31, 134 Fed. 562; *In re Fisher* (D. C., Va.), 15 Am. B. R. 652, 654, 142 Fed. 205; *In re Goodman* (C. C. A., 5th Cir.), 23 Am. B. R. 504, 174 Fed. 644; *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

### XII. DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States, or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

[Paragraph 1, except the last sentence, is the second paragraph of General Order IV, 1867, with slight changes. Paragraph 2 is derived from General Order V, 1867. Paragraph 3 is new; its validity as a limitation on the power of the referee to grant stays is doubted (see p. 25), especially where the district judge has conferred such power on the referee by § 38-a(4).]

**Cross-references:** To the law: As to general jurisdiction and powers of referee, §§ 38, 39; As to orders of reference, §§ 18-f-g, 22; As to time and place when duties of referee will be performed, § 55; As to limitations on powers of referee, §§ 12-d, 14-b, 38-a(4), 39-b; As to allowance of claims, § 57; As to bankrupt's subjection to orders of court, § 7(2) As to orders of protection, § 9-a.

To the General Orders: IX, XI, XVI, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXIX, XXX, XXXIII, XXXV.

To the Official Forms: Nos. 14, 15.

Duties generally of referees after reference are discussed under sections 2, 9, 18, 38, 39, 55 and 57. For duties and compensation of special masters, see sections 12, 14, 18 and 72.

**Jurisdiction and authority of referee; in general.**—The authority of the referee dates from the time the order of reference is placed in his hands, not from the time of its signing or filing. The phrase "forthwith be sent by mail to the referee" includes delivery as well as mailing, so that, whether the copy of order of reference be sent by mail or delivered personally, the jurisdiction of the referee attaches only from the time of its receipt by him. *In re Florcken* (D. C., Cal.), 5 Am. B. R. 802, 107 Fed. 241. The last sentence of subdivision 1 is new and was evidently intended by the justices of the Supreme Court to apply to the new and enlarged jurisdiction of the referee under the present act. *In re Scott* (Ref., Mass.), 7 Am. B. R. 35. This order, together with § 38(4), confine a referee strictly within the limits of the order of reference, all original and ultimate power being vested in the judge. *In re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282. Section 9-a and Gen. Ord. Nos. 12 and 30 are *in pari materia* and should be construed together. *United States ex rel. Kelly v. Peters*, 22 Am. B. R. 177, 166 Fed. 613.

The general authority of a referee in bankruptcy extends to the consideration of an intervening petitioner's claim to property or its proceeds in the hands of the trustee, alleged to be the property of the petitioner, and not of the bankrupt estate. *In re Drayton* (D. C., Wis.), 13 Am. B. R. 602, 135 Fed. 888.

**Suits for recovery of property.**—The word "proceedings" in General Order XII (I) is used in its established meaning as applied to bankruptcy matters, and does not include suits brought by the trustee against third persons in respect to property not in the custody of the bankruptcy court. *Matter of Weldborn* (D. C., Mass.), 39 Am. B. R. 338, 243 Fed. 756. Compare *Matter of Salm Baking Co.* (D. C., Tex.), 43 Am. B. R. 511.

**Reference to special master.**—Upon petition for reclamation from bankrupt's trustee of property, the title to which is claimed by petitioners, the practice has been to refer the matter to a special master and not to the referee in bankruptcy; and although the referee may have jurisdiction to determine such questions and thus save the expense of a reference, a change should be made by the Supreme Court, in order that the practice may be uniform throughout the United States. *In re Tracy* (C. C. A., 2d Cir.), 24 Am. B. R. 539, 179 Fed. 366. The referee has no jurisdiction

to hear applications for discharge except upon reference to him, as special master. In *re Taylor* (D. C., Ala.), 26 Am. B. R. 143.

**Reference to referee as special master.**—This General Order does not limit the District Court in appointing special masters to the cases named therein, but it may, in the exercise of sound discretion, refer issues to special masters and name a referee as such special master. *United States v. Ward* (C. C. A., 8th Cir.), 43 Am. B. R. 711, 257 Fed. 352.

**The proceedings required by the act to be had before the judge** are applications for discharge, for approval of compositions, for punishment for contempt, contested involuntary petitions in bankruptcy, and all petitions for adjudication when the judge is in the district. The proceedings other than those required by the general orders to be had before the judge are applications for injunctions to stay proceedings of a court or officer of the United States. *Matter of the Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 14, 134 Fed. 51; *United States v. Liberman* (D. C., N. Y.), 23 Am. B. R. 734, 176 Fed. 161. In the following words from this general order, "and thereafter all the proceedings. . . shall be had before the referee," the word "shall" is directory, and the jurisdiction of the judge over such of the said proceedings as may be brought before him in the first instance is not thereby ousted. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 815.

**Protection of bankrupt from arrest.**—Section 9-a, subd. 2, providing that the bankrupt shall not be exempt from arrest where a debt or claim would not be released by his discharge, except when he is "in attendance upon a Court of Bankruptcy or engaged in the performance of a duty imposed by the act," as construed by this general order, suspends the exercise of the right of arrest pending the bankrupt's application for discharge. In *re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 594, 99 Fed. 73.

**Reference to special master.**—The purpose of a reference under this order is to give to the court every aid which the referee can afford, to relieve the congested condition of the business which may be before the judge, and, when the report is filed, the court's attention must be directed to such parts thereof to which objection can be made, by exceptions filed within twenty days as provided by rule 66 of the Equity Rules. *Matter of Pierce, Jr.* (D. C., Wash.), 32 Am. B. R. 96, 210 Fed. 389.

**Discharge; jurisdiction of referee.**—The referee has no jurisdiction to determine the question as to discharge, but the court may refer the case to him generally for a report. He aids the court like a master in chancery. He cannot finally determine the question of discharge or non-discharge, but he may be ordered to report the facts and his recommendation or conclusion as to the matter. *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736; *Matter of Amer* (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576; *Matter of C. H. Kendrick & Co.* (D. C., Vt.), 35 Am. B. R. 630, 226 Fed. 980; In *re Rauchenplat* (D. C., Porto Rico), 9 Am. B. R. 763. But where an application for discharge must be heard and decided by the judge, such application or any specified issue arising thereon may be sent to the referee to ascertain and report the facts, and no one is prejudiced thereby. In *re McDuff* (C. C. A., 5th Cir.), 4 Am. B. R. 110, 101 Fed. 241.

In the western district of Kentucky, where specifications of objections to a bankrupt's discharge have been filed, the practice is to refer the application for discharge to a referee to ascertain and report the facts under the third clause of this general order. *Matter of Daugherty* (D. C., Ky.) 26 Am. B. R. 550.

**Confirmation of a composition.**—It seems that the judge may require the referee to report the facts concerning an application for confirmation of a composition. *Adler v. Jones* (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967.

**Claims of intervening petitioners.**—No provision of the bankruptcy act or of the general orders requires the claim of an intervening petitioner, to property in the hands of the trustee, to be heard before the judge. In *re Drayton* (D. C., Wis.), 13 Am. B. R. 602, 135 Fed. 883.

**Injunctions.**—The reason for this provision is obvious; "the supreme court had in mind the dignity of other courts, Federal and State, and of other officers, and provided that they might only be interfered with by a tribunal of equal rank, and not by a subordinate official, unless for definitely described reasons action by the latter should be unavoidable." In *re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 143 Fed. 598.

Archibald, District Judge, in *re Benjamin* (D. C., Pa.), 15 Am. B. R. 351, 140 Fed. 320, says: "The right of a referee to award an injunction cannot be regarded as finally settled. For while it is sustained by some of the leading works on bankruptcy . . . it is denied by rule in certain jurisdictions . . . and limited in others. . . and is materially restricted, if not taken away, by the general orders of the supreme court. General Orders XII."

Judge Lowell discussed the subject to some extent in *Re Steuer* (D. C., Mass.), 5 Am. B. R. 214, but declined to decide the point. He says there, however, that "it is strongly implied that the referee has some jurisdiction to issue injunctions to any party not an officer of the United States or of a State, unless the injunction stays the proceedings of the court." This opinion is approved in *re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 255, 143 Fed. 598.

Under this general order, it seems, that a petition to stay pending suits should be filed in the bankruptcy court. *Continental Nat. Bank v. Katz* (Super. Ct., Ill.), 1 Am. B. R. 19.

If, by consent of the parties in a case, the referee acquires jurisdiction to hear a motion for injunction, he may hear it, and advise the judge of his decision by filing it with the clerk of the court. But only the judge can issue the order. In *re Siebert* (D. C., N. J.), 13 Am. B. R. 348, 133 Fed. 781.



**When power of referee to grant injunction immaterial.**—Where the District Court upon its own motion broadens and issues anew an injunction restraining the prosecution of a suit in the State court, it is immaterial whether the referee had power to order a stay in the first instance. *In re Brown & Company* (C. C. A., 8th Cir.), 28 Am. B. R. 336.

**Compensation of referee.**—Where a contested application for a discharge is refused as authorized by General Order 12, the court since the amendment to § 72 is without power to allow special compensation to the referee for his services in the matter. *In re Wilcox* (D. C., Mich.), 19 Am. B. R. 241, 156 Fed. 685. Where a case is referred to a referee to ascertain and report the facts upon an application for discharge, the referee is not entitled to any other compensation than that prescribed by the act itself. *In re Troth* (D. C., Ohio), 4 Am. B. R. 780, 104 Fed. 291. A referee is not entitled to special compensation for services on the reference of a petition to vacate an order of adjudication where the reference was made to him as "referee in bankruptcy." *Matter of Langford, Felts & Myers* (D. C., Cal.), 35 Am. B. R. 519, 225 Fed. 311.

**Other cases citing this order.**—*In re Huddleston* (Ref., Ala.), 1 Am. B. R. 572; *In re Parker* (Ref., Kan.), 1 Am. B. R. 615; *In re Logan* (D. C., Ky.), 4 Am. B. R. 525, 102 Fed. 876; *In re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 160, 106 Fed. 57; *In re Lesser Bros.* (C. C. A., 2d Cir.), 5 Am. B. R. 320; *Mueller v. Nugent*, 7 Am. B. R. 224, 232, 184 U. S. 1, 46 L. Ed. 405; *In re Gutman & Wenk* (D. C., N. Y.), 8 Am. B. R. 252, 255, 114 Fed. 1009; *Metcalf v. Barker*, 9 Am. B. R. 36, 46, 187 U. S. 165; *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 611, 124 Fed. 182; *Kentucky Nat. Bank of Louisville v. Carley* (C. C. A., 3d Cir.), 12 Am. B. R. 119, 127 Fed. 686; *Moulton v. Coburn* (C. S. A., 1st Cir.), 12 Am. B. R. 533, 131 Fed. 201, affg. 11 Am. B. R. 212; *In re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 138 Fed. 837; *Matter of Matthews Consolidated Slate Co.* (Ref. Mass.), 15 Am. B. R. 779; *Matter of Adler* (C. C. A., 2d Cir.), 16 Am. B. R. 414, 144 Fed. 659; *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 439, 144 Fed. 245; *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117; *Matter of Cohn* (Ref., Cal.), 18 Am. B. R. 786, 792; *Matter of Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 33, 36, 158 Fed. 679; *Knapp v. Spencer Co. v. Drew* (C. C. A., 8th Cir.), 20 Am. B. R. 355, 160 Fed. 413; *Matter of Berkowitz* (D. C., N. J.), 22 Am. B. R. 227, 173 Fed. 1013; *Norton v. Bielby* (N. Y., Oneida County Court), 33 Am. B. R. 295, 86 Misc. 644; *Matter of Komar* (D. C., N. Y.), 37 Am. B. R. 683, 234 Fed. 378.

### XIII. APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

[As a rule of bankruptcy, this general order is new; but the former bankruptcy law itself contained similar provisions as to the approval of the choice of a trustee (Act of 1867, § 13, R. S., § 5034). Under that act a trustee could be removed not only by order of the court, but in some cases by a vote of the creditors with the approval of the court (Act of 1867, § 18, R. S., § 5039).]

**Cross-references:** To the law: As to appointment of trustees, §§ 2(17), 44, 45, 56; As to removal of trustees, § 46.

To the General Orders: XIV, XV, XVI, XVII, XXV.

To the Official Forms: Nos. 22, 23, 24, 27, 52, 53, 54, 55.

To the Supplementary Forms: No. 160.

**Meaning and application of order.**—This provision means that a supervisory power is vested in the court to meet contingencies which could not be definitely provided for in the act, and which must appeal to the good judgment and conscience of the court, and whereby the court would be armed with the power to prevent the selection of a person, who, in its judgment, and notwithstanding the expressed desire of the majority in number and amount of the creditors, or even of all the creditors, would not be a proper selection, and whose appointment might result in a defeat of the proper, just and equitable administration of the bankrupt law in that particular case. But the emergency should not be a trivial one; it should be one of grave character and due weight, and unless such an emergency appears, it is the duty of the referee to approve the selection, always subject, of course to a review of such action by the district judge. *In re Henachel* (Ref., N. Y.), 6 Am. B. R. 25.

The approval by the referee and district judge of the appointment of a trustee by the creditors is a matter of discretion, depending upon the circumstances of each case. The choice of the creditors should not be overruled by the referee or district judge except for substantial reasons, and the confirmation of such appointment should not be disturbed by the Circuit Court of Appeals unless an abuse of discretion appears. *Matter of Merrit Construction Co.* (C. C. A., 2d Cir.), 33 B. R. 616, 219 Fed. 555; *Wilson v. Continental Building & Loan Assoc.* (C. C. A., 9th Cir.), 37 Am. B. R. 444, 232 Fed. 824.

"This general order confers no power on a referee to announce that he will not appoint the trustee already appointed by the creditors. It does authorize him to disapprove such

appointment by order, and should this be done at the time the appointment is made by the creditors it is probable that the creditors may proceed at once to appoint some other person . . . ; but should they do this the matter should be reported to the judge, who may remove the trustee appointed by the creditors, and order another appointment by the creditors. In no event can the referee ignore the appointment made by the creditors, and proceed summarily to appoint the trustee without holding another election." In *re Hare* (D. C., N. Y.), 9 Am. B. R. 520, 119 Fed. 246.

**Approval or disapproval of elections.**—It is evident that the Supreme Court intended by this order to establish a rule concerning the approval or disapproval of elections by creditors similar to that which existed under the act of 1867. The decisions under the present law on this point show that such has been the understanding of our Federal courts. In *re Eastlack* (D. C., N. J.), 14 Am. B. R. 529, 145 Fed. 68.

Whenever a referee disapproves of a choice of trustee made by creditors, it is a good rule to permit them another opportunity to make a selection of one who is free from any "entangling alliances" that might interfere with the proper discharge of the duties devolving upon him. In *re Van De Mark* (D. C., N. Y.), 23 Am. B. R. 760, 175 Fed. 287.

The following cases establish the rule that the election of a trustee by the creditors is not to be disapproved, unless there is good reason for believing that the election has been directed, managed, or controlled by the bankrupt, or his attorney, or by some influence opposed to the creditor's interest. In *Falter v. Reinhard* (D. C., Ohio), 4 Am. B. R. 792, 104 Fed. 292, the votes of certain creditors were challenged on the ground that the letters of attorney to the person representing them had been procured through the influence and efforts of the bankrupts for the purpose of controlling the election of the trustee. After hearing the evidence in the matter, the referee sustained the challenge. The opinion in that case shows that a plan for the election of the bankrupts' candidate was conceived and carried out in the bankrupts' place of business, and that the bankrupts themselves had, by preparing the proofs of claims for creditors without expense to them, and by the solicitation of creditors at their place of business to give their proxies to one of the bankrupts' clerks, attempted to direct and control the proceedings looking to the election of a trustee. The referee disapproved this action, and, on petition for review, the court affirmed the order of the referee. This decision was affirmed by the circuit court of appeals. In *re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57.

Where the person appointed trustee of a bankrupt estate receives his appointment, in part, at least, as a result of the active efforts in the solicitation and voting of claims by a creditor which is his corporate employer and in which he is a stockholder, and such creditor holds security for a part of its debt and is charged with having received preferences, such person's appointment will be disapproved. *Matter of Anson Mercantile Co.* (D. C., Tex.), 25 Am. B. R. 429, 185 Fed. 993.

In the case of *In re Rakersdres* (D. C., N. Y.), 5 Am. B. R. 811, 108 Fed. 206, an attorney representing the bankrupt and her regularly appointed attorney, who also held letters of attorney from three creditors, nominated a certain person for the trusteeship of the bankrupt. Objection being made in behalf of another creditor to the nomination, the referee sustained the objection, because the business association of the proposed trustee with the regularly appointed attorney of the bankrupt raised a presumption that the person nominated for trustee was nominated in fact by the bankrupt or her attorney, and was therefore not a suitable person to act in the interest of creditors. The district court approved the referee's action.

Bankrupt had an estate of only \$3,500, to be divided, after paying expenses among creditors having claims aggregating \$9,000, over \$7,000 of which claims were said to be owing to near relatives of the bankrupt or members of the family. One of the bankrupt's attorneys presented the claims of and had powers of attorney from about 80 per cent. of these claimants at the first meeting of creditors, thus controlling the appointment of the trustee and he insisted, over the objection of the other creditors, upon the selection of an attorney as trustee, who had an office in the building occupied by the bankrupt's attorneys. It was held that under this general order the appointment of a trustee by the majority of the creditors being subject to the approval or disapproval of the referee, the referee was justified in disapproving, as contrary to public policy, a selection which would allow the bankrupt and his relatives to administer the estate. In *re Sitting* (D. C., N. Y.), 25 Am. B. R. 682, 192 Fed. 917.

In the case of *In re Henschel* (Ref., N. Y.), 6 Am. B. R. 25, upon the election of a trustee, it was objected that the attorney by whose vote the trustees were elected held proxies obtained from creditors who were acting in combination with the bankrupt, and that the trustee was in fact the choice of the bankrupt and had announced in advance that if elected he would not prosecute certain actions which some of the creditors thought should be prosecuted. On a trial of the merits of the objection, the attorney refused to answer certain relevant questions, and this fact, together with the fact that a large number of the claims represented by the attorney were proven, and that the letters of attorney to him were executed before adjudication in bankruptcy, led to the disapproval of the election of the trustee.

In the case *In re Dayville Woolen Co.* (D. C., Conn.), 8 Am. B. R. 85, 114 Fed. 674, the attorney of certain creditors was asked whether any of the claims intended to be voted by him had been assigned to any person or corporation in the interest of the bankrupt. He refused to answer the question. Notwithstanding this refusal, and the fact that he had acted as counsel for the bankrupt during the proceedings in insolvency, the referee permitted him to vote and

approved the election. On these facts the court set aside the order of approval made by the referee.

In the case of *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 620, there were objections that the trustee elected by the creditors had previously advised the assignment for the benefit of creditors under the State law, which was the act of bankruptcy complained of, he being also the assignee, and that he was intimately associated with the attorney of certain stockholders of the bankrupt corporation who claimed also to be creditors. But the court held that these mere facts did not make the election an improper one, but called only for a close scrutiny of it. In passing on the point, the court said:

"It is to be remembered in all such cases that the choice of a trustee is lodged by the law with the creditors constituting a majority in number and amount, and that their selection is not to be interfered with, unless it clearly imperils the fair and efficient administration of the estate."

In the case of *In re Machin* (D. C., Pa.), 11 Am. B. R. 409, 128 Fed. 316, it was held that votes of creditors for a trustee could not be rejected, on the mere ground that the candidate voted for had formerly been the attorney of the bankrupts.

In the case of *In re Gordon Supply & Manufacturing Co.* (D. C., Pa.), 12 Am. B. R. 94, 129 Fed. 622, the trustee elected was only a stockholder in the bankrupt corporation, but had been associated closely as attorney and legal adviser with those who had theretofore been in control of the corporation. Inasmuch as their management appeared not only to be the subject of criticism, but might call for action on the part of the trustee to hold them personally responsible, it was held that the election could not be approved.

In the case of *In re Cooper* (D. C. Pa.), 14 Am. B. R. 320, 135 Fed. 196, it was held that the attorney who had been employed by the bankrupt to file his petition and whose obligation as attorney ceased at that point, and who had received no fee therefor, was not disqualified from voting on claims afterward received from creditors without his own solicitation or the procurement of the bankrupt.

**Review by district judge.**—An order of a referee approving the creditors' appointment of a trustee is subject to review by the district judge. In *re Hanson* (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 717. The proper way to take a review of the proceedings in the election of a trustee is by a petition for review of the order of the referee approving the appointment of the trustee by the creditors. *Matter of Arti-Stain Company* (D. C., Mass.), 32 Am. B. R. 643, 216 Fed. 942.

**Other cases citing this order.**—In *re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57; *Matter of Cohen* (D. C., Mass.), 11 Am. B. R. 439, 442, 131 Fed. 391; In *re Kenny & Co.* (D. C., Ind.), 14 Am. B. R. 611, 617, 136 Fed. 451; In *re Allert* (D. C., N. Y.), 23 Am. B. R. 101, 105, 173 Fed. 691; *Vulcan Metal Co. v. North Platte Valley Irrigation Co.* (C. C. A., 8th Cir.), 33 Am. B. R. 686, 220 Fed. 106; *Matter of Holden* (D. C., N. Y.), 44 Am. B. R. 161, 258 Fed. 720.

#### XIV. NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee act in classes of cases.

[Part of General Order IX, as amended in 1874, without substantial change.]

#### XV. TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

[This general order is new. Its validity has been doubted. See cross-references below.]

**Cross-references:** To the law: §§ 2(17), 44, 45, 56. See also §§ 6 and 47-a(11), and read § 2 (11).

To the General Orders: XIII, XIV

To the Official Forms: No 27

To the Supplementary Forms: No 77

**After the lapse of one year.**—The court may appoint a trustee under this order, upon the petition of the assignee of a creditor alleging that the bankrupt died leaving property which he had fraudulently disposed of to defraud creditors. *Clark v. Pidcock* (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745.

**Exemptions may be set apart by the court** where no trustee has been appointed, as provided in this order. *Smalley v. Langenour*, 196 U. S. 93, 13 Am. B. R. 692, 695.

**Other cases citing this order.**—In *re Soper and Slada* (Ref., N. Y.), 1 Am. B. R. 193; In *re Rung Bros.* (Ref., N. Y.), 2 Am. B. R. 620, 622.

**XVI. NOTICE TO TRUSTEE OF HIS APPOINTMENT.**

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

[General Order IX, 1867, with some slight additions as to the contents of the notice and with other minor changes.]

**Cross-references:** To the law: §§ 44, 50-a-j-k.

To the General Orders: XIII

To the Official Forms: Nos. 24, 25, 26.

To the Supplementary Forms: Nos. 167, 168.

**XVII. DUTIES OF TRUSTEE.**

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

[General Order XIX, 1867, with several slight changes.]

**Cross-references:** To the law: Duty of trustees, in general, §§ 47, 49; As to filing bonds, § 50; As to exemptions, §§ 6, 7 (8), 47-a (11), as perhaps limited by § 2 (11); As to appraisals and sales, § 70-b.

To the General Orders: XXIII, XXI(6), XXV, XXVIII, XXIX, XXXIII, XXXV.

To the Official Forms: Nos. 40, 41, 47, 48, 49, 50, 51, and generally to the forms for sales, Nos. 42 to 46, inclusive.

To the Supplementary Forms: Nos. 77, 78, 79, 80 on exemptions, and Nos. 161, 162, 163, 164, 165 as to reports and distribution; also generally.

**Meaning of order.**—Remington, referee, in *Re Ellis* (Ref., Ohio), 10 Am. B. R. 754, 756, distinguishing *In re White* (D. C., Vt.), 4 Am. B. R. 613, 103 Fed. 774, says: "What the supreme court's General Order really means is, as it seems to me, simply this: the trustee must, within twenty days after his appointment, set apart the exemptions claimed by the bankrupt, provided and so far as they are correct; the bankrupt may except as of course to his determination; and the creditors shall not be bound in this particular by their trustee's acts, although they usually are bound by their trustee's acts, but may themselves also take exceptions. . . . Were it not for the rule creditors would perhaps have no right to object at all, except for fraud or collusion; but, that they did have the right, would have an indefinite time within which to except to the trustee's report, and thus tie up the question of exception indefinitely. By this rule the trustee is free from all exceptions on the part of any fault-finding creditors after twenty days. Of course there is no need of any such limitation in regard to the bankrupt's filing exceptions, for he is right on the spot when the exemptions are thus set off and will act without delay anyway if he wants to get more; and his delay, for that matter, would tie up nobody. . . . Simply because the supreme court's General Order says

that creditors have twenty days' time within which they may file exceptions, does not mean that only creditors may file exceptions, but means simply what it says, namely that when creditors wish to file exceptions to the trustee's report they must file them within twenty days."

**Exemptions; setting apart.**—It is provided by this order that the trustees shall set apart the exemptions and make report of his action, and that thereafter the creditor's will file exceptions, if they wish, to such report. In *re Allen & Co.* (D. C., Va.), 13 Am. B. R. 518, 521, 134 Fed. 620. The language of this order "and Form 47, as to the trustee's report of exempted property, indicates quite clearly that, without reference to any prior allowance of exemption by State officials, it is the duty of the trustee to set apart the bankrupt's exemption." In *re Camp* (D. C., Ga.), 1 Am. B. R. 166, 91 Fed. 745. See also In *re Rung Bros.* (Ref., N. Y.), 2 Am. B. R. 620.

The trustee is to set apart bankrupt's exemptions and report the items and estimated value thereof, to the court as soon as practicable after his appointment. Sec. 47-a, cl. 11. And General Order XVII requires such report to be made within twenty days after receiving the notice of his appointment. In *re Wisniefsky* (D. C., N. J.), 24 Am. B. R. 798, 181 Fed. 896.

It is the duty of the trustee under this order within twenty days after his appointment to set off to the bankrupt the property selected or such part of it as in his judgment the bankrupt is entitled to, and file an itemized report thereof with the referee. For the purpose of determining the correct amount of such exemptions and setting them apart the trustee is entitled to the possession of the property although he does not take title thereto. *Matter of McClintock* (Ref., Ohio), 13 Am. B. R. 606.

In order that the trustee may be able to report the article set off to the bankrupt by him, the bankrupt must comply with § 7, clause 8, of the bankruptcy act, requiring him to file a claim for his exemption within ten days. In *re Wunder* (D. C., Pa.), 13 Am. B. R. 701, 133 Fed. 821.

The duties of a trustee to set apart the bankrupt's exemptions and report the items and value thereof to the court may not be neglected, or their discharge postponed, until an issue of fraud in regard to the disposition of property is tried. *Matter of Harrell* (D. C., N. Car.), 34 Am. B. R. 809, 222 Fed. 160.

**Selection of exemptions by bankrupt's assignee.**—Section 2(11) of the bankruptcy act which authorizes courts of bankruptcy to "determine all claims of bankrupts to their exemptions" and this general order, which requires a trustee to report to the court "the articles set off to the bankrupt by him," cannot be construed as denying the power of the court to recognize the right of a party other than the bankrupt, hold under a valid and effective assignment, conferring in express terms authority to make the selection in the name of the assignor. In *re Hastings* (C. C. A., 6th Cir.), 24 Am. B. R. 360, 181 Fed. 33.

**Valuation of property.**—This order requires that each article shall have an estimated value placed upon it, and thus requires a specification of items and a separate appraisal. This explicit direction cannot be neglected. In *re Manning* (D. C., Pa.), 7 Am. B. R. 571, 112 Fed. 948.

**Filing exceptions.**—When the trustee has made his report to the referee the dissatisfied party may except thereto in the manner prescribed by this order, and at the request of either party it is made the duty of the referee to certify the exceptions for the final determination of the judge. But if no trustee has been appointed the record and findings certified by the referee will be returned with instructions to take the proper steps to secure the appointment of a trustee. In *re Smith* (D. C., Tex.), 2 Am. B. R. 190, 93 Fed. 791.

General Order XVII clearly allows any creditor to make objections by filing exceptions to the trustee's report. Considering the source of the general orders, the familiarity of the Supreme Court with the practice as to taking exceptions to reports of master in chancery, it seems very probable that the intent was that exceptions to a trustee's report should be in the familiar form of exceptions to the master's report. In *re Campbell* (D. C., Va.), 10 Am. B. R. 723, 124 Fed. 417.

A creditor, desiring to object to the trustee's report setting apart the bankrupt's exemptions, should file all of his objections within twenty days after the filing of said report as prescribed by this general order, and cannot come in after the expiration of that time and file objections or add new and additional grounds to his objections already on file. In *re Cotton & Preston* (D. C., Ga.), 25 Am. B. R. 532, 183 Fed. 190.

A fraudulent concealment of property is not a sufficient ground of exception, under this order, to deprive a bankrupt of his right to exemptions guaranteed by the law of his domicile. In *re Rothschild* (Ref., Ga.), 6 Am. B. R. 43.

On objection that exceptions to a trustee's report were not filed within twenty days as required by General Order XVII, the court will be governed by the file marks and the record. *Matter of Libby* (D. C., Fla.), 41 Am. B. R. 630, 253 Fed. 278.

A trustee is a "creditor" within the meaning of the provisions of General Order No. 17, that "any creditor may except to the determination of the trustee," etc., in allowing a claim of exemption, on the ground of the bankrupt's fraud. In *re Rice* (D. C., Pa.), 21 Am. B. R. 202, 184 Fed. 589.

**Time for filing exceptions.**—The provision in this order allowing twenty days for filing exceptions to the trustee's report, applies only to creditors, and not to the bankrupt. In *re White* (D. C., Vt.), 4 Am. B. R. 613; In *re Turnbull* (Ref., Mass.), 5 Am. B. R. 231. Exceptions filed more than twenty days after the filing of the report must be dismissed. *Matter of Amos* (Ref., Ga.), 19 Am. B. R. 804; *Matter of Cotton & Preston* (D. C., Ga.).

23 Am. B. R. 586, 588. The provision that any creditor may take exceptions to the determination of the trustee as to articles set off to the bankrupt as exempt within twenty days after the filing of the report is mandatory and the District Court has no discretion to extend the time for presenting such exemptions. *Matter of Krecun* (C. C. A., 7th Cir.), 36 Am. B. R. 172, 229 Fed. 711.

**Allowance for auditing trustee's account.**—It being the duty of the referee under this order to audit all of the accounts of the trustees, he should not be allowed extra compensation therefor. *Matter of McCubbin Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277; *Matter of Lacey & Company* (Sup. Ct., D. C.), 35 Am. B. R. 231.

**Other cases citing this order.**—In *re White* (D. C., Mo.), 6 Am. B. R. 451, 454, 109 Fed. 635; *McGahan v. Anderson* (C. C. A., 4th Cir.), 7 Am. B. R. 641, 643, 113 Fed. 115; *Matter of Ingalls Bros.* (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517; In *re Soper* (D. C., Neb.), 22 Am. B. R. 868, 173 Fed. 116; In *re Gerber* (C. C. A., 9th Cir.), 26 Am. B. R. 608, 617; *Gregory Co. v. Bristol* (C. C. A., 8th Cir.), 26 Am. B. R. 938, 191 Fed. 31; *Sheridan State Bank v. Rowell* (D. C., Ore.), 32 Am. B. R. 747, 212 Fed. 529; *United States v. Sondheim* (D. C., Mass.), 33 Am. B. R. 217, 188 Fed. 378; *Matter of Dean* (D. C., Cal., Ref.), 34 Am. B. R. 156; *Matter of Humphreys* (D. C., N. Car.), 34 Am. B. R. 655, 221 Fed. 997; *Matter of Coles* (D. C., Iowa), 35 Am. B. R. 339, 224 Fed. 170; *Matter of Shriner* (D. C., N. Car.), 35 Am. B. R. 404, 228 Fed. 794; *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255; *Wilson v. Continental Building & Loan Assoc.* (C. C. A., 9th Cir.), 37 Am. B. R. 444, 232 Fed. 824.

### XVIII. SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.
2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.
3. Upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

[Paragraph 1 is new; paragraph 2 is part of General Order XXI, 1867, without change; paragraph 3 is General Order XXII, 1867, with various changes.]

**Cross-references:** To the law: § 70-b, and as to notices, § 58-a(4).

To the General Orders: None.

To the Official Forms: Nos. 42, 43, 44, 45, 46.

To the Supplementary Forms: Nos. 182, 183, 184, 190, 191, 192.

**Petition for sale.**—A sale should not be directed under this order upon a petition which simply alleges that the cost and expenses of keeping the property will be accumulative if a sale is not ordered. In *re Harris* (D. C., Ala.), 19 Am. B. R. 635, 155 Fed. 216.

**Appointment of appraisers.**—A referee has generally authority to order a sale of the bankrupt's property and to appoint appraisers, but, when the property is in the hands of a receiver before adjudication, the district court is the only tribunal that can appoint appraisers or order a sale. In *re Styer* (D. C., Pa.), 3 Am. B. R. 424, 98 Fed. 290.

**Private sale.**—"The discretionary power of the referee directing a private sale of a bankrupt estate ought not to be disturbed, unless it clearly appears to have been improvidently exercised." In *re Hawkins* (D. C., N. Y.), 11 Am. B. R. 49, 125 Fed. 633. But a sale of bankrupt's property at private sale, by a trustee without its appraisal and without the order of the court and which has not been approved by the court, vests no title in the buyer. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 815, 819.

While the want of an appraisal does not necessarily invalidate a sale by a trustee of property of a bankrupt's estate, and a sale for a reasonable price, without appraisal, may be confirmed, a private sale without appraisal for one hundred dollars, though ordered by the referee, of property which was worth five hundred dollars and which would probably have brought that sum at public auction, not allowed to stand unless the purchaser pays to the trustee the difference in value, with interest. As the alternative, the purchaser may return the property and have back the purchase price with interest, the property to be sold by the trustee at public auction after due advertisement; provided, that if the funds of the estate shall be sufficient to pay the claims allowed and proper costs and expenses of

administration, the property to be returned to the bankrupt. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 820.

The words of this order, authorizing a private sale of "any specified portion of the bankrupt's estate," have been taken to mean such portion thereof as is specified in the petition and order for sale, and do not prohibit an order authorizing the sale of the entire estate at private sale. *Matter of Knox Automobile Co.* (D. C., Mass.), 32 Am. B. R. 67, 210 Fed. 569.

Perishable property may be sold under this order, even without notice to the creditors, and the courts have been very liberal in their construction of what is "perishable." This order cannot be held to be in derogation of the statute. *In re Edes* (D. C., Me.), 14 Am. B. R. 382, 384, 135 Fed. 595.

Perishability within the meaning of the term in bankruptcy involves physical deterioration of the property itself. Mere depreciation in value is not enough. A stock of hardware cannot be sold without notice to creditors as "perishable property," although by delay it is becoming unseasonable. *Matter of Beutel's Sons* (Ref., Ohio), 7 Am. B. R. 768. *Contra*: *Matter of Reinstein* (D. C., Mass.), 39 Am. B. R. 856.

Sales by receivers in bankruptcy are justified only when property is perishable or is rapidly depreciating in value on a falling market or for other reasons. *In re Desbrochers* (D. C., N. Y.), 25 Am. B. R. 703, 183 Fed. 991.

Real estate may be considered perishable within the meaning and intent of this order, when it consists of buildings, rapidly deteriorating and in a dilapidating condition and requiring immediate expenditure of a large sum of money by the trustee to prevent absolute loss. *In re Milne Mfg. Co.* (D. C., N. Y.), 21 Am. B. R. 468.

Sale of property discharged of liens.—Assuming that a court has power to sell a bankrupt's real property discharged of liens, the court will not order such a sale unless it is satisfied that the interests of the general creditors would thus be advanced and the interests of the lien creditors not injuriously affected. *In re Styer* (D. C., Pa.), 3 Am. B. R. 424, 98 Fed. 290.

#### XIX. ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

[Latter part of General Order XII, 1867, without any substantial change.]

Cross-references: To the law: §§ 2(3) (5), 3-a, 52, 69.

To the General Orders: X.

To the Official Forms: Nos. 8, 9, 10.

#### XX. PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

[This general order is new.]

Cross-references: To the law: As to the duty of referees concerning papers filed with them, § 39-a; As to clerk's duties concerning same, § 51(3). See also § 42-h.

To the General Orders: XXIV.

#### XXI. PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. If the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending, the deposition may be made by some officer or agent of the corporation having knowledge of the facts. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received

for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. [Amended Nov. 1. 1915.]

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured, or if secured, the security as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witness that may be called by either party and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

[General Order XXXIV, 1874, with slight changes.]

**Cross-references:** To the law: As to proof of debts, generally, §§ 2(2), 57; As to provable debts, § 63; As to set-off of debts, §§ 60-c, 68.

To the General Orders: XXIV, XXVIII, XXXIII.

To the Official Forms: Nos. 20, 21, 31, 32, 33, 34, 35, 36, 37, 38, 39.

To the Supplementary Forms: Nos. 170, 171, 172, 173, 174, 175.

**Title of court, necessity for.**—A proof of claim otherwise good is not vitiated because the title of the court is not given in accordance with this general order and Form 31. In re Blue Ridge Packing Co. (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619.

**Acknowledgments by justices of peace.**—In States where justices of the peace are expressly authorized to take oaths the Supreme Court did not intend by subdivision 5 of this general order to exclude such officials from taking acknowledgments. In re Roy (D. C., N. Y.), 26 Am. B. R. 4.

A function of the oath required upon proof of a debt due to a partnership is to guard against



mistake or fraud in the proof of the claim itself and does not refer to the question of the letter of the attorney. In *re Finlay* (Ref., N. Y.), 3 Am. B. R. 738. The very fact that in subdivision 5 an oath is required in the case of a letter of attorney is evidence that it was the intention that the oath required by subdivision 1 should not be taken in place of the oath required by subdivision 5.

**Proof of claim by agent; sufficient reason.**—It seems that a corporation may make proof in its claim by agent or attorney in fact when there is sufficient reason why it should not be made by the officer designated. In the case of a French corporation the mere fact that the treasurer or proper officer was in France is not a sufficient reason why he should not have verified the proof of claim. *Matter of Reboulin Fils & Co.* (Ref., N. J.), 19 Am. B. R. 215.

This order provides that a proof of claim made by an agent should state the reason the deposition was not made by the claimants in person; it would seem as if the provision was for some purpose and that the reason must be a good and valid and sufficient reason. *Matter of Reboulin Fils & Co.* (Ref., N. J.), 19 Am. B. R. 215.

The verification by an attorney which fails to assign a reason why the claimants have not personally made it, although defective, may be amended. In *re Medina Quarry Co.* (D. C., N. Y.), 24 Am. B. R. 769, 179 Fed. 929.

**Itemizing accounts.**—While Order XXI does not directly provide that accounts made up of items shall be itemized, and would seem to relate to the fixing of an average due date where items fall due at different dates, and provides a penalty for failure to fix the average due date by the forfeiture of interest on said account, yet the order is predicated on the theory that accounts consisting of items will be itemized. It is conforming to the simplest business method to set forth the items which make up the account which is to be presented to the debtor. It is very necessary that this should be done when the debtor's property has become a common fund for application ratably in the payment of his debts, for then all creditors have an interest in each account presented, and they can know nothing of the nature of the account except through the disclosures of the proof of debt. The statement of consideration should be sufficiently specific and full to enable creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim, and, if it is so meager and general in character as not to do this, it must be held insufficient. In *re Scott* (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418.

**Filing claims.**—Where proofs of a claim have been received by the trustee within a year, as provided in the last sentence of this subdivision, it has been held that the claim was sufficiently filed. *Orcutt Co. v. Green*, 17 Am. B. R. 72, 204 U. S. 96, revg. 13 Am. B. R. 512.

The provision that "proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred," does not confer jurisdiction to file a claim *nunc pro tunc* after the expiration of a year. *Matter of Ingalls Bros.* (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517.

It seems that a trustee cannot file with himself his proof of his own claim against the estate of the bankrupt. *Orcutt Co. v. Green*, 17 Am. B. R. 72, 204 U. S. 96, revg. 13 Am. B. R. 512.

**Assigned claims.**—Subd. 3, relating to the proof of assigned claims, applies to assignees of proven claims. *Matter of Breakwater Co.* (D. C., Pa.), 36 Am. B. R. 752. A proof of claim by a surety which is in the form of a petition for the establishment of its subrogated rights, and which very elaborately sets forth a history of the entire transaction, substantially complies with subd. 3 of this general order. *Kilpatrick v. U. S. Fidelity & Guaranty Co.* (C. C. A., 5th Cir.), 37 Am. B. R. 36, 228 Fed. 587.

A referee has jurisdiction under subdivision 3 of this General Order to determine a controversy arising in bankruptcy proceedings, consisting of the right, as between two claimants to a dividend based upon a claim which was assigned to them after proof and the assignments entered on the referee's docket. *Matter of Port Tampa Phosphate Company* (D. C., Mass.), 41 Am. B. R. 154.

A president of a corporation who performs the duties of the treasurer may sign a claim. *Matter of Eisenberg* (D. C., N. Y.), 40 Am. B. R. 864, 251 Fed. 427.

**Service of petition on claimant.**—This general order does not require the service of a copy of the petition upon the claimant, nor does it prevent the joining of all the claimants in one petition. *Matter of Caledonia Coal Co.* (D. C., Mich.), 43 Am. B. R. 93, 254 Fed. 742.

As to what constitutes an assigned claim, see In *re Finlay* (Ref., N. Y.), 3 Am. B. R. 738.

**Claims of sureties.**—Subdivision 4 is limited to persons who may be contingently liable for some debt or default of the bankrupt. *Phenix Nat. Bank v. Waterbury* (App. Div., N. Y.), 20 Am. B. R. 140, 145, affd. 23 Am. B. R. 250, 197 N. Y. 161. That is, it deals only with the claims of sureties. In *re Ellis* (D. C., Mass.), 8 Am. B. R. 564, 568, 98 Fed. 967.

The liability of the guarantor of the payment of rent under a lease to a partnership for the balance of the term at the date of the bankruptcy of the lessee, the lessors having taken no proceedings, is contingent, but the claim may, under this general order, subd. 4, be proven in the name of the lessors, for the amount for which the guarantor is contingently liable. *Matter of Baker & Edwards* (D. C., N. Car.), 35 Am. B. R. 469, 224 Fed. 611.

**Power of attorney for individual or corporation; distinction.**—A very clear distinction is made between a letter of an attorney executed on behalf of an individual and one executed on behalf of a partnership or of a corporation. The former may be proved or acknowledged. But in the case of the latter two cases the person executing the instrument shall make oath. In *re Finlay* (Ref., N. Y.), 3 Am. B. R. 738.

**Oath contained in proof of debt.**—The requirement of this order that the person executing a partnership letter of an attorney must take oath that he is a member of the firm, is sufficiently complied with where the oath is contained in the proof of debt which accompanied and was executed the same day as the letter, and the attorney is entitled to represent the creditor at the election of a trustee. In *re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619.

**Proof of claims of foreign creditors.**—The language of this subdivision is not exclusive and the different clauses taken together seem to indicate that the proof of claims of foreign creditors was not within the contemplation of the court in affirming the order; thus a power of the attorney acknowledged before a foreign counsel is sufficient to authorize proof of the claim of a foreign creditor. In *re Eugenheimer* (D. C., N. Y.), 1 Am. B. R. 425, 91 Fed. 744.

**Notice to creditors of proposed sale.**—Under the law requiring that notices to creditors "shall be addressed as specified in the proof of debt," notice sent to a creditor whose name and address appear in the bankrupt's schedules of liabilities, is not notice to an assignee of the creditor, whose proof of claim, containing his address, was duly filed with the referee; unless the notice sent to the assignor reaches the assignee. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 820.

**Re-examination; who may procure.**—The use of the word "creditor" in subd. 6 of this order, as one who has the right to take a review, should be confined to a review or appeal in case a creditor's individual claim is decided adversely; where the body of creditors is affected, the review must be taken by the trustee solely as their representative. *Matter of Arti-Stain Company* (D. C., Mass.), 32 Am. B. R. 640, *affd.* 32 Am. B. R. 643, 216 Fed. 942.

If any creditor or interested person desires a review he should request the trustee to take such action. In case of refusal by the trustee, the suitor's remedy is by motion or petition filed with the court, asking that the trustee be ordered to take a review as to any questions of procedure or allowance. *Matter of Arti-Stain Company* (D. C., Mass.), 32 Am. B. R. 640, *affd.* 32 Am. B. R. 643, 216 Fed. 942.

It is not within the contemplation of this order to permit the trustee and creditors concurrently to pursue a re-examination of a claim, or to permit a creditor to do so when the trustee for sufficient reasons does not approve, or when in the interests of all it is desirable that the trustee should conduct the proceeding. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1. This provision authorizes a petition by a creditor at the appropriate stage of the proceeding when it may be desirable for the creditor to intervene. The word "desire" is used in the sense of intend. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1.

The right to apply by petition for a re-examination, under this order and section 57-k, seems to be limited to the trustee and to creditors who are dissatisfied with the amount allowed to some creditor of the bankrupt other than the petitioner. In *re Chambers, Calder & Co.* (Ref., R. I.), 6 Am. B. R. 707.

The language of this subdivision clearly excludes action on the part of any one but the trustee or a creditor. And the bankrupt has no right to compel action on the part of a trustee when that official or any of the creditors refuse to take such action after demand made. *Matter of Levy* (Ref., N. Y.), 7 Am. B. R. 56.

When there is a trustee in existence, proceedings for a re-examination of claims of creditors may be instituted only by him, and a creditor has no capacity to attack the claims of other creditors. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1. The trustee in bankruptcy may institute a joint proceeding against several creditors. *Matter of Lyon* (Ref., N. Y.), 7 Am. B. R. 61.

If the trustee should, without sufficient reason, refuse to proceed, the court by its order may compel him to do so or remove him for disobedience. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1.

**Time of re-examination.**—A claim may be re-examined prior to the qualification of the trustee, as delays frequently ensue in the election and qualification of this officer, and it might be that evidence would be lost in the meantime. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1. A re-examination cannot be had after the estate has been closed. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1.

**Notice of hearing on petition for re-examination.**—A trustee is not required to give notice of a re-examination to all the creditors. Notice to the claimant is sufficient. In *re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 661, 109 Fed. 308. Notice of a special meeting, called upon the petition of a creditor to have a re-examination of certain claims under this subdivision, should be sent out by the referee and not by the petitioner. In *re Stoever* (D. C., Pa.), 5 Am. B. R. 250, 105 Fed. 355.

In a proceeding to obtain a re-examination of a claim the referee shall give notice to the creditor whose claim is contested of a hearing on the petition for re-examination. At this hearing the referee shall take the examination of the creditor and of any witness that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished the referee may so order. The burden of proof is on the objecting party. In *re Doty* (Ref., N. Y.), 5 Am. B. R. 58.

**Petition for re-examination.**—Answers or exceptions to claims, filed by a trustee may be treated as a petition for the re-examination of the claims. It would be better practice, however, to follow the general order. In *re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 660, 109 Fed. 308.

**What claims may be re-examined.**—This subdivision prescribes the method by which the trustee or a creditor may invoke the re-examination of a claim filed, and is broad enough to include any and all claims—secured and unsecured. It is quite as important to the estate and other creditors that the right of a secured or priority creditor to vote upon the excess of his claim over his security or priority should be correctly determined and limited to the proper amount as that the amount of any other claim asserted should be ascertained. *Matter of Columbia Iron Works* (D. C., Mich.), 14 Am. B. R. 526, 535, 142 Fed. 234.

This paragraph refers to claims against the bankrupt that were in existence when the petition was filed, and not to claims against the estate for expenses of administration, such as a referee's account. In *re Reliance, etc., Co.* (D. C., Pa.), 4 Am. B. R. 49, 100 Fed. 619.

**Relief on re-examination.**—This subdivision limits proceedings with reference to a reconsideration of claims to the mere matter of expunging or diminishing them. *Fitch v. Richard* (C. C. A., 1st Cir.), 16 Am. B. R. 835, 837, 147 Fed. 196. A claim which has been allowed may be reconsidered and rejected on the petition of a creditor. *Matter of Collins* (D. C., La.), 37 Am. B. R. 692, 235 Fed. 937.

There does not appear to be any authority for increasing the amount of a claim by a petition for re-examination. It would seem that the proper method for a creditor to pursue whose claim has been disallowed is for him promptly to file his petition for a review of the orders of the referee by the district court, or if through inadvertence the creditor has omitted to include in his proof of claim any items which are provable against the estate he should either file an amended proof of claim or a second proof of claim based upon such additional items. In *re Chambers, Calder & Co.* (Ref., R. I.), 6 Am. B. R. 707.

Where a trustee petitions for a re-examination of a creditor's claim, the referee has no power to do more than allow the petition, expunge or diminish the claim, or refuse to do either, and he cannot pass upon and decide controversies involving questions of fact regarding the title or other legal rights to property between the trustee and third parties, thus depriving the parties of trial by jury as secured by the Constitution. In *re Peacock* (D. C., N. Car.), 24 Am. B. R. 159, 178 Fed. 851.

A court of bankruptcy has jurisdiction by a summary proceeding to diminish or expunge an allowed claim unless the claimant pays to the trustee the value of the property of the bankrupt which he has taken and converted to his own use, without any prior claim to it, after the petition in bankruptcy was filed. In *re Paterson Co.* (C. C. A., 8th Cir.), 25 Am. B. R. 855, 186 Fed. 629.

**Other cases citing this order.**—In *re Soper and Slada* (Ref., N. Y.), 1 Am. B. R. 193, 196; In *re Pauly* (Ref., N. Y.), 2 Am. B. R. 333, 335; In *re Blankfein* (D. C., N. Y.), 3 Am. B. R. 165, 168, 97 Fed. 191; In *re Rider* (D. C., N. Y.), 3 Am. B. R. 192, 96 Fed. 811; *Hayer v. Comstock* (Sup. Ct., Iowa), 7 Am. B. R. 493; In *re Jones* (D. C., Mich.), 18 Am. B. R. 206, 209, 151 Fed. 108; In *re John Osborne Sons & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 65, 177 Fed. 184; *Davis v. Trust Co.* (C. C. A., 6th Cir.), 25 Am. B. R. 621, 639, 181 Fed. 10; *Matter of Goodman-Kinstler Cigar Co.* (D. C., Cal.), 32 Am. B. R. 624; *Matter of Siegel Company* (D. C., Mass.), 32 Am. B. R. 645, 216 Fed. 943; *Williams v. U. S. Fidelity & Guaranty Co.*, 236 U. S. 549, 34 Am. B. R. 181; *Matter of Krecun* (C. C. A., 7th Cir.), 36 Am. B. R. 172, 229 Fed. 711.

## XXII. TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

[General Order X, 1867, with changes, recognizing the right of the referee to decide objections raised as to the competency, relevancy and materiality of questions; and with other slight changes.]

**Cross-references:** To the law: As to examinations, §§ 7(9), 21, 38-a(2); As to costs, § 2(18).

To the General Orders: XXII.

To the Official Forms: Nos. 29, 30, 56.

To the Equity Rules: LXVII, to LXIX.

**Duty of referee in taking testimony.**—It is the duty of the referee under this order to receive the evidence which is offered, to note objections and to record the evidence; and, if either party persists in offering incompetent or irrelevant matter, the other party has a remedy, because the order provides that "the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions or parts of them as may be just." The equity practice is to be followed by the referees. In *re Sturgeon* (C. C. A., 2d Cir.), 14 Am. B. R. 681, 139 Fed. 608.

A hearing before a referee in bankruptcy, being substantially a hearing in proceedings in equity, is governed by the rules of equity of the United States courts; and the general order in bankruptcy regulating the examination of witnesses before the referee, is almost identical in substance with rule in equity No. 67. In *re Lipset* (D. C., N. Y.), 9 Am. B. R. 32, 119 Fed. 379.

Referees in bankruptcy in taking testimony are governed by the rules in equity, and should not on simple objection excuse witnesses from answering questions, but it is his duty to note the objection and take the answer. *Dressel v. North State Lumber Co.* (D. C., N. Car.), 9 Am. B. R. 541, 119 Fed. 531.

It is the duty of the referee to take all excluded testimony down and make the same a part of the record with his ruling on the objections and also the exceptions which may be taken noted in connection with such testimony. In *re Lipset* (D. C., N. Y.), 9 Am. B. R. 32, 119 Fed. 379. Contra, *Matter of Wilde's Sons* (D. C., N. Y.), 11 Am. B. R. 714.

The referee, whether acting as such or as a special commissioner, must receive all the evidence offered upon a hearing before him, noting the objections made, and he may refuse to stop the proceedings and certify questions raised on objections to testimony. *Bank of Ravenswood v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463. Upon the hearing of objections to the granting of a bankrupt's discharge, he should preserve all testimony objected to, noting the objections and taking answers subject thereto, and report the same to the court, or if necessary, certify to the court on proper application any particular ruling. In *re Isaacson* (D. C., N. Y.), 23 Am. B. R. 665, 174 Fed. 406; *United States v. Liberman* (D. C., N. Y.), 32 Am. B. R. 734, 176 Fed. 161.

The referee in taking testimony must have it taken down preferably in narrative form, but upon objection raised, it is his duty to require the matter to be presented by question, to which the objection and reason thereof is to be clearly but briefly noted, then to enter his ruling thereon as to whether proper or not and although he may rule it to be improper, yet allow it to be answered. In *re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 788, 138 Fed. 837.

**Examination of absent bankrupts and witnesses.**—This general order has somewhat regulated the practice of taking testimony in cases pending before a referee; but the Supreme Court does not seem to have especially regulated the practice of taking the testimony or an inquisitorial examination of absent bankrupts and witnesses. It seems that the original equity practice is the proper method of taking such testimony. In *re Williams* (D. C., Tenn.), 10 Am. B. R. 538, 543, 123 Fed. 321.

**Admissibility of unsigned testimony.**—Notes of testimony given by bankrupts on examination at creditors' meeting, which was not completed because of their refusal to answer, are admissible in evidence in a proceeding to punish them for contempt, although not read to or signed by them as required by this general order, especially where their accuracy is proved by the stenographer who made them. *Matter of Kaplan Brothers* (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 Fed. 753.

Where a creditor, objecting to a bankrupt's discharge, dies pending the application, his testimony, taken by consent and given under oath, may be used, upon proof of the administration of the oath to testify, even though the testimony was not read over to the witness and signed by him as required by this general order. *Matter of Blaesser* (D. C., N. Y.), 36 Am. B. R. 796, 230 Fed. 528.

An attorney in fact may not conduct the examination of witnesses. *Matter of Looney* (D. C., Tex.), 44 Am. B. R. 542, 262 Fed. 209.

**Signing deposition.**—The word "deposition" as used in General Order 22, means written testimony given upon the examination of a witness in bankruptcy proceedings, whether upon general examination or not, and the referee has the power to order the bankrupt to sign testimony given by him on his general examination. *Matter of Post* (D. C., Ohio), 43 Am. B. R. 136, 256 Fed. 233.

**Examination of testimony by witness.**—A witness, although not a creditor but a party owing money to a bankrupt estate, is entitled to examine the minutes of his testimony before signing the same. *Matter of Waters-Culver Co.* (D. C., N. Y.), 32 Am. B. R. 379, 212 Fed. 761.

**Original proceeding before referee.**—The provisions of this General Order do not preclude a referee, acting as a judicial officer in a proceeding originally instituted before him, from excluding irrelevant evidence, nor require him to admit and record all the evidence offered whether under objection or not. In *re Harrison Bros.* (D. C., Pa.), 28 Am. B. R. 293.

**Other cases citing this order.**—In *re Hoyt & Mitchell* (D. C., N. Car.), 11 Am. B. R. 784, 127 Fed. 908; *Matter of Kinnane & Company* (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488.

### XXIII. ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

[General Order VIII, 1867, with verbal changes.]

**Cross-references:** To the law: Generally.

To the General Orders: IV, XII.

To the Equity Rules: LXXXV, LXXXVI.

See In *re Russell Card Co.* (D. C., N. J.), 23 Am. B. R. 300, 174 Fed. 202. It is the duty of referees to make their orders conform to this rule. *Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861.

In *re Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51, the court said: "We do not think this order should be held to apply to a mere direction or ruling that a witness be sworn or that he shall or shall not answer certain questions."

**Failure to recite notice in order.**—An order of a referee, dismissing a claim unless the claimant surrender a preference, is not invalid because of its failure to recite notice as provided in this general order, especially where the claimant was not entitled to notice to

confer jurisdiction. *McCulloch v. Davenport Savings Bank* (D. C., Iowa), 35 Am. B. R. 765, 226 Fed. 309.

**Error without prejudice.**—The fact that without complying with this order, the referee made an order on the unadjudicated member of a partnership, after it and the other member had been adjudicated bankrupt, to file the schedule of his debts and the inventory of his property on or before nineteen days after the adjudication, is not fatal to the order of the court confirming such an order, because the unadjudicated member was required by the bankruptcy law and general order 8 to make these filings within ten days after that adjudication. *Armstrong v. Fisher* (C. C. A., 8th Cir.), 34 Am. B. R. 701, 224 Fed. 97.

**Other cases citing this order.**—*Matter of Lacey & Company* (Sup. Ct., D. C.), 35 Am. B. R. 231, 43 Wash. L. R. 434.

#### XXIV. TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

[Compare General Order XI, 1867. This general order does not fit into the present system of administration, and is rarely observed.]

**Cross-references:** To the law: §§ 39-a, 57.

To the General Orders: XII, XX.

To the Official Forms: No. 19.

**Taxation of costs.**—The details of making taxation of costs may be attended to in the office of the clerk or the referee, as authorized by this order. *Matter of Scott* (Ref., Mass.), 7 Am. B. R., 710, 713.

#### XXV. SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

[This general order is new. Its necessity or even value is doubted.]

**Cross-references:** To the law: As to meetings of creditors, § 55; As to meeting for choice of new trustee, § 44; As to notices of meetings, § 58.

To the General Orders: XIII.

To the Official Forms: Nos. 52, 53, 54, 55.

See *In re Louis Lewensohn* (D. C., N. Y.), 3 Am. B. R. 299, 303, 98 Fed. 576.

#### XXVI. ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or any officer attending him in the performance of his duties in any case which may be referred to him: and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

[First part of General Order XII, 1867, with substantial change. Referees usually keep accurate accounts, but the making of monthly returns of expenses is rare.]

**Cross-references:** To the law: §§ 9-a, 42.

To the General Orders: X, XXXV(2), and, by analogy, XIX.

**Cases citing this order.**—*In re Todd* (D. C., N. Y.), 6 Am. B. R. 88, 91, 106 Fed. 265; *In re Scott* (Ref., Mass.), 7 Am. B. R. 35; *In re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 654, 109 Fed. 308; *In re Daniels* (D. C., Ia.), 12 Am. B. R. 446, 449, 130 Fed. 597; *Matter of McCubbin* (Sup. Ct., D. C.), 33 Am. B. R. 277.

#### XXVII. REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

[General Order XVII, 1874, with changes.]

**Cross-references:** To the law: §§ 2(10), 38-a, 39-a(5).

To the General Orders: By analogy, XXXVI.

To the Supplementary Forms: Nos. 158, 159, and, by analogy, Nos. 146, 147, 148, 149.

**Purpose of order.**—The purpose of this general order is to provide a simple and effective method of procedure for securing early hearings and a speedy determination of litigated questions. In *re Koenig & Van Hoogenhuyze* (D. C., Tex.), 11 Am. B. R. 617, 127 Fed. 891. It is intended to carry into effect the provisions of § 39 so as to avoid as far as possible the sending of the original proofs to the judge and to substitute therefor where the ends of justice will permit a summary thereof. *Cunningham v. German Ins. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 192, 103 Fed. 932; *Crin v. Woodford* (C. C. A., 4th Cir.), 14 Am. B. R. 302, 306, 136 Fed. 34.

This general order provides the only method for securing a review by the judge of an order or finding by the referee, in *re Clark Coal & Coke Co.* (D. C., Pa.), 23 Am. B. R. 273, 173 Fed. 658; *Matter of Octave Mining Co.* (D. C., Ariz.), 32 Am. B. R. 474, 212 Fed. 457, and an attempted appeal from a decision of the referee confers no power on the court. *Matter of Octave Mining Co.* (D. C., Ariz.), 32 Am. B. R. 474, 212 Fed. 457. There can be no review unless a petition is filed; it is not sufficient for the referee to certify a question for review without a petition. *Craddock-Terry Co. v. Kaufman* (D. C., Tex.), 23 Am. B. R. 724, 175 Fed. 303.

The certification of a question prevents disputes among counsel concerning the opinion presented and decided, and the summary of the evidence is required in order to save the judge the labor of examining what is often a mass of testimony on many different questions. In *re Kurtz* (D. C., Pa.), 11 Am. B. R. 129, 125 Fed. 992.

**Review under § 38.**—This general order and § 38 of the act provide for review by the court of the orders of referees in the most general terms and are far from limiting the court to the rules which govern a chancery suit. Therefore, the district court may disregard the findings of the referee entirely, and proceed *de novo* to reject them for reasons of law, or refuse them or accept them in whole or in part without assigning reasons therefor. In *re Pettingill & Co.* (C. C. A., 1st Cir.), 14 Am. B. R. 757, 761, 135 Fed. 218. But a review under § 38 of the bankruptcy act cannot be had unless the procedure prescribed by this general order is followed. In *re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 147 Fed. 538.

**Parties entitled to review.**—Where by consent certain creditors are permitted by an order of the court to become parties to a petition to review an order of the referee a district court has jurisdiction to review such order although the claim of the original petitioner has been simply filed with the referee and neither allowed or disallowed. Such petitioner, if not "a bankrupt creditor," is at least "such other person" as under this order is entitled to a review. *Allgair v. Fisher & Co.* (C. C. A., 3d Cir.), 16 Am. B. R. 278, 143 Fed. 962.

The use of the word "creditor" in this general order, as one who has the right to take a review, should be confined to a review or appeal in case a creditor's individual claim is decided adversely; where the body of creditors' interests is affected the review must be taken by the trustees solely as their representative. *Matter of Arti-Stain Company* (D. C., Mass.), 32 Am. B. R. 640, *affd.* 32 Am. B. R. 643, 216 Fed. 942. See also *Matter of Siegel Co.* (D. C., Mass.), 32 Am. B. R. 645, 216 Fed. 945.

**General review not intended.**—This general order provides for "review by the judge of any order made by the referee," but it seems that a general review of the proceedings before the referee or a review of rulings not directly affecting an order made was not intended either by the act or by the orders. In *re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747. Ordinarily a review by the judge of an order made by the referee will be confined to the error pointed out in the petition for review. *Matter of Natelle De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 129, 114 Fed. 328.

Specific questions, as they arise in the proceedings, are to be presented on certificate of the referee, or in the case of orders entered on petition for review. In *re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

**Application for review; when granted.**—An application for a review of the decision of the referee will be dismissed when the party objecting has not complied with the requirements of this order. In *re Schiller* (D. C., Va.), 2 Am. B. R. 704, 96 Fed. 400; In *re Scott* (D. C., N. Car.), 3 Am. B. R. 625, 94 Fed. 404. Thus, a petition will be dismissed where it asks for a review of the decision of the referee instead of a review of the order of the referee. In *re Chambers, Calder & Co.* (Ref., R. I.), 6 Am. B. R. 709. Or where the referee simply transmits to the clerk the notice of testimony, his opinion and the creditor's petition for review. The precise questions ruled upon and the summary of the evidence relating thereto should always be presented. In *re Kurtz* (D. C., Pa.), 11 Am. B. R. 129, 125 Fed. 992. But where the referee, believing that all the testimony would be needed to present the questions at issue failed to summarize the evidence, the court will not deprive the petitioners of their rights to a review. *Crim v. Woodford* (C. C. A., 4th Cir.), 14 Am. B. R. 302, 306, 136 Fed. 34.

If any injustice is done a witness by an order of a referee he has a right to review the same and to be heard thereon before a judge of the court under this order. *Matter of Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 17, 134 Fed. 51. The rulings of a referee cannot be reviewed, while the case is still pending before him, by simply filing in the district court exceptions to such ruling. In *re Hawley* (D. C., Iowa), 8 Am. B. R. 632, 116 Fed. 428. A referee can certify a question which he foresees may arise from a proceeding before him and upon which he desires to be advised. In *re Beukauff Sons & Co.* (D. C., Pa.), 14 Am. B. R. 344, 135 Fed. 251.

Where the record presented to the court on an application to review an order of the referee holding that specifications in opposition to the bankrupt's discharge had not been sustained, discloses no action taken by the contesting creditor in exception to the order or ruling of the referee looking to its review, and there is no petition setting forth the error complained of, and the referee has not certified the question presented for review together with a summary of the evidence relating thereto and his findings and order made thereon as required by General Order 27, there is no issue before the court, and it will return the record to the clerk. *Matter of Stubblefield* (D. C., Tex.), 43 Am. B. R. 151, 260 Fed. 591.

A statement by the referee that "if the claimant and his attorney desire to appeal the case, they will have ten days from this date, on paying all costs incurred before the referee," would seem to cover inadmissible additions to what is required by the general order. *West v. McLaughlin Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 654, 667, 162 Fed. 124.

Upon a reference, to ascertain facts designed alone to aid the court in determining whether a bankrupt should be discharged or not, a referee is not required to certify objections made to his rulings upon the testimony. *In re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 138 Fed. 837.

A referee may not review his own order upon exceptions thereto. *In re Greek Mfg. Co.* (D. C., Pa.), 21 Am. B. R. 111, 164 Fed. 211; *In re Marks* (D. C., Pa.), 22 Am. B. R. 568, 171 Fed. 281.

**Record.**—A bankruptcy court will not review a decision of a referee in bankruptcy unless the record to be examined is made up and submitted in the manner provided by section 39 (5) and (9) of the Bankruptcy Act and this rule. *Matter of Petersen* (D. C., Nev.), 40 Am. B. R. 637, 262 Fed. 846.

**Filing petition.**—This general order imperatively requires the referee to certify the question to the judge, not the next month nor the year following, but forthwith, in order that there may be an early determination of the questions at issue. *In re Koenig & Van Hoogenfuyse* (D. C., Tex.), 11 Am. B. R. 617, 127 Fed. 891. The right to file a petition cannot be so exercised as unreasonably and necessarily to delay the distribution of the assets of the bankrupt. *In re Grant* (D. C., R. I.), 16 Am. B. R. 256, 143 Fed. 661.

A referee's decision may be reviewed only by petition therefor under this general order. *In re Russell* (D. C., Cal.), 5 Am. B. R. 566, 105 Fed. 501.

The effect of a special district rule, taken in connection with this general order considered, and held, that a decision of a referee may only be reviewed by petition and that such petition must be presented within ten days, the period specified by the rule, or afterward only by allowance of a judge of the district court and that an order once entered is not subject to be reviewed or altered by the referee himself. *In re Leshar & Son* (D. C., Pa.), 5 Am. B. R. 218, 176 Fed. 650. See also *Matter of Winter* (D. C., Pa.), 36 Am. B. R. 809.

Although no time limit for filing a petition for the review of an order of the referee is fixed by the bankrupt act, or by the general orders, still, it seems that such petition should be presented promptly. Thus, a petition presented after eighteen months should be dismissed. *In re Chambers, Calder & Co.* (Ref., R. I.), 6 Am. B. R. 700. A petition for review under this order may be filed within a reasonable time from the date of the filing of the revised order. *Crin v. Woodford* (C. C. A., 4th Cir.), 14 Am. B. R. 302, 306, 136 Fed. 34. Such reasonable time may be fixed by a standing rule. *In re Foss* (D. C., Me.), 17 Am. B. R. 439, 147 Fed. 790. The petition should be filed within twenty days. *Matter of Maloney* (Sup. Ct., D. C.), 21 Am. B. R. 502, 37 Wash. L. Rep. 147. Under the rule in the Eastern District of Pennsylvania the petition must be filed in ten days. *In re Marks* (D. C., Pa.), 22 Am. B. R. 568, 171 Fed. 281. Eleven months after the decision is not within a reasonable time. *Matter of Octave Mining Co.* (D. C., Ariz.), 32 Am. B. R. 474, 213 Fed. 457. A compliance with a local rule, requiring that petitions for review of orders of referees shall be filed within ten days from the date of the order sought to be reviewed, is sufficient. *Matter of Kruse* (D. C., Ia.), 37 Am. B. R. 687, 231 Fed. 470.

Where a petitioner to review an order of a referee in bankruptcy filed its petition by mistake with the clerk instead of the referee as required by this general order, in the absence of a special rule prescribing an express limitation of time for initiating proceedings for such review, an application for special leave to file its petition anew is addressed to the discretion of the district court, even though the ten days which it has been customary to allow for making such applications have elapsed. *In re Nippon Trading Co.* (D. C., Wash.), 25 Am. B. R. 695, 132 Fed. 959.

The petition for the review of an order of a referee, required by General Order 27, is the foundation of authority and cannot be dispensed with. When the petition is filed the referee is bound to certify; without it there is no authority to review. *Matter of Avoca Silk Co.* (D. C., Pa.), 39 Am. B. R. 391, 240 Fed. 607.

An appeal may be taken to the circuit court of appeals from the decision of the judge where the amount of the claim is more than \$500. *Clendenen v. Nat'l Bank* (Sup. Ct., N. D.), 11 Am. B. R. 245, 251. See § 25-a.

**Other cases citing this order.**—*In re Howard* (D. C., Cal.), 4 Am. B. R. 69, 100 Fed. 630; *Mueller v. Nugent*, 7 Am. B. R. 224, 229, 184 U. S. 1; *In re Arnett* (D. C., Tenn.), 7 Am. B. R. 522, 112 Fed. 770; *In re Hawley* (D. C., Iowa), 8 Am. B. R. 629, 116 Fed. 429; *In re Heebner* (D. C., Pa.), 13 Am. B. R. 256, 132 Fed. 1003; *In re Fisher & Co.* (D. C., N. J.), 14 Am. B. R. 366, 135 Fed. 223; *Bank v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463; *Matter of Cohn* (Ref., Cal.), 18 Am. B. R. 786, 792; *Knapp & Spencer Co. v. Drew* (C. C. A., 8th Cir.), 20 Am. B. R. 355, 359, 160 Fed. 413; *In re Peacock* (D. C., N. Car.), 24 Am. B. R. 159, 163, 178 Fed. 851; *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 815, 817; *Matter of Katz* (D. C., N. J.), 32 Am. B. R. 422, 216 Fed. 949; *Matter of Arti-Stain Company* (D. C., Mass.), 32 Am. B. R. 643, 216 Fed. 942; *Peck v. Richter* (C. C. A., 8th Cir.), 33 Am. B. R. 11, 217 Fed. 880; *Matter of Humphreys* (D. C., N. Car.), 34 Am. B. R. 655, 221 Fed. 907; *Matter of Lacey & Company* (Supp. Ct., D. C.), 43 Wash. L. Rep. 434, 35 Am. B. R. 231; *Matter of Isert* (D. C., Cal.), 36 Am. B. R. 431; *Matter of Goldman Bros.* (D. C., Pa.), 39 Am. B. R. 58, 241 Fed. 385; *Matter of Capital Security Co.* (D. C., Tenn.), 41 Am. B. R. 184, 251 Fed. 927.

## XXVIII. REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to

compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

[General Order XVII, 1867, with slight changes. This general order is an inheritance merely. Its value, save in so far as it refers to § 27, is doubted.]

**Cross-references:** To the law: As to redemption of property from liens, none, save by analogy, §§ 2 (7), 67; As to compounding of claims, §§ 27, 58-a (7), and by analogy, § 26.

To the General Orders: XXXIII.

The determining question is what action is for the best interests of the estate; that is, the creditors as a whole. In *re Kearney Bros.* (D. C., N. Y.), 25 Am. B. R. 757, 760, 184 Fed. 190.

Under this order not only the bankrupt, but his trustee, or any creditor who has proven his claim may, whenever it is for the benefit of the estate, redeem any mortgage or lien upon the bankrupt's property. In *re Hasie* (D. C., Tex.), 30 Am. B. R. 83, 88.

**Other cases citing this order.**—In *re Mammoth Pine Lumber Co.* (D. C. Ark.), 8 Am. B. R. 651, 668, 109 Fed. 308; In *re Wolf & Levy* (D. C., Tenn.), 10 Am. B. R. 153, 122 Fed. 127; In *re Grainger* (C. C. A., 9th Cir.), 20 Am. B. R. 166, 173, 160 Fed. 69.

### XXIX. PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

[Latter half of General Order XXVII, 1867, without material change.]

**Cross-references:** To the law: §§ 47-a, 61.

To the Supplementary Forms: No. 165.

This general order is mandatory.—*Huttig Manfg. Co. v. Edwards* (C. C. A., 8th Cir.), 20 Am. B. R. 349, 354. And where the trustee has not deposited the money with a designated depository as required by this order the trustee will not be allowed the payment of money as an exemption. In *re Hoyt* (D. C., N. Car.), 9 Am. B. R. 574, 119 Fed. 987. See also In *re Hoyt & Mitchell* (D. C., N. Car.), 11 Am. B. R. 784, 127 Fed. 968. The referee has no authority to order the trustee to pay out funds belonging to the estate of a bankrupt. In *re Cobb* (D. C., N. Car.), 7 Am. B. R. 202, 112 Fed. 655.

Money deposited as required by the act cannot be paid except by check or warrant drawn in accordance with the order and countersigned by the judge or some one designated by the judge for that purpose. These deposits should therefore be made to the creditor by the court or judge, designating at the time of the deposit the estate to which such deposits belong. In *re Cobb* (D. C., N. Car.), 7 Am. B. R. 202, 112 Fed. 655. As the trustees must sign the checks, it would seem that the fund should be deposited to the credit of the trustee, as such, designating the estate in bankruptcy. In *re Carr* (D. C., N. Car.), 9 Am. B. R. 58, 117 Fed. 572.

**Recovery of deposit; order of referee as res judicata.**—An order of a referee in bankruptcy, denying the right to recover a check payable to a trustee in bankruptcy, which has been deposited by a person not a creditor, as a part of a deposit required under a composition, and payment thereon subsequently stopped after some controversy had arisen, is *res adjudicata*



and a bar to a subsequent action in the state court by the maker of the check. *Coen v. James*, 164 N. Y. App. Div. 419, 33 Am. B. R. 249.

The consideration paid upon a composition is not within the provisions of this General Order. *Matter of Newbold* (D. C., Utah), 40 Am. B. R. 298, 244 Fed. 888.

Other cases citing this order.—*Kinkaid v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 300, 230 Fed. 362.

### XXX. IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailer or any officer in whose custody he may be, before the referee, for the purpose of testifying in any manner relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

[General Order XXVII, 1867, without substantial change.]

Cross-references: To the law: § 9-a.

To the General Orders: XII (1).

To the Supplementary Forms: None; but, by analogy, Nos. 87, 88.

The term "arrest" may be held to apply to the continued detention of a person in custody, although the word is frequently used to mean the original taking of a person into custody; and that when the statute provides for the exemption of a bankrupt from arrest upon civil process, except in certain cases, it means, not only that he shall not be taken into custody, but also that he shall not be detained in custody, after he becomes a bankrupt. *Turgeon v. Emery* (D. C., Me.), 25 Am. B. R. 664, 182 Fed. 1016; *Matter of Komar* (D. C., N. Y.), 37 Am. B. R. 663, 234 Fed. 378.

Contempt proceedings.—If a bankrupt is found guilty of contempt of a State court and punished by imprisonment, the bankruptcy court has ample power, by writ of *habeas corpus*, to bring the bankrupt before the court, where his detention will interfere with the proper conduct of the bankruptcy proceedings. *Matter of Francisco* (D. C., N. Y.), 41 Am. B. R. 87, 245 Fed. 216.

Discharge from imprisonment; when granted.—This general order provides for cases where the bankrupt is in custody under an arrest made both before and after the initiation of the bankruptcy proceedings; but it is only in cases where the bankrupt has been arrested or committed after the filing of his petition, that the court is authorized to grant a discharge from imprisonment, even though the debt be provable. In *re Claiborne* (D. C., N. Y.), 5 Am. B. R. 812, 109 Fed. 74. The district court is required to discharge on *habeas corpus* a bankrupt imprisoned upon process in any civil action for the collection of a claim provable in bankruptcy. *Matter of Adler* (C. C. A., 2d Cir.), 16 Am. B. R. 414, 144 Fed. 659. The general order extends to claims provable in bankruptcy. In *re Hilton* (D. C., N. Y.), 4 Am. B. R. 774, 104 Fed. 981.

A bankrupt arrested under a judgment entered upon an action for breach of promise is entitled to a discharge from custody under this general order. In *re Fife* (D. C., Pa.), 6 Am. B. R. 258, 109 Fed. 880.

Where a bankrupt is imprisoned upon a judgment for the support of a bastard child the court will not release him from imprisonment by a writ of *habeas corpus*. In *re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 954.

The bankrupt is exempt from arrest on civil process while attending to his duties in the bankruptcy court. *Matter of Dresser* (D. C., N. Y.), 10 Am. B. R. 270, 124 Fed. 915.

Test of legality of bankrupt's imprisonment.—The order must yield to the terms of the suit, and the test of the legality of the bankrupt's imprisonment is not whether the claim or demand upon which it is based is provable against the bankrupt's estate, but it is whether his discharge in bankruptcy would operate as a release of the claim or demand. In *re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 954. The decision of the courts under the act of 1867 fully sustain this view. In *re Robinson*, 6 Blatchf. 253; In *re Patterson*, 2 Ben. 155; In *re Whitehouse*, 1 Lowell, 429.

Compared with section 9 of the act.—It seems that there is nothing in the provisions of this order necessarily inconsistent with section 9 of the act, and if there are, the provisions of the act must prevail. *People ex rel. Taranto v. Erlanger* (D. C., N. Y.), 13 Am. B. R. 197, 132 Fed. 883. It is presumably limited in its operation to the same period of time as General Order XII, and thereby becomes practically compatible with section 9-a, subd. 2. In *re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 594, 598, 99 Fed. 73.

**Bail.**—Where a bankrupt makes application, under General Order No. 30, for his release from arrest, the court, neither under section 2 (15) nor under section 9-b, is authorized to require the bankrupt to give bail. *United States ex rel. Kelley v. Peters* (D. C., Ill.), 22 Am. B. R. 177, 166 Fed. 613.

**Other cases citing this order.**—*Knott v. Putnam* (D. C., Vt.), 6 Am. B. R. 80, 107 Fed. 907; *Barrett v. Prince* (C. C. A., 7th Cir.), 16 Am. B. R. 64, 143 Fed. 302.

### XXXI. PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

[This general order is new.]

**Cross-references:** To the law: §§ 14, 18-c.

To the General Orders: XXXII.

To the Official Forms: No. 57.

To the Equity Rules: XX to XXV.

**Cases citing this order.**—*In re Soper and Slada* (Ref.), 1 Am. B. R. 193, 196; *In re Glass* (D. C., Tenn.), 9 Am. B. R. 391, 394, 119 Fed. 509; *In re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 146.

### XXXII. OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge. [Amended June 4, 1917.]

[General Order XXIV, 1867, in part.]

**Cross-references:** To the law: §§ 12, 14.

To the General Orders: IV, XXXI.

To the Official Forms: Nos. 58, 59.

To the Supplementary Forms: As to opposition to discharge, Nos. 110, 111, 112, 113, 114, 115, and, by analogy, Nos. 105, 106, 107, 108, 109. As to opposition to confirmation of a composition, Nos. 99, 100, 101, 102, 103, and, by analogy, Nos. 94, 95, 96, 97, 98.

**Intent and purpose of order.**—It is evident from the language of this general order that it was intended the appearance of objecting creditors, or other persons interested, should be entered on the day upon which they were required to show cause as upon that day the court passes upon the right of the petitioner to be discharged, and will enter such a decree if no objecting creditor appears. *In re Ginsberg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627.

**Compliance with order.**—This general order should be strictly complied with, and failure so to do will only be excused when excellent reasons therefor are shown to the court. *In re Clothier* (D. C., Pa.), 6 Am. B. R. 203, 108 Fed. 199.

The exceptions to be filed in ten days should be filed before the judge. *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278.

**Appearance of creditors opposing discharge.**—The appearance of a creditor opposing a bankrupt's discharge must be entered on the day when the creditors are required to show cause. *In re Grant* (D. C., Pa.), 14 Am. B. R. 398, 135 Fed. 889; *In re Young* (D. C., Pa.), 20 Am. B. R. 697, 162 Fed. 912. A failure to enter an appearance on the return day precludes objecting creditors from filing exceptions to a discharge thereafter, even though they be filed within the ten days. *In re Ginsburg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627.

A creditor opposing a discharge has the duty of alleging sufficiently specified grounds of such opposition, and the burden of proving such grounds. *In re Holman* (D. C., Iowa), 1 Am. B. R. 600, 92 Fed. 512.

**Opposing creditors** should be required to enter their appearance and file specifications in writing of the ground of opposition, except in the rare cases where the facts may warrant the court in ordering an investigation of suspicious circumstances if its own motion. *Adler v. Jones* (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967. If the time within which specifications of opposition to a discharge may be filed is not extended by the court as required by this order, a subsequent application will be dismissed upon motion. *In re Albrecht* (D. C., Pa.), 5 Am. B. R. 223, 104 Fed. 974.

**Presumption of appearance.**—Upon appeal from an order denying a discharge to a bankrupt, the record failed to disclose any appearance by the objecting creditors on the day when the creditors were by law required to show cause against his discharge. It was held, that it must be presumed that such appearance as is required by this general order was duly and properly entered, where no objection thereto had been urged in the court below and the certificate of the clerk of the district court appended to the record recited that the same was "a true transcript of so much of the record and proceedings of said court as was requested by counsel

for appellant." *Shaffer v. The Koblegard Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 898, 183 Fed. 71, aff. 22 Am. B. R. 147.

**Time of filing objections.**—Objections to a discharge must be filed with the clerk of the bankruptcy court within ten days after the "show cause" hearing, and unless filed within that time a motion to dismiss must be granted, unless the time within which to file the objections with the clerk is enlarged in accordance with this general order, and that question will not be considered unless formal motion to enlarge the time is made within the ten days. *Matter of C. H. Kendrick & Co.* (D. C., Vt.), 35 Am. B. R. 680, 228 Fed. 680.

Where the return day was fixed at less than thirty days from the date of notice of the application for a discharge and no appearance was made, the court made an order fixing another return day and requiring proper notice to creditors. *Matter of Langfeldt* (D. C., Fla.), 41 Am. B. R. 586, 253 Fed. 468.

**Right to oppose discharge.**—This general order inferentially limits the right to file objections to the creditors and does not allow a referee, on his own motion, to interpose objections to the discharge. *Matter of Walsh* (C. C. A., 7th Cir.), 43 Am. B. R. 268, 256 Fed. 653.

**Enlargement of time.**—The district judge may, in his discretion, extend the time within which a creditor may enter his appearance in opposition to a bankrupt's discharge, even after the expiration of the time limit as provided in this order. *In re Levin* (C. C. A., 1st Cir.), 23 Am. B. R. 845, 176 Fed. 177.

**Amendment of objections.**—The court may, in its discretion, permit the specifications of objections to a bankrupt's discharge to be amended after the expiration of the ten days allowed by this general order, for the filing thereof. *In re Nathanson* (D. C., N. Y.), 18 Am. B. R. 262, 152 Fed. 536; *In re Osborne* (C. C. A., 1st Cir.), 8 Am. B. R. 165.

Upon an application to confirm a composition where no creditors appeared formally in opposition, but the trustee, as trustee, appeared and opposed such confirmation, though not a party to the record, and where such composition was refused and an appeal was taken by the bankrupt against the trustee, and citation issued to such trustee and to no other person, the appeal must be dismissed. *Ross v. Saunders* (C. C. A., 1st Cir.), 5 Am. B. R. 350, 105 Fed. 915.

**Other cases citing this order.**—*In re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; *In re Gasser* (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537; *In re Glass* (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509; *In re Henschel* (Sp. Com., N. Y.), 12 Am. B. R. 31, 34; *In re Levey* (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572; *Matter of Alex* (D. C., Pa.), 15 Am. B. R. 450; *Matter of Krecun* (C. C. A., 7th Cir.), 36 Am. B. R. 172, 229 Fed. 711.

### XXXIII. ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

[Part of General Order XX, 1867.]

**Cross-references:** To the law: §§ 26, 58-a(7), and, by analogy, § 27.

To the General Orders: By analogy, XXVIII.

**Cases citing this order.**—*In re Hixon* (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440.

### XXXIV. COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed the debtor shall recover like costs against the petitioner.

[Part of General Order XXXI, 1867, without change.]

**Cross-references:** To the law: §§ 2(18), 3-e.

To the General Orders: By analogy, X.

**Application of order.**—This order is confined in its terms to involuntary bankruptcy, and contested adjudications. *In re Barrett* (D. C., Tenn.), 12 Am. B. R. 626, 635, 113 Fed. 107. Effect of order, see *In re Halsey Electric Generator Co.* (D. C., N. J.), 23 Am. B. R. 401, 413, 163 Fed. 118.

Under this general order and section 824 of the U. S. Revised Statutes, providing that on a trial in equity \$20 attorney's fees shall be taxed in favor of the successful and against the losing party, an alleged involuntary bankrupt who successfully resists the proceeding is entitled to an attorney's fee of \$20. *Matter of Wise* (D. C., Wash.), 32 Am. B. R. 510, 212 Fed. 567.

**Power to award costs.**—The district court, sitting in bankruptcy, has power to award costs against a creditor who fails to substantiate his specifications of objection in opposition to the bankrupt's discharge. This power is inherent in the district court. *In re Wolpert* (Ref., N. Y.) 1 Am. B. R. 436. But the court has no power to award costs where a petition in bankruptcy against a corporation is dismissed for want of jurisdiction. The rule which denies to a court the power to award costs, when a case is dismissed for want of jurisdiction (*Citizens Bk v. Vanon*, 164 U. S. 319), prevails in a court of bankruptcy. *In re Philadelphia & Lewes Transportation Co.* (D. C., Pa.), 11 Am. B. R. 444, 127 Fed. 896.

The provision of General Order 34, allowing the petitioning creditors on contested objections to "be paid out of the estate" their costs, is merely cumulative, and not exclusive. The language of said General Order clearly contemplates, and is applicable to, the question of costs as between the petitioning creditor and the alleged bankrupt only. *Petition of Kurts Brass Bed Co.* (D. C., Mich.), 42 Am. B. R. 3, 250 Fed. 118.

**Security by bankrupt for costs.**—A debtor who files an answer denying alleged acts of bankruptcy cannot be compelled to advance the money to pay or contribute to the expense of the petitioning creditors' case under the penalty of having a valid answer stricken out and of being adjudicated a bankrupt. *Matter of Wester* (C. C. A., 3d Cir.), 40 Am. B. R. 89, 242 Fed. 465.

**Counsel fees and compensation of trustee** are not taxable as costs under General Order 34 upon the dismissal of an adjudication. *Matter of Ohio Motor Car Co.* (C. C. A., 6th Cir.), 39 Am. B. R. 218, 241 Fed. 330.

**Costs; amount or items.**—Where an application is contested, either at the outstart, or afterward on motion to vacate, the costs include all that could be recovered under similar circumstances, if the case were in equity. *Selkregg v. Hamilton Bros.* (D. C., Pa.), 10 Am. B. R. 474, 144 Fed. 556. But counsel fees, expenses and damages will not be granted in addition to the costs, unless the property has been seized pursuant to section 3-e of the act. *In re Ghiglione* (D. C., N. Y.), 1 Am. B. R. 580, 93 Fed. 158. See also *In re Hines* (D. C., Or.), 16 Am. B. R. 538, 144 Fed. 147.

**Nature of costs included.**—This order does not refer to the costs provided for in section 3(e) of the bankruptcy act and therefore the entry of adjudgment for costs incident upon the determination of the issue of bankruptcy in favor of the debtor, including costs or the attendance of witnesses and docket fees on jury trials, authorized by this order, is not *res adjudicata* of the issue raised by a subsequent petition to fix the costs, expenses and damages by reason of the seizing and detaining of the property of the debtor, authorized by section 3(e). *Matter of McKensie* (D. C., Wash.), 34 Am. B. R. 111, 219 Fed. 630.

**Other cases citing this order.**—*Hoffschlaeger Co. v. Young Nap* (D. C., Hawaii), 12 Am. B. R. 526; *Matter of Weissford* (D. C., N. J.), 39 Am. B. R. 243, 241 Fed. 516.

### XXXV. COMPENSATION OF CLERKS, REFEREES, AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out moneys; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee, and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceeding in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned. [Amended Dec. 11, 1905.]

[This general order is new. The last sentence of subdivision 4 was added in December, 1905.]  
Cross-references: To the law: As to compensation of clerks, §§ 51, 71. As to compensation of referees, §§ 40, 72. As to compensation of trustees, §§ 48, 72. As to pauper cases, § 51-a(2).

To the General Orders: X, XII, XVII, XIX, XXVI, XXIX.

To the Supplementary Forms: Nos. 166, 169.

**Fees of clerk.**—The clerk has no authority to demand more than the statutory fees. *In re Langslow, Fowler & Co.* (D. C., N. Y.), 1 Am. B. R. 268, 98 Fed. 809.

**Compensation of referee; special allowance.**—The performance by the referee of the ordinary services following a general reference, or of services following a special reference having to do with any of the matters which the Supreme Court have said *may be referred* to the referee by the judge, authorizes the referee to receive only the compensation specially provided in the statute. But the performance of other services, not included within the above category, if referred to the referee, or to any other person as a *special master*, pursuant to the general power of the court to call to its aid the services of a special master, would justify the allowance of special fees therefor. *Matter of Langford, Felts & Myers* (D. C., Cal.), 35 Am. B. R. 519, 225 Fed. 311.

No construction of this general order will authorize any allowance to the referee except for the specific purposes named. In *re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 661, 664, 109 Fed. 308. It seems that the Supreme Court did not intend that additional compensation should be given to a referee. In *re Wilcox* (D. C., Mich.), 19 Am. B. R. 241, 243, 156 Fed. 685. Additional compensation not allowed where business of bankrupt is continued by trustee. *Bray v. Johnson* (C. C. A., 4th Cir.), 21 Am. B. R. 383, 166 Fed. 57.

A special allowance to a referee for services performed under the statute cannot be made, even with the consent of attorneys. The fees fixed by statute are in full compensation. *Dressel v. North State Lumber Co.* (D. C., N. Car.), 9 Am. B. R. 541, 547, 119 Fed. 531. The referee has no authority for charging a *per diem* in any case whatsoever. In *re Pierce* (D. C., Colo.), 6 Am. B. R. 747, 111 Fed. 516.

**Compensation of referees; when no assets.**—This General Order and section 40 of the act recognizes no other compensation to the referee, where there are no assets than the preliminary fee deposited with the clerk. In *re Langalaw, Fowler & Co.* (D. C., N. Y.), 1 Am. B. R. 258, 98 Fed. 869.

**Compensation of referee; services away from home.**—A referee cannot charge extra for his own service merely because they are performed away from home. *Matter of Elk Valley Coal Mining Co.* (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383.

**Advance payment of referee's fees.**—Without an order of the judge the referee cannot demand an advance payment of his fees by the trustee. *Matter of Borger* (Sup. Ct., D. C.), 43 Wash. L. Rep. 436, 35 Am. B. R. 238.

**Allowance for expenses.**—The provision "in regard to expenses of mailing notices, traveling and perpetuating testimony, refers to actual expenses; but a referee may make a general charge, which should be a uniform charge in all cases, for blanks that may be used in each case, for notices to creditors, and orders which may be entered by him. He may make a similar charge for clerk hire where the business is such that clerks are needed." In *re Pierce* (D. C., Colo.), 6 Am. B. R. 747, 111 Fed. 516. It is obvious that the cost of the publication of the necessary notices upon application for discharge, and for stationery, are expenses properly chargeable to the bankrupt or his estate, under this general order, but the referee is not entitled to charge for his own services. In *re Dixon* (D. C., Cal.), 8 Am. B. R. 145, 114 Fed. 675.

Maintenance of an office, clerk hire in preparing and mailing notices to creditors and attendance to correspondence are "expenses necessarily incurred in the performances of their duties under the Act," and hence, upon being "allowed by special order of the judge," as provided in general orders 26 and 35, the referee should be entitled to reimbursement therefor. *Matter of McCubbin Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277; *Matter of Lacey & Co.* (Sup. Ct., D. C.), 43 Wash. L. Rep. 434, 35 Am. B. R. 231.

While a referee is entitled to his own traveling expenses, he should not be allowed such expenses of his clerk, unless special circumstances are shown. *Matter of Elk Valley Coal Mining Co.* (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383.

A charge for mailing notices based upon a "fee" of 25 cents for each notice will not be allowed. The utmost that can be allowed for this service is the amount of proper "expenses" incurred in mailing the notices as contemplated by the general order, and such amount must be shown by proper proof. *Matter of Elk Valley Coal Mining Co.* (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383.

A charge of 40 cents for mailing notices of applications for discharge, based upon sections 828 and 840 of the U. S. Rev. Stat. is unauthorized. *Matter of Longhney* (D. C., Wash.), 34 Am. B. R. 206, 218 Fed. 980.

**Compensation of trustee.**—This order limits the compensation of the trustee and is conclusive. In *re Carolina Cooperage Co.* (D. C., N. Car.), 3 Am. B. R. 154, 96 Fed. 920. Additional compensation will not be allowed to a trustee for services in investigating the bankrupt's disposition of property and the loss of his stock by fire. In *re Screws* (D. C., Ga.), 17 Am. B. R. 296, 147 Fed. 989. An allowance of \$2.50 to the trustee for his services as a lawyer not only violates this general order, but also the bankruptcy act itself. In *re Felson* (D. C., N. Y.), 15 Am. B. R. 185, 194, 139 Fed. 281. Motion for approval of additional expenses incurred by trustee allowed, such expenses being satisfactorily shown to be "necessarily incurred" by the trustee in the performance of his duties. *Matter of Hart & Co.* (D. C., Hawaii), 17 Am. B. R. 480.

The trustee and receiver are allowed to employ attorneys whose compensation is part of the expense of the trusteeship or receivership. An attorney employed by creditors to oppose claims, after the appointment of a trustee, is not entitled to compensation for such

services unless the trustee has improperly refused to make defense. In re Roadarmour (C. C. A. 6th Cir.), 24 Am. B. R. 49, 177 Fed. 379.

**Application of subdivision 4.**—It is manifest that this subdivision relates only to cases in voluntary bankruptcy, and the language shows that there may be such cases in which the petitioning debtor is not required to pay the fees of the clerk, referee and trustee, before or at the time of filing his petition, although he presents a schedule of property in excess of the exemptions allowed by the law of the State of his domicile and surrenders an estate in bankruptcy. Otherwise, it would be futile to provide that "the judge at any time during the pendency of the proceedings in bankruptcy may order those fees to be paid out of the estate." Sellers v. Bell (C. C. A., 5th Cir.), 2 Am. B. R. 529, 554, 94 Fed. 801.

**Application under pauper's oath.**—The application of a party to proceed under the pauper's oath will be denied and his petition will be dismissed unless within a reasonable time the deposit is made, where it appears that he is earning \$30 per month. In re Collier (D. C., Tenn.), 1 Am. B. R. 182, 93 Fed. 191. A referee is unauthorized to require the bankrupt to pay the statutory fee before he is given his discharge, where such bankrupt has filed an affidavit of inability. In re Plimpton (D. C., Vt.), 4 Am. B. R. 614, 103 Fed. 775.

**Preparation and mailing of notices.**—It was intended by this general order that the clerk should prepare or supervise the printing, mailing, etc., of the notices required, and did not intend that the field of the clerk should be invaded, and the prerogatives of his office usurped, and an arm of the court impaired by uncertainty in the discharge of such functions of his office, by persons preparing the copies of the petition for discharge and notice, and require the clerk to certify and mail them. Matter of Longhney (D. C., Wash.), 34 Am. B. R. 206, 218 Fed. 980.

**Special or extra compensation is not allowable to the clerk of the court, under this general order, for mailing notices to creditors; his clerical services in such matters—so far at least as no extraordinary expense is involved—being covered by the filing fee of ten dollars provided by section 52, subd. a of the Bankruptcy Act. Matter of Iwanga (D. C., Hawaii), 36 Am. B. R. 285.**

**Other cases citing this order.**—In re Thoth (D. C., Ohio), 4 Am. B. R. 780, 104 Fed. 291; In re Epstein (D. C., Ark.), 6 Am. B. R. 191, 109 Fed. 878; In re Scot (Ref., Mass.), 7 Am. B. R. 35; In re Mammoth Pine Lumber Co. (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731; In re Daniels (D. C., Iowa), 12 Am. B. R. 446, 130 Fed. 597; In re Dunn Hardware & Furniture Co. (D. C., N. Car.), 14 Am. B. R. 186, 134 Fed. 997; Matter of Motridge (C. C. A., 9th Cir.), 44 Am. B. R. 175, 258 Fed. 229.

### XXXVI. APPEALS.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the Supreme Court of a territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the Supreme Court of a territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

[This general order is practically new. Compare, however, General Order XXVI, 1867.]

**Cross-references:** To the law: §§ 24, 25.

To the General Orders: By analogy, XXVII.

To the Official Forms: None.

To the Supplementary Forms: Nos. 146, 147, 148, 149, and, by analogy, Nos. 153, 159.

**Subdivision 2; effect of.**—The requirement, that appeals to the Supreme Court shall be taken within thirty days after judgment, has the same effect as if written in the statute. Conboy v. Nat. Bank, 203 U. S. 147, 16 Am. B. R. 775. Where an appeal to this court was

taken within thirty days and the circuit court of appeals made the findings of fact and conclusions of law part of the record by an order made within thirty days, directing the same to be filed *nunc pro tunc*, as of the date of the judgment, there is a sufficient compliance with the provisions of said general order. *Coder, Trustee, etc., v. Arts* (Sup. Ct.), 22 Am. B. R. 1, 213 U. S. 223.

**Writ of error; time within which to bring.**—The statutes (R. S., § 1008, and the Act of March 3, 1891, ch. 517, §§ 4, 5), fix the time within which writs of error may be brought to this court, and a motion to dismiss a writ of error upon the ground that it was not sued out in time, because General Order No. 36 allows only thirty days for appeals, and upon the further ground that no bill of exceptions was filed will be denied. *Grant Shoe Co. v. Laird Co.* (Sup. Ct.), 21 Am. B. R. 484, 212 U. S. 445.

**Intention of subdivision 3.**—It is not the intention of this subdivision that a circuit court of appeals shall, of its own motion, ascertain and determine in advance of its decision upon an appeal in bankruptcy, whether a question is raised upon which a party is entitled to allowance of an appeal to the Supreme Court. If such right is claimed, it should be called to attention in advance of decision, with requests for findings in the event of adverse ruling upon the question alleged to be appealable. *Knapp v. Milwaukee Trust Co.* (C. C. A., 7th Cir.), 20 Am. B. R. 671, 673, 162 Fed. 675, affg. 19 Am. B. R. 491. See also *Crucible Steel Co. v. Holt* (C. C. A., 6th Cir.), 23 Am. B. R. 302, 174 Fed. 127.

Where, before a discharge is issued to the bankrupt, the opposing creditors by petition ask that separate findings of facts and conclusions of law be filed as provided in this general order, the order granting the discharge must be set aside and the prayer of the petition granted. *In re Rauchenplat* (D. C., Porto Rico), 9 Am. B. R. 763.

**Request for findings.**—Findings of fact and conclusions of law under General Order in Bankruptcy No. 36, paragraph 3, will not ordinarily be made unless requested, and one who contemplates an appeal to the Supreme Court, if the conclusion of the Circuit Court of Appeals shall be against him, should make a request for such findings before the decree of the Circuit Court of Appeals is entered. *Washington v. Tearney* (C. C. A., 4th Cir.), 28 Am. B. R. 633.

**Record on appeal; contents of:** Where the record does not contain the findings of facts and conclusions of law of the court below, as required by this order, the appeal will be dismissed and the omission cannot be supplied by reference to the opinion of the court below. *Chapman v. Bowers*, 18 Am. B. R. 844, 207 Fed. 89.

While neither the bankruptcy act nor the general orders prescribe the practice to be adopted in proceedings on revisory petitions, the matters of law of which revision is sought should in some manner be clearly presented. *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

An appeal to the Circuit Court of Appeals from an order or decree denying an adjudication and dismissing an involuntary petition cannot be entered where the record contains none of the testimony, either in form or substance, returned by the referee and passed upon by the district court. *Matter of Murphy* (C. C. A., 9th Cir.), 36 Am. B. R. 712, 229 Fed. 988.

Where a trustee in bankruptcy has filed a petition to sell all the stock in trade and other property of the bankrupt, and appellant has intervened to establish the lien of a chattel mortgage on such property to be satisfied out of the proceeds of sale, and the validity of such mortgage has been attacked by the trustee, it is a controversy arising in a bankruptcy proceeding and the procedure upon appeal to the U. S. Supreme Court is the same as in like cases under the Court of Appeals Act of 1891, and no special findings of fact and conclusions of law in the circuit court of appeals are required, as General Order No. XXXVI, adopted pursuant to § 25-b of the bankruptcy act, does not apply to such a case. *In re Standard Telephone & Elec. Co.*, 216 U. S. 545, 24 Am. B. R. 761, affg. 20 Am. B. R. 761.

**Other cases citing this order.**—*In re Abraham* (C. C. A., 5th Cir.), 2 Am. B. R. 266, 292, 93 Fed. 767; *First Nat. Bank of Denver v. Klug*, 8 Am. B. R. 12, 186 U. S. 204; *Jaquith v. Alden*, 9 Am. B. R. 773, 189 U. S. 78; *Hiscock v. Varick Bank of N. Y.*, 18 Am. B. R. 1, 208 U. S. 28; *Bacon v. Roberts* (C. C. A., 3d Cir.), 17 Am. B. R. 421, 146 Fed. 729; *Armstrong v. Fernandez*, 19 Am. B. R. 746, 750, 208 U. S. 324; *In re Cooper Bros.* (D. C., Pa.), 20 Am. B. R. 392, 159 Fed. 956; *Duryea Power Co. v. Sternbergh* (Sup. Ct., U. S.), 25 Am. B. R. 66, 68, 218 U. S. 299; *Hill v. Western Electric Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 332, 214 Fed. 243; *Matter of Krecun* (C. C. A., 7th Cir.), 36 Am. B. R. 172, 229 Fed. 711.

### XXXVII. GENERAL PROVISIONS.

In the proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case,

vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

[Last half of General Order XXII, 1867, without material change.]

**Equity practice.**—The district court, being a court of equity in bankruptcy matters, is a court of equity for all purposes in such matters, and all the principles and rules of equity apply. In re Huddleston (Ref., Ala.), 1 Am. B. R. 572, 574. Under this general order the rules of equity practice "must be followed as near as may be." Ex parte Steele (D. C., Ala.), 20 Am. B. R. 575, 606, 162 Fed. 694.

It is well settled that, except in certain specified particulars, proceedings in bankruptcy are of an equitable nature. In re Waugh (C. C. A., 9th Cir.), 13 Am. B. R. 187, 192, 133 Fed. 281.

**Application of order.**—Shulte v. Patterson (C. C. A., 8th Cir.), 77 Am. B. R. 99, 102, 147 Fed. 509; Matter of Fleischer (D. C., N. Y.), 18 Am. B. R. 194, 197, 151 Fed. 81.

Under the provisions of this general order, which extends the equity rules of the Supreme Court to "proceedings in equity," failure to file an answer to a petition seeking to expunge a claim justifies a decree *pro confesso* under Rule 18, carrying the ordinary incidents and consequences of such a decree. In re Docker-Foster Co. (D. C., Pa.), 10 Am. B. R. 584, 123 Fed. 190.

Where a petition in involuntary proceedings, in conformity with this general order, stated that the claims of the petitioning creditors were for goods sold and delivered, and that the alleged bankrupts purchased the same within one year from the date of the execution of the petition, and were provable claims, it is unnecessary to state when the several amounts became due, the amount of the securities held nor the manner in which their value was fixed. Matter of Hark Bros. (D. C., Pa.), 14 Am. B. R. 400, 135 Fed. 603.

**Application of equity rules in bankruptcy proceedings.**—This general order does not make the General Equity Rules applicable as rules of court in the performance of the administrative work of the courts of bankruptcy. They may be looked to for analogies but not for rules. International Harvester Co. v. Carlson (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736; Matter of Hughes (C. C. A., 2d Cir.), 44 Am. B. R. 447, 262 Fed. 500.

A proceeding for the confirmation of a composition is not one of those to which General Order 37 makes the Supreme Court equity rules applicable, nor is it covered by local rule 23, requiring all appealable decisions in equity or admiralty to be supplemented by a "formal decree giving effect thereto." Matter of Brookstone Mfg. Co. (C. C. A., 1st Cir.), 39 Am. B. R. 552, 239 Fed. 697.

**Summary proceedings.**—This general order applies only to equity proceedings, properly so called, and not to summary proceedings by the trustee to compel the bankrupt to turn over money to him. Matter of Cunney (D. C., Mass.), 35 Am. B. R. 617, 225 Fed. 426.

**Other cases citing this order.**—In re Keisler (Ref., Wis.), 2 Am. B. R. 79; In re Strait (Ref., N. Y.), 2 Am. B. R. 308; In re Lipset, Leviton & Co. (Ref., N. Y.), 9 Am. B. R. 22, 34; In re Glass (D. C., Tenn.), 9 Am. B. R. 391, 399, 119 Fed. 509; In re Williams (D. C., Tenn.), 10 Am. B. R. 538, 543, 123 Fed. 321; In re Henschel (Spec. Com., N. Y.), 12 Am. B. R. 81; In re Barrett (D. C., Tenn.), 12 Am. B. R. 626, 636, 132 Fed. 362; In re Kenney & Co. (D. C., Ind.), 14 Am. B. R. 611, 615, 136 Fed. 451; Matter of McIntyre & Co. (C. C. A., 2d Cir.), 24 Am. B. R. 4, 40, 176 Fed. 552; Matter of Pierce, Jr. (D. C., Wash.), 22 Am. B. R. 96, 210 Fed. 389; Matter of Loughran (C. C. A., 3d Cir.), 33 Am. B. R. 303, 218 Fed. 619.

### XXXVIII. FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

**Construction of statute; orders and forms.**—Seek the meaning and intent of the law first and follow that rather than the order or form, and if the latter are not harmonious each with the other, seek the meaning and intent of the order and follow it rather than the form. In re Soper and Slada (Ref., N. Y.), 1 Am. B. R. 193.

**Forms; use of.**—The forms are not designed to effect any change in the law. They are "forms" and nothing more. Thus, it has been held that the failure of a bankrupt to precisely observe "Schedule B (5)" in making a claim for exemptions is not fatal. Burke v. Guarantee Title & Trust Co. (C. C. A., 3d Cir.), 14 Am. B. R. 31, 134 Fed. 562.

The brackets used in Form No. 1 for debtor's petition, containing the phrase "or has resided or has had his domicile" show that the Supreme Court meant that one or the other of the statements may be used; and they are inserted in the form by way of suggestion of such alterations as may be necessary to suit the circumstances of any particular case. In re Laskaris (Ref., N. Y.), 1 Am. B. R. 490.

**Other cases citing this order.**—In re Gerber (C. C. A., 9th Cir.), 26 Am. B. R. 608, 617; Matter of Lenters (D. C., Pa.), 35 Am. B. R. 3, 225 Fed. 878; Pollack v. Meyer Bros. Drug Co. (C. C. A., 8th Cir.), 36 Am. B. R. 835.





# **OFFICIAL FORMS**

**AS PRESCRIBED BY**

**THE SUPREME COURT OF THE UNITED STATES AT THE  
OCTOBER TERM OF 1898.**

**[1225]**



# OFFICIAL FORMS IN BANKRUPTCY.<sup>1</sup>

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[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.]

- Form No. 1. Debtor's petition, 1228.*  
*No. 2. Partnership petition, 1242.*  
*No. 3. Creditors' petition, 1244.*  
*No. 4. Order to show cause upon creditors' petition, 1245.*  
*No. 5. Subpoena to alleged bankrupt, 1246.*  
*No. 6. Denial of bankruptcy, 1246.*  
*No. 7. Order for jury trial, 1247.*  
*No. 8. Special warrant to marshal, 1248.*  
*No. 9. Bond of petitioning creditor, 1249.*  
*No. 10. Bond to marshal, 1250.*  
*No. 11. Adjudication that debtor is not bankrupt, 1251.*  
*No. 12. Adjudication of bankruptcy, 1252.*  
*No. 13. Appointment, oath, and report of appraisers, 1252.*  
*No. 14. Order of reference, 1254.*  
*No. 15. Order of reference in judge's absence, 1255.*  
*No. 16. Referee's oath of office, 1255.*  
*No. 17. Bond of referee, 1256.*  
*No. 18. Notice of first meeting of creditors, 1257.*  
*No. 19. List of debts proved at first meeting, 1258.*  
*No. 20. General letter of attorney in fact when creditor is not represented by attorney at law, 1259.*  
*No. 21. Special letter of attorney in fact, 1260.*  
*No. 22. Appointment of trustee by creditors, 1261.*  
*No. 23. Appointment of trustee by referee, 1262.*  
*No. 24. Notice to trustee of his appointment, 1262.*  
*No. 25. Bond of trustee, 1263.*  
*No. 26. Order approving trustee's bond, 1264.*  
*No. 27. Order that no trustee be appointed, 1264.*  
*No. 28. Order of examination of bankrupt, 1265.*  
*No. 29. Examination of bankrupt or witness, 1266.*  
*No. 30. Summons to witness, 1266.*  
*No. 31. Proof of unsecured debt, 1267.*

1. For the validity of these forms, see Section Thirty, ante.

- Form No. 32.** *Proof of secured debt, 1268.*  
**No. 33.** *Proof of debt due corporation, 1269.*  
**No. 34.** *Proof of debt by partnership, 1276.*  
**No. 35.** *Proof of debt by agent or attorney, 1271.*  
**No. 36.** *Proof of secured debt by agent, 1272.*  
**No. 37.** *Affidavit of lost bill, or note, 1273.*  
**No. 38.** *Order reducing claim, 1274.*  
**No. 39.** *Order expunging claim, 1275.*  
**No. 40.** *List of claims and dividends to be recorded by referee and by him delivered to trustee, 1275.*  
**No. 41.** *Notice of dividend, 1276.*  
**No. 42.** *Petition and order for sale by auction of real estate, 1277.*  
**No. 43.** *Petition and order for redemption of property from lien, 1278.*  
**No. 44.** *Petition and order for sale subject to lien, 1279.*  
**No. 45.** *Petition and order for private sale, 1280.*  
**No. 46.** *Petition and order for sale of perishable property, 1281.*  
**No. 47.** *Trustee's report of exempted property, 1282.*  
**No. 48.** *Trustee's return of no assets, 1283.*  
**No. 49.** *Account of trustee, 1284.*  
**No. 50.** *Oath to final account of trustee, 1285.*  
**No. 51.** *Order allowing account and discharging trustee, 1286.*  
**No. 52.** *Petition for removal of trustee, 1286.*  
**No. 53.** *Notice of petition for removal of trustee, 1287.*  
**No. 54.** *Order for removal of trustee, 1287.*  
**No. 55.** *Order for choice of new trustee, 1288.*  
**No. 56.** *Certificate by referee to judge, 1289.*  
**No. 57.** *Bankrupt's petition for discharge, 1289.*  
**No. 58.** *Specification of grounds of opposition to bankrupt's discharge, 1291.*  
**No. 59.** *Discharge of bankrupt, 1291.*  
**No. 60.** *Petition for meeting to consider composition, 1292.*  
**No. 61.** *Application for confirmation of composition, 1293.*  
**No. 62.** *Order confirming composition, 1294.*  
**No. 63.** *Order of distribution on composition, 1295.*

### Form No. 1.

#### Debtor's Petition.\*

To the Honorable . . . . .,

Judge of the District Court of the United States

for the . . . . . District of . . . . .:

The petition of . . . . ., of . . . . ., in the county of . . . . .,  
 and district and State of . . . . ., . . . . . [*State occupation*], respectfully  
 represents:

\* Consult Sections Two, Four, Eighteen,  
 and Fifty-nine. See also General Orders  
 II, IV, V, VI, VII. Petition and schedules

in voluntary proceedings should be drawn  
 and verified in triplicate and filed with  
 the clerk.

That he has had his principal place of business [*or has resided, or has had his domicile*]<sup>3</sup> for the greater portion of six months next immediately preceding the filing of this petition at . . . . ., within said judicial district;<sup>4</sup> that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule<sup>5</sup> hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged<sup>6</sup> by the court to be a bankrupt<sup>7</sup> within the purview of said acts.

....., *Attorney.*

United States of America, District of . . . . ., ss.:<sup>8</sup>

I, . . . . ., the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

....., *Petitioner.*

Subscribed and sworn to before me this ... day of . . . . ., A. D. 19...

.....

.....

[*Official character.*]

3. Strike out some or all the words in brackets, as the facts may be.

4. § 2(1).

5. § 7-a(8).

6. § 18-g.

7. If partners petition, use Form No. 117, *post*, omitting certain allegations if all join.

8. Verification.—See under section eighteen, *ante*.

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence (if known, that fact must be stated).	Where and when contracted.	Debts, and or joint.	Amount.
(1.) Taxes and debts due and owing to the United States.						\$
(2.) Taxes due and owing to the State of _____ or to any county, district or municipality thereof.						
(4.) Other debts having priority by law.						
Total.....						

\_\_\_\_\_, Petitioner.

9. §§ 7-a (8), 39-a (3) (6); General Order IX. For suggestions as to drafting schedules, see Section Seven, ante, and General Order V. The insertion of the word "None" where the form calls for statements not applicable to the particular case, is usual.

10. § 64-a-b.

11. Names and addresses should be written with care. Wertheimer v. Howard, 14 Am. B. R. 547, 47 Misc. 145, 93 N. Y. Supp. 518; Lissum v. Kraus, 35 Misc. 376, 71 N. Y. Supp. 1022. Ditto marks should not be used in stating the addresses of creditors. In re Mackey (Ref., N. Y.), 1 Am. B. R. 593. Abbreviations should be avoided. Sutherland v. Lasher, 11 Am. B. R. 780, 41 N. Y. Misc. 249. Official forms should be used. Mahoney et al. v. Ward, 3 Am. B. R. 770, 100 Fed. 278; In re McClintock, 13 Am. B. R. 606. But they are forms and nothing more and are to be observed and used with such alterations as may be necessary to suit the circumstances of any particular case. Burke v. Guarantee Title & Trust Co. (C. C. A., 3d Cir.), 14 Am. B. R. 31, 67 C. C. A. 486, 134 Fed. 599.









SCHEDULE A. (5)

Accommodation paper.<sup>18</sup>

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.
						\$ c.
					Total.....	

\_\_\_\_\_, Petitioner.

OATH TO SCHEDULE A.

United States of America, District of....., ss:

On this.....day of....., A. D. 19....., before me personally came....., the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this.....day of....., A. D. 19....

.....  
[Official character.]

<sup>18</sup> Consult foot-notes to Schedule A(4).

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.\*

SCHEDULE B. (1)  
Real estate.

Location and description of all real estate owned by debtor, or held by him.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value.
			\$
			c
		Total.....	

\_\_\_\_\_, Petitioner.

17. Consult, for what is property of the bankrupt, Section Seventy, ante, and for the frame of schedules Section Seven, and General Orders V, IX.

SCHEDULE B. (2)<sup>12</sup>

Personal Property.

	\$	c.
a.—Cash on hand.....		
b.—Bills of exchange, promissory notes, or securities of any description (each to be set out separately).....		
c.—Stock in trade, in — business of —, at —, of the value of —.....		
d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.....		
e.—Books, prints, and pictures, viz.....		
f.—Horses, cows, sheep, and other animals (with number of each), viz.....		
g.—Carriages and other vehicles, viz.....		
h.—Farming stock and implements of husbandry, viz.....		
i.—Shipping, and shares in vessels, viz.....		
k.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.....		
l.—Patents, copyrights, and trade-marks, viz.....		
m.—Goods or personal property of any other description, with the place where each is situated viz.....		
Total.....		

\_\_\_\_\_, Petitioner.

18. Consult foot-note to Schedule B(1).

SCHEDULE B. (3)<sup>19</sup>  
*Choses in action.*

	Dollars.	Cents.
a.—Debts due petitioner on open account.....		
b.—Stocks in incorporated companies, interest in joint-stock companies and negotiable bonds.....		
c.—Policies of insurance.....		
d.—Unliquidated claims of every nature, with their estimated value.....		
e. Deposits of money in banking institutions and elsewhere.....		
Total.....		
_____, Petitioner.		

19. Consult foot-note to Schedule B (1).

# **SCHEDULE B. (4) 20**

*Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.*

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realised from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest.
Interest in land.....		£                      s.
Personal property.....		
Property in money, stock, shares, bonds, annuities, &c.....		
Rights and powers, legacies and bequests.....		
<i>Property heretofore conveyed for benefit of creditors.</i>	<b>(Total).....</b>	
What portion of debtor's property has been conveyed by deed of assignment or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed, amount realised therefrom, and disposal of same, so far as known to debtor.....		Amount realised from proceeds of property conveyed. £                      s.
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.....	<b>Total.....</b>	
		_____, <i>Petitioner.</i>

20. Consult footnote to Schedule B (1). See also Pollack v. Meyer Bros. Drug Co. (C. C. A., 8th Cir.), 36 Am. B. R. 835.

SCHEDULE B. (5) <sup>21</sup>

*A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.*

	Valuation.	
	\$	c.
Military uniform, arms, and equipments.....		
Property claimed to be exempted by state laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.....		
Total.....		
_____, Petitioner.		

<sup>21</sup> The failure of a bankrupt to precisely observe this schedule in making a claim for exemption is not fatal. *Burke v. Guarantee Title & Trust Co.* (C. C. A., 3d Cir.), 14 Am. B. R. 31, 67 C. C. A. 486, 134 Fed. 562. As to what is exempt, see Section Six; as to necessity of claiming, see Section Seven. Consult also footnote to Schedule A(1).



SCHEDULE B. (6)<sup>22</sup>*Books, papers, deeds, and writings relating to bankrupt's business and estate.*

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.

Deeds.

Papers.

\_\_\_\_\_, *Petitioner.*OATH TO SCHEDULE B.<sup>23</sup>

United States of America, District of . . . . ., ss.:

On this . . . . . day of . . . . ., A. D. 19.., before me personally came . . . . ., the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

. . . . .,

. . . . .,

[*Official character.*]<sup>22</sup>. Consult foot-note to Schedule B(1).<sup>23</sup>. This oath is perhaps unnecessary, the petition, which refers to the schedules, being verified. If used it should be changed into

the form of an affidavit (as is that at the end of the petition itself), to be signed by the affiant, with the proper jurat to be signed by the officer administering the oath.

SUMMARY OF DEBTS AND ASSETS.

(From the statements of the bankrupt in Schedules A and B.)

Schedule A	1	(1) Taxes and debts due United States.			
"	1	(2) Taxes due States, counties, districts, and municipalities.			
"	1	(3) Wages			
"	1	(4) by law.			
Schedule A	2	ought to be paid by other parties thereto			
Schedule A	3				
Schedule A	4				
Schedule A	5				
Schedule B	1				
Schedule B	2				
Schedule B	3				
Schedule B	4				
Schedule B	5				
Schedule B	6				
Schedule B	7				
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Schedule B	63				
Schedule B	64				
Schedule B	65				
Schedule B	66				
Schedule B	67				
Schedule B	68				
Schedule B	69				
Schedule B	70				
Schedule B	71				
Schedule B	72				
Schedule B	73				
Schedule B	74				
Schedule B	75				
Schedule B	76				
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Schedule B	79				
Schedule B	80				
Schedule B	81				
Schedule B	82				
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Schedule B	84				
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Schedule B	86				
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Schedule B	88				
Schedule B	89				
Schedule B	90				
Schedule B	91				
Schedule B	92				
Schedule B	93				
Schedule B	94				
Schedule B	95				
Schedule B	96				
Schedule B	97				
Schedule B	98				
Schedule B	99				
Schedule B	100				
Schedule B, total					

**Form No. 2.****Partnership Petition.<sup>24</sup>**

To the Honorable .....  
 Judge of the District Court of the United States  
 for the ..... District of .....

The petition of ..... respectfully represents:

That your petitioners and ..... have been partners under the firm name of ....., having their principal place of business at ....., in the county of ....., and district and State of ....., for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by ..... oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by ..... oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said ..... further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ..... further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places

<sup>24</sup> Consult Sections Four, Five, and Fifty-nine, if all partners join. If one or more do not, consult Sections Five and Eighteen. See, generally, Section Two for the place to file and Section Seven for the schedules. Read also General Orders V,

VI, VII, VIII. In the "Supplementary Forms," *post*, Form No. 117 will be found useful when all the partners do not join in a voluntary petition; also, by way of suggestion, when they do.

of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ..... further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ..... further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

.....,  
.....,  
.....,

....., *Attorney.*

*Petitioners.*

....., the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

.....,  
.....,  
.....,

*Petitioners.*

Subscribed and sworn to before me, this .... day of ....., A. D. 19...

.....,

[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

**24a. Form for adjudication of firm and petitioning partners.**—Where an adjudication is desired of petitioning partners as individuals as well as the firm, official form No. 2 should not be literally followed, but

there should be inserted in the prayer of the petition a request for the adjudication of the petitioning partners as well as the firm. *Matter of Lenoir-Cross Co.* (D. C., Tenn.), 35 Am. B. R. 774, 226 Fed. 227.

**Form No. 3.****Creditors' Petition.<sup>25</sup>**

To the Honorable .....  
 Judge of the District Court of the United States  
 for the ..... District of .....

The petition of ....., of ....., and .....  
 of ....., and ....., of ....., respectfully shows:<sup>26</sup>

That ....., of ....., has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [or resided, or had his domicile] at ....., in the county of ..... and State and district aforesaid, and owes debts to the amount of \$1,000.

That your petitioners are creditors of said ....., having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500. That the nature and amount of your petitioners' claims are as follows:

.....  
 .....

And your petitioners further represent that said ..... is insolvent, and that within four months next preceding the date of this petition the said ..... committed an act of bankruptcy, in that he did heretofore, to wit, on the day of.....

.....

Wherefore your petitioners pray that service of this petition, with a subpoena, may be made upon ....., as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

.....,  
 .....  
 .....

*Petitioners.*

....., *Attorney.*

<sup>25</sup> This form is demurrable. The use of Form No. 118, *post*, is suggested.

<sup>26</sup> For the necessary allegations in a creditors' petition consult Sections Two, Three, Four, Five (if against a partner-

ship), Eighteen, and Fifty-nine. See also General Orders V, VI, VII, IX, XI, and Equity Rules XX to XXV, XXVIII to XXX. See also *Mather v. Coe*, 1 Am. B. R. 504, 92 Fed. 333.

United States of America, District of ....., ss.:

....., being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, ....., this .... day of ....., 19....

.....,

.....

[Official character.]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

**Form No. 4.**

**Order to Show Cause upon Creditors' Petition.<sup>27</sup>**

In the District Court of the United States for the ..... District of .....

<p>IN THE MATTER OF</p> <p>.....</p>
--------------------------------------

In Bankruptcy.

Upon consideration of the petition of ..... that ..... be declared a bankrupt, it is ordered, that the said ..... do appear at this court, as a court of bankruptcy, to be holden at ....., in the district aforesaid, on the ..... day of ....., at .... o'clock in the ..... noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpoena, be served on said ....., by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable ....., judge of the said court, and the seal thereof, at ....., in said district, on the ..... day of ....., A. D. 19....

{ Seal of  
the court }

.....

Clerk.

<sup>27</sup> This form is archaic. It is an adaptation from Form No. 57, under the law of 1867, and does not fit either the present law

or the general orders. It is now rarely used. Form No. 5 is enough. Consult Section Eighteen of this work.

## Form No. 5.

Subpoena to Alleged Bankrupt.<sup>28</sup>

United States of America, ..... District of .....

To ....., in said district, greeting:

For certain causes offered before the district court of the United States of America within and for the ..... district of ....., as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear<sup>29</sup> before our said district court to be holden at ....., in said district, on the ..... day of ....., A. D. 19..., ..... to answer<sup>30</sup> to a petition filed by ..... in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said district court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable ....., judge of said court, and the seal thereof, at ....., this ..... day of ....., A. D. 19...

{ Seal of  
the court }

.....,  
Clerk.<sup>31</sup>

## Form No. 6.

Denial of Bankruptcy.<sup>32</sup>

In the District Court of the United States for the ..... District of.....

IN THE MATTER OF

.....

In Bankruptcy.

At ....., in said district, on the ..... day of ....., A. D. 19...

28. This is always issued and is tested by the clerk. See General Order III. For method of service, see Section Eighteen, *ante*, and note that the time within which to appear has been shortened by the amendatory act of 1903, as has the time for service by publication.

29. For methods of appearance, see Section Eighteen.

30. For the memorandum to be put at the bottom of this subpoena, see Equity Rule

XII. Consult also for process and service, Equity Rules VII to XVI.

31. For "Order Directing Service by Publication," see Form No. 121; for "General Appearance," see Form No. 122; for "Appearance by Intervening Creditor," see Form No. 123; and for other forms useful in involuntary proceedings, see "Supplementary Forms," *post*, and Hagar and Alexander's Bankruptcy Forms.

32. Consult for available defenses to a

And now the said ..... appears, and denies<sup>33</sup> that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court,<sup>34</sup> [or, he demands that the same may be inquired of by a jury.]<sup>35</sup>

Subscribed and sworn to before me, this .... day of ....., A. D. 19..

.....,

[Official character.]

**Form No. 7.<sup>36</sup>**

**Order for Jury Trial.<sup>37</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

At ....., in said district, on the ..... day of ....., A. D. 19...

Upon the demand in writing filed by ....., alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.<sup>38</sup>

{ Seal of  
the court }

.....,  
Clerk.

creditors' petition, Sections Two, Three, Four, Five (if against a partnership), Eighteen, and Fifty-nine; for time to file denial (answer), see § 18-b, as amended by the act of 1903. See also *Mather v. Coe*, 1 Am. B. R. 504, 92 Fed. 333.

33. For form of "General Answer," see Form No. 127; for "Answer Alleging More than Twelve Creditors," see Form No. 128; and for other useful forms in involuntary cases, see "Supplementary Forms," *post*.

34. For pleadings in equity, see Equity Rules generally.

35. The demand for a jury trial is often in a separate paper; see Form No. 126.

36. This order is not used in the southern district of New York.

37. This follows as a matter of course the timely filing of a denial in the shape of Form No. 6, provided the denial puts at issue either insolvency or the commission of an act of bankruptcy; or, if such an issue is made by an answer and demand of jury trial in the method suggested by Forms Nos. 126 and 127.

38. For practice on jury trials consult Section Nineteen, *ante*. See also General Order III. For costs in contested adjudications, see General Order XXXIV.



## Form No. 8.

Special Warrant to Marshal.<sup>39</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the .... day of ....., A. D. 19....., filed against ....., of the county of ..... and State of ....., in said district, and said petition is still pending; and whereas it satisfactorily appears that said ..... has committed an act of bankruptcy [*or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value*], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said ....., and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable ....., judge of the said court, and the seal thereof, at ....., in said district, on the ..... of ....., A. D. 19...

{ Seal of }  
{ the court. }

.....,  
Clerk.

## RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named ....., and of all his deeds, books of account, and papers which have come to my knowledge.

.....,  
Marshal [*or Deputy Marshal*].

<sup>39</sup> This form is somewhat of an inheritance from the law of 1867. It is useful in seizures of property authorized by §§ 3-e and 69. It is suggestive when a receiver is appointed under § 2 (3) and given power to take possession of the bankrupt's prop-

erty under § 2(15). See the appropriate Sections of this work; also General Orders III, X, XIX, and Equity Rule XV. The oath at the end of the form may be taken before any of the officers mentioned in § 80.

*Fees and Expenses.*

- |   |  |  |
|---|--|--|
| 1. Service of warrant.....  |  |  |
| 2. Necessary travel, at the rate of six cents a mile each way.....            |  |  |
| 3. Actual expenses in custody of property and other services, as follows..... |  |  |
| [Here state the particulars.]   |  |  |

.....,  
*Marshal* [or *Deputy Marshal*].

District of ....., A. D. 19...

Personally appeared before me the said ....., and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

.....,  
*Referee in Bankruptcy.*

**Form No. 9.****Bond of Petitioning Creditor.<sup>40</sup>**

Know all men by these presents: That we, ....., as principal, and ....., as sureties, are held and firmly bound unto ....., in the full and just sum of ..... dollars, to be paid to the said ....., executors, administrators, or assigns to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ..... day of ....., A. D. 19...

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ..... district of ..... against the said ....., and the said ..... has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said ....., subject to the further orders of said district court:

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said ..... shall indemnify the said ..... for such damages as he shall sustain in the event such seizure

<sup>40</sup> This bond seems to conform to the requirements of § 69. It can be used also in seizures under § 2-a. See foot-note to Form No. 8.

shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in

presence of — ..... [SEAL.]  
 ..... [SEAL.]  
 ..... [SEAL.]

Approved this ..... day of ....., A. D. 19...

.....,  
*District Judge.*

### Form No. 10.

#### Bond to Marshal.<sup>41</sup>

Know all men by these presents: That we, ....., as principal, and ....., as sureties, are held and firmly bound unto ....., marshal of the United States for the ..... district of ..... in the full and just sum of ..... dollars, to be paid to the said ....., his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ..... day of ....., A. D. 19...

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ..... district of ....., against the said ....., and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said ....., subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court, upon a petition of said ....., has ordered the said property to be released to him:

Now, therefore, if the said property shall be released accordingly to the said ....., and the said ....., being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the

presence of — ..... [SEAL.]  
 ..... [SEAL.]  
 ..... [SEAL.]

Approved this ..... day of ....., A. D. 19...

.....,  
*District Judge.*

<sup>41</sup> See foot-notes to Forms Nos. 8 and 9. This bond seems to apply only to § 69.

Form No. 11.

Adjudication that Debtor is Not Bankrupt.<sup>49</sup>

In the District Court of the United States for the ..... District of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p>	}	In Bankruptcy.
--	---	----------------

At ....., in said district, on ..... day of ....., A. D. 19..., before the Honorable ....., judge of the ..... district of .....

This cause came on to be heard at ....., in said court, upon the petition of ..... that ..... be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.*]

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said ..... was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable ....., judge of said court, and the seal thereof, at ....., in said district, on the ..... day of ....., A. D. 19...

{ Seal of  
the court. }

.....,  
Clerk.

<sup>49</sup> This form is the converse of Form No. 12. See, generally, Sections Two, Three, Four, Five (if against a partnership), Eighteen, and Fifty-nine; General Orders

IV, V, VI, VII, XXXIV; and compare Equity Rules LXXXV and LXXXVI. Numerous forms in point by analogy will be found in "Supplementary Forms," *post*.

**Form No. 12.****Adjudication of Bankruptcy.<sup>43</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt* .

} In Bankruptcy.

At ....., in said district, on the ..... day of ....., A. D. 19..., before the Honorable ....., judge of said court in bankruptcy, the petition of ..... that<sup>43a</sup> ..... be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said ..... is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable ....., judge of said court, and the seal thereof, at ....., in said district, on the ..... day of ..... A. D. 19...

{ Seal of  
the court. }

.....,  
Clerk.

**Form No. 13.****Appointment, Oath, and Report of Appraisers.<sup>44</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt* .

} In Bankruptcy.

It is ordered that ....., of ....., ....., of ....., and ....., of ....., three disinterested per-

<sup>43</sup>. The use of this form is quite universal. When the adjudication is made by the referee (§ 38-a(1)), it should follow the framework of the numerous referee orders in "Supplementary Forms," *post*, note the absence of the judge from the district or the division, the receipt of an order of reference from the clerk certifying that fact (§ 18-f-g; Form No. 15), and omit the

teste clause, but otherwise follow the above phraseology. See, generally, in Sections Eighteen and Thirty-eight.

<sup>43a</sup>. If the adjudication is of a partnership and the partners, see Section Five, *ante*, for the proper words here, and insert the same in the title.

<sup>44</sup>. See Section Seventy and compare General Order XVII.

sons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this ..... day of ....., A. D. 19...

.....,  
*Referee in Bankruptcy.*<sup>45</sup>

..... District of ....., ss.:

Personally appeared the within-named ..... and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

.....  
.....  
.....

Subscribed and sworn to before me, this ..... day of ....., A. D. 19...

.....,  
[Official character.]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:<sup>46</sup>

	Dollars.	Cents.

In witness whereof we hereunto set our hands, at ....., this ..... day of ....., A. D. 19...

.....  
.....  
.....

45. The appraisers can be sworn in before any officer mentioned in § 20.  
46. The schedule here is much too short. It is thought that there should be at least two schedules, one for real estate and the other for personal property, and that the appraisers should set out the various items with much of the particularity required of

a bankrupt (§ 7[8]). A statement of the basis of valuation, as "at cost," or "25% off cost," and of the incumbrances, if any, will also prove valuable to the officers and the creditors. At the end of the schedules there should also be a "summary statement."

## Form No. 14.

Order of Reference.<sup>47</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt* .

} In Bankruptcy.

Whereas ....., of ....., in the county of ..... and district aforesaid, on the ..... day of ....., A. D. 19..., was duly adjudged a bankrupt upon a petition filed in this court by [*or, against*] him on the ..... day of ....., A. D. 19..., according to the provisions of the acts of Congress relating to bankruptcy.

It is thereupon ordered, that said matter be referred to ....., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said ..... shall attend before said referee on the ..... day of ..... at ....., and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said ..... bankruptcy.

Witness the Honorable ....., judge of the said court, and the seal thereof, at ..... in said district, on the ..... day of ....., A. D. 19...

{ Seal of  
the court }

.....,  
*Clerk.*

<sup>47</sup>. This order is discussed in the text. See Sections Eighteen and Twenty-two. Consult also General Order XII.

**Form No. 15.****Order of Reference in Judge's Absence.<sup>48</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

Whereas on the ..... day of ....., A. D. 19..., a petition was filed to have ....., of ....., in the county of ..... and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy*, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to ....., one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said ..... shall attend before said referee on the ..... day of ....., A. D. 19..., at .....

Witness my hand and the seal of the said court, at ....., in said district, on the ..... day of ....., A. D. 19...

{ Seal of  
the court }

.....,

Clerk.

**Form No. 16.****Referee's Oath of Office.<sup>49</sup>**

I, ....., do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

Subscribed and sworn to before me, this ..... day of ....., A. D. 19...

.....,

District Judge.

<sup>48</sup>. See foot-notes to Form No. 12.<sup>49</sup>. See Section Thirty-six. This oath can be taken before any officer mentioned in § 30.



**Form No. 17.****Bond of Referee.<sup>50</sup>**

Know all men by these presents: That we, ..... of ..... , as principal, and ..... of ..... and ..... of ..... , as sureties, are held and firmly bound to the United States of America in the sum of ..... dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ..... day of ..... , A. D. 19...

The condition of this obligation is such that whereas the said ..... has been on the ..... day of ..... , A. D. 19... , appointed by the Honorable ..... , judge of the district court of the United States for the ..... district of ..... , a referee in bankruptcy in and for the county of ..... , in said district, under the acts of Congress relating to bankruptcy:

Now, therefore, if the said ..... shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed  
in the presence of—

..... [L. S.]  
..... [L. S.]  
..... [L. S.]

Approved this ..... day of ..... , A. D. 19...

.....

*District Judge.*

**50.** This bond is required by § 50.

Form No. 18.

Notice of First Meeting of Creditors.<sup>51</sup>

In the District Court of the United States for the ..... District of .....

<p>IN THE MATTER OF</p> <p>.....</p> <p><i>Bankrupt .</i></p>	}	<p>In Bankruptcy.</p>
---	---	-----------------------

To the creditors of ....., of ....., in the county of ....., and district aforesaid, a bankrupt.

Notice is hereby given that on the .... day of ....., A. D. 19..., the said ..... was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at ..... in ....., on the ..... day of ....., A. D. 19..., at .... o'clock in the ..... noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

.....,

*Referee in Bankruptcy.*

....., 19...

51. The use of this form is quite universal. With some changes it can be adapted to fit all of the notices given by the referee, and not by the clerk. See Forms No. 176, 177, 178, in "Supplementary Forms," *post*. For proofs of mail-

ing and of publication, see Forms Nos. 179, 180. For notices given by the clerk in the form of orders to show cause, see Forms Nos. 96, 108, 138. Consult also Section Fifty-eight, generally, and General Order XXI (2).

## Form No. 19.

List of Debts Proved at First Meeting.<sup>22</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

At ....., in said district, on the ..... day of ....., A. D. 19...., before ....., referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolla.	Cts.

.....,

*Referee in Bankruptcy.*

<sup>22</sup> This form is archaic. It does not fit the present law or practice, and is rarely, if ever, used. See General Order XXIV, which is also practically a dead letter, and

Sections Thirty-nine and Fifty-seven of this work. The referees keep a list in their claim book and transmit dividend lists to the trustee.

## Form No. 20.

General Letter of Attorney in Fact when Creditor is not Represented by Attorney at Law.<sup>53</sup>  
 In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

To .....,

.....:

I, ....., of ....., in the county of ..... and State of ....., do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the ..... day of ....., A. D. 19...

....., [L. s.]

Signed, sealed, and delivered in presence of—

.....,

Acknowledged before me, this ..... day of ....., A. D. 19...

.....,

[Official character.]

<sup>53.</sup> See §§ 1 (9), 57, and General Orders IV and XXI (5). Consult also discussion of the necessity of power of attorney to an

attorney in law representing a creditor in a bankruptcy proceeding, in Section Fifty-six, *ante*.

## Form No. 21.

Special Letter of Attorney in Fact.<sup>54</sup>

IN THE MATTER OF	}	In Bankruptcy.
.....		
<i>Bankrupt .</i>		

To .....,

.....:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ....., on the ..... day of ....., before ....., or any adjournment thereof, and then and there ..... for ..... and in ..... name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

....., [L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the ..... day of ....., A. D. 19...

Signed, sealed, and delivered in presence of —

.....,

Acknowledged before me, this ..... day of ....., A. D. 19...

.....,

[Official character.]

<sup>54</sup> See foot-note to Form No. 20. This form is for use when the attorney is not given general authority. It is rarely used.

Form No. 22.

Appointment of Trustee by Creditors.<sup>55</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF	} In Bankruptcy.
.....	
Bankrupt .	

At ....., in said district, on the ..... day of ....., A. D. 19..., before ....., referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [here insert the names of the newspapers in which notice was published], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint ..... of ....., in the county of ..... and State of ....., to be the trustee.. of the said bankrupt's estate and effects.

Signatures of creditors.	Residence of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered, that the above appointment of trustee.. be, and the same is hereby approved.<sup>56</sup>

.....,  
Referee in Bankruptcy.

55. Cross-references: For who appoints trustees, §§ 2 (17), 44; for qualifications of trustees, § 45; for meetings of creditors, § 55; for who may vote at such meetings, § 56; for notices of meetings of creditors, § 58-a-b. See also General Orders XIII, XIV, XV.

56. This form is also somewhat archaic. It is not often used. Referees having the

right to approve or disapprove the choice of creditors (General Order XIII), a brief order of approval and fixing the bond, but without requiring the signatures of creditors, is suggested as a substitute. See Form No. 160. For order dispensing with the appointment of trustee (General Order XV), see Form No. 27 and compare Form No. 77.

**Form No. 23.****Appointment of Trustee by Referee.<sup>57</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

} In Bankruptcy.

*Bankrupt .*

At ....., in said district, on the ..... day of ....., A. D. 19..., before ....., referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [here insert the names of the newspapers in which notice was published] I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint ....., of ....., in the county of ..... and State of ....., as trustee of the same.

.....,  
*Referee in Bankruptcy.*

**Form No. 24.****Notice to Trustee of His Appointment.<sup>58</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

} In Bankruptcy.

*Bankrupt .*

To ....., of ....., in the county of ....., and district aforesaid:

<sup>57</sup> See foot-note to Form No. 22. Form No. 160 can easily be adapted to fit the facts outlined above.

<sup>58</sup> This form seems to be required by General Order XVI. It is, however, little used. As to the trustee's bond, see § 50.

I hereby notify you that you were duly appointed trustee [or one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the ..... day of ....., A. D. 19... and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at ..... dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at ..... the ..... day of ....., A. D. 19...

.....,

*Referee in Bankruptcy.*

**Form No. 25.**

**Bond of Trustee.<sup>59</sup>**

Know all men by these presents: That we, ....., of ....., as principal, and ....., of ....., and ....., as sureties, are held and firmly bound unto the United States of America in the sum of ..... dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ..... day of ....., A. D. 19...

The condition of this obligation is such, that whereas the above-named ..... was, on the ..... day of ....., A. D. 19..., appointed trustee in the case pending in bankruptcy in said court, wherein ..... is the bankrupt, and he, the said ....., has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said ....., trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in

presence of —

.....  
.....  
.....

....., [SEAL.]

....., [SEAL.]

....., [SEAL.]

<sup>59</sup> The court must "receive" evidence of the actual value of the securities. Where they are natural persons this can best be

done by adding an affidavit as to property to the bond. Thus see Form No. 167, post.



**Form No. 26.****Order Approving Trustee's Bond.<sup>60</sup>**

At a court of bankruptcy, held in and for the ..... District of .....,  
at ....., this ..... day of ....., 19...

Before ....., referee in bankruptcy, in the District Court  
of the United States for the ..... District of .....

IN THE MATTER OF

.....

} In Bankruptcy.

*Bankrupt .*

It appearing to the court ....., of ....., and in said  
district, has been duly appointed trustee of the estate of the above-named  
bankrupt, and has given a bond with sureties for the faithful performance  
of his official duties, in the amount fixed by the creditors [or by order of  
the court], to wit, in the sum of ..... dollars, it is ordered that the said  
bond be, and the same is hereby, approved.

.....,

*Referee in Bankruptcy.*

**Form No. 27.****Order that No Trustee be Appointed.<sup>61</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

} In Bankruptcy.

*Bankrupt .*

It appearing that the schedule of the bankrupt discloses no assets, and  
that no creditor has appeared at the first meeting, and that the appointment

<sup>60</sup>. This order is not so phrased as to give certain important facts when recorded in a record office (§ 21-e). Hence Form No. 168, *post*. See also Sections Twenty-one and Fifty of this work.

<sup>61</sup>. See General Order XV and foot-notes. Consult also Sections Six and Forty-seven. If this form is used it may, perhaps, be supplemented as to the bankrupt's exempt property by Form No. 109.

of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

.....,

*Referee in Bankruptcy.*

**Form No. 28.**

**Order for Examination of Bankrupt.<sup>62</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

At ....., on the ..... day of ....., A. D. 19...

Upon the application of ....., trustee of said bankrupt [or creditor of said bankrupt], it is ordered that said bankrupt attend before ....., one of the referees in bankruptcy of this court, at ..... on the ..... day of ....., at ..... o'clock in the ..... noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

.....,

*Referee in Bankruptcy.*

<sup>62</sup> See Sections Seven and Twenty-one, also Section Twelve. Compare General Order XII (1). This form is rarely used; the bankrupt appears without a formal

order and is examined at the first meeting of creditors or adjournments thereof. Where the testimony of one not the bankrupt is desired Form No. 30 is used.

## Form No. 29.

Examination of Bankrupt or Witness.<sup>63</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

} In Bankruptcy.

*Bankrupt .*

At ....., in said district, on the ..... day of ....., A. D. 19..., before ....., one of the referees in bankruptcy of said court, ....., of ....., in the county of ....., and State of ....., being duly sworn and examined at the time and place above mentioned, upon his oath says: [*Here insert substance of examination of party.*]

.....,  
*Referee in Bankruptcy.*

## Form No. 30.

Summons to Witness.<sup>64</sup>

To .....

Whereas ....., of ....., in the county of ....., and State of ....., has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the district court of the United States for the ..... district of .....

These are to require you, to whom this summons is directed, personally to be and appear before ....., one of the referees in bankruptcy of the said court, at ....., on the .... day of ....., at ... o'clock in the ..... noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable ....., judge of said court, and the seal thereof at ....., this ..... day of ....., A. D. 19...

.....,  
*Clerk.*

<sup>63</sup>. This is archaic. The bankrupt or the witness is sworn and his examination taken down by a stenographer and transcribed, and the testimony, after being read over and signed, is made a part of the referee's record-book. Consult General Order XXII; also §§ 7(9), 21, 33-a(2), 41-a.

<sup>64</sup>. Cross-references: To the law,

§§ 7(9), 21, 52-b; to the general orders, III, XXII; to the forms, No. 28. See also, for designation of persons other than the marshal to serve subpoenas. Equity Rule XV, though the phrasing of the Return, *supra*, seems to indicate that any person may serve a subpoena without specific designation.

## Return of Summons to Witness.

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy.

*Bankrupt .*

On this ..... day of ....., A. D. 19..., before me came .....,  
 ....., of ....., in the county of ..... and State of .....,  
 and makes oath, and says that he did, on ....., the ..... day of .....,  
 A. D. 19..., personally serve ....., of ....., in the  
 county of ..... and State of ....., with a true copy of the summons  
 hereto annexed, by delivering the same to him; and he further makes oath  
 and says that he is not interested in the proceeding in bankruptcy named in  
 said summons.

.....

Subscribed and sworn to before me, this ..... day of ....., A. D.  
 19...

.....

## Form No. 31.

Proof of Unsecured Debt.<sup>65</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy.

*Bankrupt .*

At ....., in said district of ....., on the ..... day of  
 ....., A. D. 19..., came ....., of ....., in the  
 county of ....., in said district of ....., and made oath, and

<sup>65</sup>. Consult Section Fifty-seven. See also General Order XXI. If this form does not fit the latter special clauses must usually be added. Thus (1) that no note

is held to or judgment entered on the debt, and (2) concerning the average due date on an account maturing at different times, and (3) if on open account, when such

says that ....., the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of ..... dollars; that the consideration of said debt is as follows: .....

.....  
 that no part of said debt has been paid [except .....];  
 .....];  
 that there are no set-offs or counterclaims to the same [except .....];  
 .....];  
 and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

.....,  
*Creditor.*

Subscribed and sworn to before me, this ..... day of ....., A. D. 19...

.....,  
 [Official character.]

**Form No. 32.**

**Proof of Secured Debt.<sup>66</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

At ....., in said district of ....., on the ..... day of ....., A. D. 19..., came ....., of ....., in the county of ....., in said district of ....., and made oath, and says that

account became or will become due, and (4) if by a corporation (see Form No. 33) why the claim is not verified by its treasurer, and (5) if the claim has been assigned after the bankruptcy, certain other allegations as to the assignment. For these special clauses see Form No. 170.

<sup>66</sup> This can be sworn to before persons "authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken." See § 20.

<sup>67</sup> See foot-notes to Form 31.

....., the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of ..... dollars; that the consideration of said debt is as follows .....; that no part of said debt has been paid [except .....]; that there are no set-offs or counterclaims to the same [except .....]; and that the only securities held by this deponent for said debt are the following: .....

.....,  
*Creditor.*

Subscribed and sworn to before me, this ..... day of ....., A. D. 19...

.....,  
[Official character.]

### Form No. 33.

#### Proof of Debt Due Corporation.<sup>68</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

In Bankruptcy.

*Bankrupt .*

At ....., in said district of ....., on the ..... day of ....., A. D. 19..., came ....., of ....., in the county of ....., and State of ....., and made oath, and says that he is ..... of the ....., a corporation incorporated by and under the laws of the State of ....., and carrying on business at ....., in the county of ..... and State of ....., and that he is duly authorized to make

<sup>68</sup> See foot-notes to Form 31.

Proof by corporation should be made by treasurer. May be made through its agent or attorney when sufficient reason is shown why it is not made by treasurer, or if it has none, by the officer whose duties most nearly correspond to those of treasurer as provided by General Order No. XXI. Matter of Reboulin Fils Co. (D. C., N. J.), 19

Am. B. R. 215, — Fed. —. When proof is not made by the treasurer insert the following clause: "That the reason this proof is not made by the treasurer is that . . . etc. [stating reason], and that deponent is an officer of such corporation whose duties most nearly correspond to those of treasurer."

this proof, and says that the said . . . . ., the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of . . . . . dollars; that the consideration of said debt is as follows: . . . . . ; that no part of said debt has been paid [except . . . . .] ; that there are no set-offs or counterclaims to the same [except . . . . .] ; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

. . . . .,  
 . . . . . of said Corporation.

Subscribed and sworn to before me, this . . . . . day of . . . . ., A. D. 19 . . .

. . . . .,  
 [Official character.]

**Form No. 34.**

**Proof of Debt by Partnership.<sup>68</sup>**

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF  . . . . .  <i>Bankrupt .</i>	} In Bankruptcy.
--	------------------

At . . . . ., in said district of . . . . ., on the . . . . . day of . . . . ., A. D. 19 . . ., came . . . . ., of . . . . ., in the county of . . . . ., in said district of . . . . ., and made oath, and says that he is one of the firm of . . . . ., consisting of himself and . . . . ., of . . . . ., in the county of . . . . . and State of . . . . . ; that the said . . . . ., the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of . . . . . dollars; that the consideration of said

<sup>68</sup>. See foot-notes to Form No. 31.

debt is as follows: .....  
 .....;  
 that no part of said debt has been paid [except .....];  
 that there are no set-offs or counterclaims to the same [except.....  
 .....]; and this deponent has not, nor has his said firm, nor has any  
 person by their order, or to this deponent's knowledge or belief, for their  
 use, had or received any manner of security for said debt whatever.

.....,  
*Creditor.*

Subscribed and sworn to before me, this ..... day of ....., A. D.  
 19...

.....,  
 [Official character.]

### Form No. 35.

#### Proof of Debt by Agent or Attorney.<sup>70</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy.

*Bankrupt .*

At ....., in said district of ....., on the ..... day of .....,  
 A. D. 19..., came ....., of ....., in the county of  
 ....., and State of ....., attorney [or authorized agent] of  
 ....., in the county of ....., and State of ....., and made  
 oath and says that ....., the person by [or against] whom a  
 petition for adjudication of bankruptcy has been filed, was at and before the  
 filing of said petition, and still is, justly and truly indebted to the said  
 ....., in the sum of ..... dollars; that the consideration  
 of said debt is as follows: .....  
 .....;  
 that no part of said debt has been paid [except.....  
 .....];  
 and that this deponent has not, nor has any person by his order, or to this  
 deponent's knowledge or belief, for his use had or received any manner of

<sup>70</sup>. See foot-notes to Form No. 31.



security for said debt whatever. And this deponent further says, that this deposition cannot be made by the claimant in person because .....  
.....  
and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

Subscribed and sworn to before me, this ..... day of ....., A. D. 19...

.....,  
[Official character.]

Form No. 36.

Proof of Secured Debt by Agent.<sup>71</sup>

In the District Court of the United States for the ..... District of ....

IN THE MATTER OF	} In Bankruptcy.
.....	
Bankrupt .	

At ....., in said district of ....., on the ..... day of ....., A. D. 19..., came ....., of ....., in the county of ....., and State of ....., attorney [or authorized agent] of ....., in the county of ....., and State of ....., and made oath, and says that ....., the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said ..... in the sum of ..... dollars; that the consideration of said debt is as follows: .....  
.....;  
that no part of said debt has been paid [except.....];  
.....;  
that there are no set-offs or counterclaims to the same [except.....];  
.....;

71. See foot-notes to Form No. 31.

and that the only securities held by said ..... for said debt are the following .....  
 .....;  
 and this deponent further says that this deposition cannot be made by the claimant in person because .....  
 .....  
 and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

.....

Subscribed and sworn to before me, this ..... day of ....., A. D. 19...

.....,  
 [Official character.]

**Form No. 37.**

**Affidavit of Lost Bill, or Note.<sup>72</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF  .....  <i>Bankrupt .</i>	}	In Bankruptcy.
--	---	----------------

On this ..... day of ....., A. D. 19..., at ....., came ..... of ....., in the county of ....., and State of ....., and makes oath and says that the bill of exchange [*or note*], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, .....  
 .....  
 .....  
 and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said ....., or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or note*], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

<sup>72</sup> See foot-notes to Form No. 31.

*Bill or note above referred to.*

Date.	Drawer or maker.	Acceptor.	Sum.

.....

Subscribed and sworn to before me, this ..... day of ....., A. D. 19...

.....,

[*Official character.*]

**Form No. 38.**

**Order Reducing Claim.<sup>73</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

At ....., in said district, on the ..... day of ....., A. D. 19...

Upon the evidence<sup>74</sup> submitted to this court upon the claim of ..... against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of ....., as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ....., and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the ..... day of ....., A. D. 19...].

.....,

*Referee in Bankruptcy.*

73. See, generally, Section Fifty-seven, *etc.* Read also § 2(2), and General Order XXI(6).

74. For forms for petition and notice on an application to reduce or expunge, see Forms Nos. 171 and 172, *post*.

**Form No. 39.****Order Expunging Claim.<sup>75</sup>**

In the District Court of the United States for the ..... District of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
--	---	----------------

At ....., in said district, on the ..... day of ....., A. D. 19...

Upon the evidence submitted to the court upon the claim of ..... against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

.....,

*Referee in Bankruptcy.*

**Form No. 40.**

**List of Claims and Dividends to be Recorded by Referee and by him Delivered to Trustee.<sup>76</sup>**

In the District Court of the United States for the ..... District of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
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At ....., in said district, on the ..... day of ....., A. D. 19...

<sup>75</sup> See foot-note to Form No. 38.

<sup>76</sup> This form fits into § 39-a(1). As a rule, however, dividend sheets are prepared by the trustee from the files and record-book of the referee. The practice here is somewhat archaic. See Forms Nos. 166 and

168 for use of a part of the form in connection with an order declaring a dividend and ordering it paid and the practice there outlined. Consult also, generally, Sections Thirty-nine and Sixty-five, *ante*.

*A list of debts proved and claimed under the bankruptcy of ..... with ..... dividend at the rate of ..... per cent this day declared thereon by ....., a referee in bankruptcy.*

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

.....,  
*Referee in Bankruptcy.*

### Form No. 41.

#### Notice of Dividend.<sup>77</sup>

In the District Court of the United States for the ..... District of ~~.....~~

<p><b>IN THE MATTER OF</b></p> <p>.....</p> <p><i>Bankrupt .</i></p>	}	In Bankruptcy.
--	---	----------------

At ....., on the ..... day of ....., A. D. 19...

To .....,

Creditor of ....., bankrupt:

I hereby inform you that you may, on application at my office, ....., on the ..... day of ....., or on any day thereafter, between the hours of ....., receive a warrant for the ..... dividend due to you out of the above estate. If you cannot personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

.....,  
*Trustee.*

<sup>77</sup> This form is an inheritance from the law of 1867. It is rarely used. Consult, generally, Sections Thirty-nine and Fifty-seven, and for the notice now required, Section Fifty-eight. See also § 65 and General Order XXIX.

For notice of final meeting, see Form No. 176, which, by the substitution of the dividend clause in Form No. 177, can be adapted to a notice for the declaration and payment of a dividend. Compare also Forms Nos. 162, 164, 165.

Creditor's Letter to Trustee.

To .....,

Trustee in bankruptcy of the estate of ....., bankrupt:

Please deliver to ..... the warrant for dividend payable out of the said estate to me.

.....,

Creditor.

Form No. 42.

Petition and Order for Sale by Auction of Real Estate.<sup>78</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

Bankrupt .

Respectfully represents ....., trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [*Here describe it and its estimated value*] should be sold by auction, in lots or parcels, and upon terms and conditions, as follows: .....

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this ..... day of ....., A. D. 19...

.....,

Trustee.

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing* ..... in favor of said

78. Read Section Seventy, *ante*, and consult General Order XVIII on sales. See also for notice § 58-a (4) and the sale clause in Form No. 177, when inserted, as there explained, in Form No. 176.

It is also suggested that an adaptation of this form to the framework of Forms Nos. 190 and 191, or if after notice, to Forms Nos. 190 and 193, will be more in accord with modern methods and the practice outlined in the law and the general orders.

Use of form.—In order to bring about a

public sale of bankrupt's assets, Official Form No. 42 should be followed, which prescribes a petition by the trustee to the referee asking leave to sell the property at public sale. Notice of such petition is given to creditors and on the return thereof the referee if he sees fit, directs a sale which is then carried on by the trustee without further notice. In re Nevada-Utah Mines & Smelters Corporation (D. C., N. Y.), 28 Am. B. R. 409, *affd.* (C. C. A., 2d Cir.), 29 Am. B. R. 754.

petition and ..... in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this ..... day of ....., A. D. 19...

.....,  
Referee in Bankruptcy.

**Form No. 43.**

**Petition and Order for Redemption of Property from Liens**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

} In Bankruptcy.

*Bankrupt .*

Respectfully represents ....., trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*Here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or if the property be personal property, has been pledged or deposited and is subject to a lien*] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ....., being the amount of said lien, in order to redeem said property therefrom.

Dated this ..... day of ....., A. D. 19...

.....,  
Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being

79. The redemption of property from liens is not common under the present law. This form, however, fits into General Order XXVIII, which is an inheritance from the

law of 1867. See, generally, Sections Twenty-seven and Sixty-seven. As to notice, see § 58-a(7). See also foot-note to Form No. 42.

represented thereat [or after hearing ..... in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ....., being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this ..... day of ....., A. D. 19...

.....,

*Referee in Bankruptcy.*

**Form No. 44.**

**Petition and Order for Sale Subject to Lien.<sup>30</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

Respectfully represents ....., trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*Here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien, or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this ..... day of ....., A. D. 19...

.....,

*Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [or after hearing ..... in favor of said petition and ..... in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate

<sup>30</sup>. See foot-notes to Forms Nos. 42 and 43. As to effect of failure to follow this form, see *In re Thockmorton* (C. C. A., 6th Cir.), 28 Am. B. R. 487.



specified in the foregoing petition, by auction [*or*, at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this ..... day of ....., A. D. 19...

.....,

*Referee in Bankruptcy.*

**Form No. 45.**

**Petition and Order for Private Sale.<sup>81</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

Respectfully represents ....., duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit, .....

.....

.....

it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit: .....

.....

.....

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this ..... day of ....., A. D. 19...

.....,

*Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ..... in favor of said petition and ..... in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each

<sup>81</sup> See sections of the statute and Sections of this work, referred to in the footnotes to Forms Nos. 42, 43, and 44. See also General Order XVIII(2).

article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this ..... day of ....., A. D. 19...

.....,

*Referee in Bankruptcy.*

**Form No. 46.**

**Petition and Order for Sale of Perishable Property.<sup>82</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

} In Bankruptcy.

*Bankrupt .*

Respectfully represents ..... the said bankrupt, [*or, a creditor, or the receiver, or the trustee of the said bankrupt's estate*].

That a part of the said estate, to wit,.....

.....

now in ....., is perishable, and that there will be loss if the same is not sold immediately.

Wherefore he prays the court to order that the same be sold immediately as aforesaid.

Dated this ..... day of ....., A. D. 19...

.....

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt, [*or without notice to the creditors*], now, after due hearing, no adverse interest being represented thereat, [*or after hearing* ..... in favor of said petition and ..... in opposition thereto] I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this ..... day of ....., A. D. 19...

.....,

*Referee in Bankruptcy.*

<sup>82</sup>. See foot-notes to Forms Nos. 42, 43, 44, and 45, and, as to sales of perishable property generally, Sections Fifty-eight and

Seventy, ante, and General Order XVIII(3).

## Form No. 47.

Trustee's Report of Exempted Property.<sup>83</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF	}	In Bankruptcy.
.....		
<i>Bankrupt .</i>		

At ....., on the ..... day of ....., 19...

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolla.	Cts.
Military uniform, arms, and equipments. Property exempted by State laws(2)....			

.....,

*Trustee.*

<sup>83</sup> See, generally, Sections Six, Seven, and Forty-seven, *ante*. Consult also §§ 2(11) and 70-b of the statute. This form fits into General Order XVII, but

should be verified and specify the State statute under which the exemptions are set apart. For other useful forms on exemptions, see Nos. 77, 78, 79 and 80.

## Form No. 48.

Trustee's Return of No Assets.<sup>84</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

At ....., in said district, on the ..... day of ....., A. D. 19...

On the day aforesaid, before me comes ....., of ....., in the county of ..... and State of ....., and makes oath and says that he, as trustee of the estate and effects of the above-named bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ....., this ..... day of ....., A. D. 19...

.....,

*Referee in Bankruptcy.*<sup>85</sup>

<sup>84</sup> Consult, generally, Section Forty-seven; also General Order XVII. See also, for the other forms for trustees' reports, Forms Nos 165 and 167.

<sup>85</sup> This return should be signed by the trustee and verified, but not necessarily before the referee; see § 20.



## Form No. 50.

Oath to Final Account of Trustee.<sup>87</sup>

In the District Court of the United States for the ..... District of ~~.....~~

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

On this ..... day of ....., A. D. 19..., before me come .....,  
 ....., of ....., in the county of ..... and State of .....,  
 and makes oath, and says that he was, on the ..... day of ....., A. D.  
 19..., appointed trustee of the estate and effects of the above-named  
 bankrupt, and that as such trustee he has conducted the settlement of the  
 said estate. That the account hereto annexed, containing ..... sheets of  
 paper, the first sheet whereof is marked with the letter ..... [*reference*  
*may here also be made to any prior account filed by said trustee*] is true,  
 and such account contains entries of every sum of money received by said  
 trustee on account of the estate and effects of the above-named bankrupt ,  
 and that the payments purporting in such account to have been made by said  
 trustee have been so made by him. And he asks to be allowed for said  
 payments and for commission and expenses as charged in said accounts.

.....,

*Trustee.*

Subscribed and sworn to before me, at ....., in said ..... district  
 of ....., this ..... day of ....., A. D. 19...

.....,

[*Official character.*]

<sup>87</sup>. This form seems hardly necessary, save when used as suggested in the foot-note  
 to Form No. 49. See the practice outlined in Forms Nos. 162 and 163.

**Form No. 51.****Order Allowing Account<sup>88</sup> and Discharging Trustee.**

In the District Court of the United States for the ..... District of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
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The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered that the same be allowed, and that the said trustee be discharged of his trust.

.....,  
*Referee in Bankruptcy.*

**Form No. 52.****Petition for Removal of Trustee.<sup>89</sup>**

In the District Court of the United States for the ..... District of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
---	---	----------------

To the Honorable .....,

Judge of the District Court of the ..... District of .....

The petition of ....., one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that ....., heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [*Here set forth the particular cause or causes for which such removal is requested.*]

<sup>88</sup>. When the practice outlined in Forms Nos. 167 and 168 is followed, this form will not be used. It is to the same effect as a clause in Form No. 164. See Section Forty-seven and the foot-notes to Forms Nos. 49 and 50.

<sup>89</sup>. This form fits into General Orders XIII and XVII. Trustees being rarely removed it is not important. See §§ 2(17), 44 and 46.

Wherefore ..... pray that notice may be served upon said ....., trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

Form No. 53.

Notice of Petition for Removal of Trustee.<sup>90</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt* .

At ....., on the ..... day of ....., A. D. 19...  
To .....,

Trustee of the estate of ....., bankrupt:

You are hereby notified to appear before this court, at ....., on the ..... day of ....., A. D. 19..., at ... o'clock ... m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of ....., one of the creditors of said bankrupt, filed in this court on the ..... day of ....., A. D. 19..., in which it is alleged [*here insert the allegation of the petition*].

.....,  
Clerk.

Form No. 54.

Order for Removal of Trustee.<sup>91</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt*

Whereas ....., of ....., did on the ..... day of ....., A. D. 19..., present his petition to this court, praying that for

<sup>90</sup> See foot-note to Form No. 52.

<sup>91</sup> See foot-note to Form No. 53.



the reasons therein set forth, . . . . ., the trustee of the estate of said . . . . ., bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said . . . . . and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said . . . . . be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said . . . . . trustee [or, out of the estate of the said . . . . ., subject to prior charges].

Witness the Honorable . . . . ., judge of the said court, and the seal thereof, at . . . . ., in said district, on the . . . . day of . . . . ., A. D. 19 . . .

{ Seal of  
the court. }

. . . . .  
Clerk.

**Form No. 55.**

**Order for Choice of New Trustee.<sup>92</sup>**

In the District Court of the United States for the . . . . District of . . . . .

IN THE MATTER OF

. . . . .

In Bankruptcy.

*Bankrupt .*

At . . . . ., on the . . . . day of . . . . ., A. D. 19 . . .

Whereas by reason of the removal [or the death or resignation] of . . . . ., heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered that a meeting of the creditors of said bankrupt be held at . . . . ., in . . . . ., in said district, on the . . . . day of . . . . ., A. D. 19 . . ., for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

. . . . .  
Referee in Bankruptcy.

<sup>92</sup> See foot-note to Form No. 52.

## Form No. 56.

Certificate by Referee to Judge.<sup>93</sup>

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy.

I, . . . . ., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at . . . . ., the . . . . . day of . . . . ., A. D. 19 . . .

.....,

*Referee in Bankruptcy.*

## Form No. 57.

Bankrupt's Petition for Discharge.<sup>94</sup>

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy.

To the Honorable . . . . .,

Judge of the District Court of the United States

for the District of . . . . .:

. . . . ., of . . . . ., in the county of . . . . . and State of . . . . ., in said district, respectfully represents that on the . . . . . day of

<sup>93</sup> This form is hardly sufficient for the practice under the present law. Now the referee rarely certifies questions to the judge for decision. It suggests, however, the certificate on review. For certificates for referees in various matters, including

reviews, see Forms Nos. 97, 104, 109, 145, 158, 166, 169, in "Supplementary Forms," *post*. See also §§ 2(10), 39-a(5) and General Order XXVII. On reviews, consult Section Thirty-nine, *ante*.

<sup>94</sup> This form and the "Order of Notice

....., last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this ..... day of ....., A. D. 19...

.....,

*Bankrupt.*

**Order of Notice Thereon.**

District of ....., ss.:

On this ..... day of ....., A. D. 19..., on reading the foregoing petition, it is —

Ordered by the court, that a hearing be had upon the same on the ..... day of ....., A. D. 19..., before said court, at ....., in said district, at ... o'clock in the ..... noon; and that notice thereof be published in ....., a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable ....., judge of the said court, and the seal thereof, at ....., in said district, on the ..... day of ....., A. D. 19...

{ Seal of  
the court }

.....,

*Clerk.*

..... hereby depose, on oath, that the foregoing order was published in the ..... on the following ..... days, viz.:

On the ..... day of ..... and on the ..... day of ....., in the year 19...

.....

District of .....

Therein" following it has caused much confusion. The petition itself is within the law (see also General Order XXXI), and if verified by the bankrupt may be used. But the order, at least in so far as it requires the clerk to send to the creditors copies of the petition, is clearly wrong. See, generally, Sections Fourteen and Fifty-

eight, *ante*. See also suggested "Order to Show Cause," being Form No. 126. For other forms in discharge proceedings, see Forms Nos. 105, 106, 107, 108, 109, 110, 111, 112 and 113 in "Supplementary Forms," *post*. Consult also §§ 17, 38-a (4) and 58-a (2)-b.

....., 19...  
 Personally appeared ....., and made oath that the foregoing statement by him subscribed is true.

Before me,

.....,  
*[Official character.]*

I hereby certify that I have on this ..... day of ....., A. D. 19..., sent by mail copies of the above order, as therein directed.

.....,  
*Clerk.*

### Form No. 58.

#### Specification of Grounds of Opposition to Bankrupt's Discharge.<sup>95</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

....., of ....., in the county of ..... and State of ....., a party interested in the estate of said ....., bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition.*]

.....,  
*Creditor.*

### Form No. 59.

#### Discharge of Bankrupt.<sup>96</sup>

District Court of the United States,

..... District of .....

Whereas, ..... of ..... in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it

<sup>95</sup>. This form should have a verification. See, for another form, Form No. 111, *post*. For grounds of objection to discharge and the practice, consult Section Fourteen, *ante*. See also General Order XXXII.

<sup>96</sup>. This differs from the discharge certificate under the law of 1867. The use of this form is universal. For effect, consult Section Fourteen, *ante*.

is therefore ordered by this court that said ..... be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the ..... day of ....., A. D. 19..., on which day the petition for adjudication was filed ..... him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable ....., judge of said district court, and the seal thereof this ..... day of ....., A. D. 19...

{ Seal of  
the court. }

.....,  
*Clerk.*

### Form No. 60.

#### Petition for Meeting to Consider Composition.<sup>97</sup>

District Court of the United States for the ..... District of.....

IN THE MATTER OF

.....

} In Bankruptcy.

*Bankrupt .*

To the Honorable ....., Judge of the District Court of the United States for the ..... District of .....

The above-named bankrupt respectfully represent that a composition of ..... per cent. upon all unsecured debts, not entitled to a priority ..... in satisfaction of ..... debts has been proposed by ..... to ..... creditors, as provided by the acts of Congress relating to bankruptcy, and ..... verily believe that the said composition will be accepted by a majority in number and in value of ..... creditors whose claims are allowed.

Wherefore, he pray that a meeting of ..... creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

.....,  
*Bankrupt.*

<sup>97</sup>. This form is never used, as offer and acceptances are filed and application made at once to confirm. See Section Twelve, *ante*.

## Form No. 61.

Application for Confirmation of Composition.<sup>93</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

To the Honorable ....., Judge of the District Court of the  
United States for the ..... District of .....

At ....., in said district, on the ..... day of ....., A. D. 19..., now comes ....., the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [or at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ..... dollars, has been deposited, subject to the order of the judge, in the ..... National Bank, of ....., a designated depository of money in bankruptcy cases.

Wherefore the said ..... respectfully asks that the said composition may be confirmed by the court.

.....,

*Bankrupt.*

<sup>93</sup> This form, when verified by the bankrupt, is sufficient to bring a proposed composition before the court. Consult Section Twelve, generally. See also Forms Nos.

94, 95, 96, 97, 98, 99, 100, 101, 102 and 103 for a complete practice on composition. See also § 58-a(3) and General Order XXXII.

## Form No. 62.

Order Confirming Composition.<sup>20</sup>

In the District Court of the United States for the ..... District of .....,

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interest of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable ....., judge of said court, and the seal thereof, this ..... day of ....., A. D. 19...

{ Seal of  
the court. }

.....,

*Clerk.*

<sup>20</sup>. For another form adapted to a refusal to confirm, and containing also directions for distribution. See Form No. 103, post. Consult Section Twelve, generally.

## Form No. 63.

Order of Distribution on Composition.<sup>100</sup>

UNITED STATES OF AMERICA:

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy.

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case which list is made a part of this order.

Witness the Honorable ....., judge of said court, and the seal thereof, this ..... day of ....., A. D. 19...

{ Seal of }  
{ the court. }

.....,

Clerk.

<sup>100</sup>. It is thought this order should be combined with that confirming the composition. See foot-note to Form No. 62, and compare Form No. 103, *post*.





## SUPPLEMENTARY FORMS.

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### PREFATORY NOTE.

These forms are in no sense official. Many of them are based upon the practical experience of referees and practitioners. Some of them are taken from Hagar and Alexander's Bankruptcy Forms (2d ed.). No effort has been made to supply forms for every contingency that may arise in a bankruptcy proceeding; but simply to afford the profession hints as to the more common steps and, largely, where no forms are now available.

The supplementary forms are later indexed in with the official forms and the general orders. For convenience of reference, a list, arranged by the sections of the statute to which they are peculiarly appropriate, is also given.

It is suggested that reference be made to Hagar and Alexander's Bankruptcy Forms (2d ed.), where forms for every step in bankruptcy proceedings will be found. This work will be found of great value in ascertaining the correct practice in all the various bankruptcy proceedings which have been discussed in the text of Collier on Bankruptcy.



## SCHEDULE OF FORMS.

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### SECTION TWO.

- Form** No. 64.—Petition for Appointment of Receiver before Adjudication.  
No. 65.—Order Appointing Receiver before Adjudication.  
No. 66.—Petition for Appointment of Receiver after Adjudication and Reference.  
No. 67.—Order Appointing Receiver after Adjudication and Reference.  
No. 68.—Petition by Receiver to Continue Business of Bankrupt.  
No. 69.—Order Authorizing Receiver to Continue Business of Bankrupt.  
No. 70.—Order that Receiver Complete Contracts.  
No. 71.—Report of Receiver.  
No. 71a.—Receiver's Account and Oath to Same.  
No. 71b.—Report of Special Master on Receiver's Accounts.  
No. 71c.—Notice of Motion to Confirm Report of Special Master on Receiver's Account.  
No. 72.—Order Confirming Report of Special Master on Receivers' Accounts.  
No. 73.—Petition for Injunction other than against Suits.  
No. 74.—Referee's Stay and Show Cause other than against Suits.  
No. 75.—Referee's Order that Writ of Injunction Issue.  
No. 76.—Order that Writ of Injunction Issue, after Referee's Stay and Show Cause.

### SECTION SIX.

- No. 77.—Order Determining Exemptions when no Trustee Appointed.  
No. 78.—Exceptions to Trustee's Report Setting off Exemptions.  
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- FORM** No. 101.—Order of Reference to Special Master in Composition.  
 No. 102.—Report of Special Master in Composition.  
 No. 103.—Order Confirming (or Refusing to Confirm) Composition.  
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 No. 106.—Referee's Certificate on Application for Extension of Time.  
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 No. 112.—Exceptions to Specifications.  
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 No. 131.—Order of Reference to Special Master in Involuntary Cases.  
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 No. 133.—Notice of Trial in Involuntary Proceeding.  
 No. 134.—Report of Special Master in Involuntary Case.  
 No. 135.—Exceptions to Report of Special Master in Involuntary Case.  
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## SECTION TWENTY-TWO.

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## SECTIONS TWENTY-FOUR AND TWENTY-FIVE.

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SECTION TWENTY-SEVEN.

- No. 155.— Petition for Meeting of Creditors to Consider Proposed Compromise.  
 No. 156.— Notice to Creditors of Special Meeting.  
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SECTION THIRTY-NINE.

- No. 158.— Petition for Review of Referee's Order.  
 No. 159.— Referee's Certificate on Review.

SECTION FORTY-FOUR.

- No. 160.— Order Approving Appointment of Trustee.

SECTION FORTY-SEVEN.

- No. 161.— Trustee's First Report.  
 No. 162.— Order Declaring and Ordering First Dividend Paid.  
 No. 163.— Trustee's Final Report and Account.  
 No. 164.— Final Order of Distribution.  
 No. 165.— Trustee's Combined Dividend Check and Receipt.

SECTION FORTY-EIGHT.

- No. 166.— Referee's Certificate of Fees Payable.

SECTION FIFTY.

- No. 167.— Bond of Trustee, with Justification of Sureties.  
 No. 168.— Order Approving Trustee's Bond.

SECTION FIFTY-ONE.

- No. 169.— Certificate of Referee as to Falsity of Pauper Affidavit.

SECTION FIFTY-SEVEN.

- No. 170.— Special Clauses for Proofs of Debt (to Conform to General Order XXI)  
 No. 171.— Petition for Reconsideration and Rejection of Claim.  
 No. 172.— Notice of Petition for Reconsideration and Rejection of Claim.  
 No. 173.— Proof of Secured Debt.  
 No. 174.— Order Expunging or Reducing Proof of Debt.  
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SECTION FIFTY-EIGHT.

- No. 176.— Notice of Final Meeting.  
 No. 177.— Special Clauses for Notices to Creditors.  
 No. 178.— Combined Notice to Creditors.  
 No. 179.— Affidavit of Publication of Notice.  
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SECTION SIXTY-TWO.

- No. 181.— Order Appointing Attorney for Trustee.

## SECTION SEVENTY.

- Form** No. 183.—Petition for Instruction as to Burdensome Property.  
No. 183.—Order on Petition as to Burdensome Property.  
No. 184.—Order Allowing Trustee to Continue Business.  
No. 185.—Petition for Leave by Trustee to Sue.  
No. 186.—Order Authorizing Trustee to Sue.  
No. 187.—Demand in Reclamation.  
No. 188.—Petition to Reclaim.  
No. 189.—Answer in Reclamation.  
No. 190.—Petition for Sale under General Order XVIII(2).  
No. 191.—Order for Sale under General Order XVIII(2).  
No. 192.—Petition to Confirm Sale.  
No. 193.—Order Confirming Sale after Notice to Creditors.  
No. 194.—Petition for Private Sale by Trustee.  
No. 195.—Order for Private Sale by Trustee.  
No. 196.—Petition for Sale Free and Clear of Liens.  
No. 197.—Notice of Motion for Sale Free and Clear of Liens.  
No. 198.—Order Directing Sale Free and Clear of Liens.

## SUPPLEMENTARY FORMS.

### Form No. 64.

#### Petition for Appointment of Receiver Before Adjudication.<sup>1</sup>

In the District Court of the United States for the ..... District of .....

<p>IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt</i> .</p>	}	<p>In Bankruptcy No. ...</p>
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To the Hon. ...., District Judge:

Your petitioners respectfully show:

That their petition for the adjudication of ....., of the ..... of ....., in said district, to be a bankrupt was filed herein on the ..... day of ....., 19...; that such proceeding is still pending, and will not be determined for some time.

That, as your petitioners are informed and believe, the estate of said bankrupt consists of and is worth substantially as follows:<sup>2</sup> .....

That it is absolutely necessary for the preservation of said estate that a receiver be appointed to take charge of the same<sup>3</sup> ....., for the following reasons:<sup>4</sup> .....

1. See, generally, Section Two, *ante*. And compare §§ 3-e and 59 with Forms Nos. 8, 9, and 10.

2. Here recite the property, under the two general heads of real and personal, in sufficient detail, showing in whose possession it is and whether there are any adverse claimants.

3. Or a specified part of it, stating it.

4. Here state the reasons, as, for instance, (1) that "the bankrupt has absconded and abandoned the same;" or (2) that "the bankrupt is selling the same at

prices much less than such property is worth, to wit ....., or has threatened or is liable so to do;" or (3) that "the bankrupt is neglecting such property and the same is deteriorating or liable so to do." The petition should state that the appointment of a receiver is absolutely necessary for the preservation of the estate. In re Oakland Lumber Co. (C. C. A. 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634; In re Rosenthal (D. C., N. J.), 16 Am. B. R. 448, 144 Fed. 548.



That your petitioners file herewith the bond of . . . . ., in \$ . . . . ., as required by § 3-e of the bankruptcy act of 1898.<sup>5</sup>

That<sup>6</sup> it will be for the best interests of said bankrupt and his creditors that his business, located at No. . . . . street, in the . . . . . of . . . . ., in said district, be continued until the hearing and decision on the petition for adjudication herein, for the following reasons: . . . . .

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore your petitioners pray that . . . . ., of . . . . ., in said district, be appointed receiver herein, with power to take charge of and hold said estate<sup>7</sup> and to continue said business, and for such other order as shall be just and lawful.

Dated, . . . . ., . . . . ., . . . . ., . . . . ., 19 . . . . .

. . . . .  
. . . . .  
. . . . .

*Petitioners.*<sup>8</sup>

STATE OF . . . . ., }  
County of . . . . ., } ss.:  
City of . . . . ., }

I (We), . . . . ., the petitioner .. mentioned and described in the foregoing petition, do hereby (severally) make solemn oath that the statements of fact therein contained are true, according to the best of my (our) knowledge, information, and belief.

. . . . .

Subscribed and sworn to before me, this . . . . . day of . . . . ., 19 . . . . .

. . . . .  
. . . . .

5. For bond, see Form No. 9, changing recitals to fit this kind of an application and the condition clause to fit § 3-e.

6. Omit this paragraph if the receiver is to be a custodian only.

7. Or a specified part of it, stating it.

8. This application can be made by one petitioner only. If made by attorney, show in affidavit of verification why petition was not made by the creditors.

## Form No. 65.

Order Appointing Receiver Before Adjudication.<sup>9</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

Whereas, a petition for adjudication of bankruptcy was, on the ..... day of ....., 19..., filed against ....., of the ..... of ....., in said district, and said petition is still pending, and whereas it satisfactorily appears that it is absolutely necessary for the preservation of the estate of said bankrupt that a receiver be appointed to take charge of and to hold such estate, and that he continue the business of said bankrupt, and a bond<sup>10</sup> having been filed, as provided in § 3-e of the bankruptcy act of 1898; now, on motion of ....., Esq., attorney for the petitioner,

It is ordered:

That said bond be and the same hereby is approved, both as to its form, sufficiency, and manner of execution.

That ....., of ....., in said district, be, and he hereby is, appointed receiver of the estate of said bankrupt<sup>11</sup> on filing an additional bond as receiver in the sum of \$ ....., with sufficient sureties, to be approved by this court, and that thereupon such receiver take charge of and hold such estate until further order.

That<sup>12</sup> said receiver continue the business of such bankrupt, at No. ... street, in the ..... of ....., in said district, until further order.<sup>13</sup>

It is further ordered that, should ..... be adjudicated a bankrupt, said receiver continue as such, with the powers herein conferred, until the appointment and qualification of a trustee of said bankrupt.

9. This order follows Form No. 64. See foot-notes to same.

10. The order should require the bond of the petitioning creditors be filed before the receiver takes possession of the property. *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 354, 135 Fed. 472, 68 C. C. A. 340.

11. Or a specified part of it, stating it.

12. Omit this paragraph, if the receiver is to be custodian only.

13. Here add any limitations as, for instance, concerning the borrowing of money, the buying of new goods, etc.

Witness the Honorable . . . . ., judge of the said court, and the seal thereof, at the city of . . . . ., in said district, on the . . . . . day of . . . . ., 19 . . .

{ Seal of  
the court }

. . . . ., Clerk.

### Form No. 66.

#### Petition for Appointment of Receiver After Adjudication and Reference.<sup>14</sup>

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

To . . . . ., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner was adjudicated a bankrupt herein on the . . . . . day of . . . . ., 19 . . ., and on the same day this proceeding was duly referred.

That your petitioner's estate consists of and is worth substantially as follows:<sup>15</sup> .....

That it is absolutely necessary for the preservation of said estate that a receiver be appointed to take charge of the same, for the following reasons:<sup>16</sup> .....

That <sup>17</sup> it will be for the best interests of your petitioner's creditors that his business, located as above stated, be continued until a trustee can be appointed and qualify, for the following reasons: .....

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore your petitioner prays that a receiver may be appointed herein,

14. This form is chiefly valuable in voluntary cases to protect assets until a trustee can be appointed. It can, of course, be made by a creditor as well as the bankrupt. See, generally, Section Two, *ante*.

15. Here recite the property under the two general heads of real and personal, in sufficient detail, showing in whose possession it is, and whether there are any adverse claimants.

16. Here state the reasons, as, for instance, (1) that "a portion of said estate is perishable, to wit . . . . ., and should be sold at once;" or (2) that "such property is without protection from theft or the elements, and not insured."

17. Omit this paragraph, if the receiver is to be custodian only.

with <sup>18</sup> power to continue said business, and for such other order as shall be just and lawful.

Dated, ....., ....., ....., 19...

.....,

*Petitioner.*

STATE OF ....., }  
County of ....., } ss.:  
City of ....., }

I, ....., the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information, and belief.

.....

Subscribed and sworn to before me, this ..... day of ....., 19...

.....,

.....

#### Consent of Creditors.<sup>19</sup>

We, the undersigned, creditors of said bankrupt, holding unsecured claims in the amounts set opposite our names, do hereby join in the annexed petition, and do nominate ....., of the ..... of ....., in said district, for receiver.

Dated, ....., ....., ....., 19...

....., \$. .....

....., \$. .....

....., \$. .....

<sup>18</sup> So also this clause may be omitted.

<sup>19</sup> While not essential to secure the consent of creditors, the practice is advised.

See "Practice" on receiverships in Section Two, *infra*.

## Form No. 67.

Order Appointing Receiver After Adjudication and Reference.<sup>20</sup>

At a Court of Bankruptcy, held in and for the ..... District of .....,  
at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

## IN THE MATTER OF

.....

} In Bankruptcy No. ...

*Bankrupt .*

Application having been made for the appointment of a receiver herein, and that he be given power to continue the business of the bankrupt, and ..... creditors, in a total of \$....., having joined in such application and nominated ....., to be such receiver; now, on motion of ....., Esq., attorney for said .....

It is ordered:

That ..... of the ..... of ....., in said district, be, and he hereby is, appointed receiver of the estate of said bankrupt, on filing a bond in the sum of \$....., with sufficient sureties, to be approved by this court.

That <sup>21</sup> said receiver continue the business of said bankrupt, at No. ... street, in the ..... of ....., in said district.

That <sup>22</sup> said receiver have power also to .....

That said receiver continue as such until the appointment and qualification of a trustee herein.

.....,

*Referee in Bankruptcy.*

<sup>20</sup>. This form follows Form No. 66. See foot-notes to same.

<sup>21</sup>. Omit this paragraph, if receiver is to be custodian only.

<sup>22</sup>. Use only when the receiver is given special powers.

## Form No. 68.

## Petition by Receiver to Continue Business of Bankrupt.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 65.)

United States District Court, for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ...

To the District Court of the United States, for the ..... District of .....

The petition of ..... respectfully shows:

That by an order of this court, dated ....., your petitioner was duly appointed temporary receiver herein, and duly qualified by filing the required bond. That on entering upon his duties herein as receiver, your petitioner has taken possession of the property, assets and effects of the bankrupt, consisting of .....  
 .....  
 at ..... street, .....

That he has made a careful investigation of the condition of the bankrupt's business and finds that said bankrupt has on hand a large number of unfilled orders, from which it is estimated the sum of \$...... could be realized upon completion of same.

That there is also a large stock of material on hand, consisting of .....  
 .....  
 and largely available for the purpose of completing such orders.

That this property will be greatly enhanced in value by making it up into manufactured goods; otherwise, but a small amount will be realized for the creditors in disposing of the property in its present condition.

Your petitioner believes it to be to the best interests of this estate that he be permitted to carry on the business for a limited period and fill these orders.

(That at the time the petition in bankruptcy was filed against the said bankrupt, he was endeavoring to effect a settlement with his creditors, and said bankrupt as your petitioner is informed, believes that he can now effect such settlement with his creditors, if the business be continued and the good will preserved.)

Wherefore, your petitioner respectfully prays that he be permitted and empowered to continue the business as conducted by the bankrupt for a period

of ..... days, and that in the conduct of the business, he be permitted to incur such expense and enter upon such contracts as in his judgment may seem proper in the premises.

Dated ....., 19...

.....,

*Petitioner.*

[*Verification.*]

**Form No. 66.**

**Order Authorizing Receiver to Continue Business of Bankrupt.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 66.)

At a stated term of the United States District Court held in and for the District of ....., at the Court House in the City of ....., on the ....., day of ....., 19...

Present: Hon. ...., District Judge.

**IN THE MATTER OF**

.....

*Bankrupt .*

On the annexed petition ....., temporary receiver herein, verified the ..... day of ....., 19..., and sufficient reason appearing to me therefor it is hereby

Ordered that ....., as receiver herein, be and he hereby is permitted, authorized and empowered to continue and carry on the business as conducted by the bankrupt herein, for a period of ..... days, from date hereof, and in the conduct of said business, to make such contracts and incur such expense as in his discretion may be necessary.

.....,

*D. J.*

**Form No. 70.****Order that Receiver Complete Contracts.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 69.)

**At a stated term of the District Court of the United States for the**  
 ..... District of ....., held at the Court House, City of  
 ....., on the ..... day of ....., 19...

**Present:** Hon. ...., District Judge.

IN THE MATTER OF

.....

*Bankrupt .*

Upon reading and filing the annexed petition of ....., temporary receiver herein, verified the ..... day of ....., 19..., and the annexed consent dated ....., 19..., and on motion of ....., attorney for receiver, it is

Ordered that said ....., receiver herein, be and he hereby is permitted and allowed to complete the orders which have come into his possession and which are in the course of manufacture or unfilled, and to dispose of the same when completed, in the regular course of business, for cash, and to make such expenditures in relation thereto as may become necessary.

.....,  
*D. J.*

**Form No. 71.****Report of Receiver.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 75.)

**United States District Court, for the ..... District of .....**

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

**To the United States District Court, for the ..... District of .....:**

**I, ....., do hereby make and file my report and account as temporary receiver of the estate of the above-named bankrupt:**



1. I was appointed temporary receiver herein on the ..... day of ....., 19..., and required to file a bond in the penalty of ..... (\$.....). Having been notified of my appointment, I obtained a certified copy of the order thereof, and filed my bond in the penalty required, and in company with the attorney for the petitioning creditors, I visited the premises of the alleged bankrupt, No. .... street, ..... I there met and interviewed ....., the secretary of the company, and others. Subsequently other officers of the alleged bankrupt arrived at the premises, and after consultation with attorney, turned over the premises to me. I placed a custodian in charge of the premises and took possession of the books, etc. I found that the bankrupt was a ..... corporation, engaged in the manufacture and sale of ..... I had a long consultation with the officers of the company and with various large creditors, in regard to the advisability of continuing the business, inasmuch as the company had on hand orders to be executed, amounting to about \$....., and a large supply of material. I also learned that the company had been accustomed to obtain advances upon all its invoices and that almost all of the accounts due the company had been assigned for these advances. That upwards of \$..... of book accounts had been so assigned and no estimate could be then formed as to what, if any, equity the alleged bankrupt might have in said accounts.

I finally decided that it would be of advantage to the estate to apply for an order authorizing me as receiver to continue the business for a period of twenty days, with leave to apply for a further extension, if desirable. I directed the custodian to take an inventory of all the property and sent all of the outstanding insurance policies to the various companies for transfer of interest.

2. On ....., 19..., I obtained an order allowing me to continue the business for a period of ..... days. I called an informal meeting of the creditors to meet at the bankrupt's premises, attended at the said meeting and remained in consultation with the attorneys and creditors for a considerable period. Also had consultations with the attorneys for the bankrupt company and ....., attorneys for creditors. I made a careful examination of the stock on hand and of the books, employed an expert accountant and obtained a general idea of the condition of the business. Revised and reduced the payroll as much as possible. I made arrangements with a number of supply houses to sell goods on credit and had various interviews with credit men.

[Insert any additional or special allegations as to services, etc.]

On ....., 19..., I obtained the consents of creditors representing a majority in amount of claims, for an order extending my time to run the business for an additional twenty days, inasmuch as there were a

large number of unfilled orders yet on hand and an order was signed to that effect. Subsequently I verified a petition for the appointment of appraisers and for a sale. On . . . . ., 19 . . . , an informal meeting of creditors was held on the bankrupt's premises, for which I prepared a detailed statement of the general condition of the business.

That in carrying on the business of the bankrupt company it was necessary for me to devote a large amount of time to the details of the said business and to visit the premises of the bankrupt frequently. That I employed about . . . . . persons, including the factory, office and sales departments and the weekly payroll averaged \$ . . . . . to \$ . . . . . That at the time I commenced to carry on the business, there were about \$ . . . . . in orders on hand and I subsequently obtained about \$ . . . . . additional orders. That as receiver I purchased merchandise and supplies, amounting to about \$ . . . . . , as shown in Schedule B, hereto annexed.

I manufactured, filled and shipped all of the orders above mentioned, which were deemed profitable to fill. Annexed hereto is my verified account as receiver, showing receipts and disbursements in the conduct of the business. The merchandise and plant were sold at public auction pursuant to order of this court.

I have received no compensation for my services as receiver and in conducting the business of the bankrupt under the order of this court.

Wherefore, I respectfully pray that my said account be passed as filed, that suitable allowances be made to . . . . . , my attorneys, and to the duly appointed appraisers and to myself as receiver, and for carrying on the business of said bankrupt, and that I be discharged as receiver herein.

All of which is respectfully submitted.

Dated . . . . , . . . . , . . . . , . . . . , 19 . . .

. . . . . ,

*Receiver.*

## Form No. 71a.

## Receiver's Account and Oath to Same.

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 76.)

United States District Court,  
 ..... District of ..... :  
 In Bankruptcy.

IN THE MATTER OF .....  <i>Bankrupt.</i>	}	No. ....
--	---	----------

Account of ....., Receiver.

## RECEIPTS.

I charge myself as follows:

19.....		\$.....
.....	.....	.....
.....	.....	.....
.....	.....	.....
Total receipts .....		\$.....

## DISBURSEMENTS.

I credit myself as follows:

19.....		\$.....
.....	.....	.....
.....	.....	.....
.....	.....	.....
Total disbursements .....		\$.....

## SUMMARY STATEMENT.

Total receipts .....	\$.....
Total disbursements .....	.....
<hr/>	
Balance in hands of Receiver..	\$.....
Dated ....., 19...	

.....,  
*Receiver.*

United States District Court,  
 ..... District of .....:  
 In Bankruptcy.

IN THE MATTER OF .....  <i>Bankrupt.</i>
--

No.....

On the ..... day of ....., 19..., before me comes  
 ....., and makes oath and says he was on the ..... day of  
 ....., 19..., appointed receiver of the estate and effects of the  
 above named bankrupt; that as such receiver he has conducted the adminis-  
 tration of the estate; that the account hereto annexed, containing .....  
 sheets of paper, subscribed by him is true, and such account contains entries  
 of every sum of money received by the said receiver on account of the estate  
 of the above named bankrupt, and that the payments purporting in such  
 account to have been made by such receiver, have been so made by him, and  
 he asks to be allowed for such payments and expenses as charged in said  
 account.

Subscribed and sworn to before me at the City of ....., in the  
 ..... District of ....., this ..... day of ....., 19...  
 [Annex vouchers for all payments.]

Form No. 71b.

Report of Special Master on Receiver's Account.

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 80.)

United States District Court,  
 for the .... District of .....:

IN THE MATTER OF .....  <i>Bankrupt.</i>
--

In Bankruptcy No.....

To the Honorable, .....  
 Judge of the above named Court:

I, ....., one of the Referees in Bankruptcy, to whom, as Special  
 Master, have been referred the report and account of ....., as  
 receiver herein, together with the application of the said receiver for an  
 allowance in payment of his services and disbursements as such; and also  
 the application of ....., for an allowance in payment of his  
 services and disbursements as attorney for the said receiver; and also the  
 application of ....., and ..... for an  
 allowance for their services as appraisers appointed by the court to appraise  
 the estate of the bankrupt in the hands of the said receiver, due notice

having been given to the creditors herein as required by the rule of this court, having been duly attended by the parties and creditors and having heard and considered the allegations and proofs, do hereby respectfully report as follows:

I was duly attended, upon the hearings herein, by ....., the said receiver and by ....., his attorney, by ....., the duly appointed trustee in bankruptcy herein and certain creditors. No objections were made or filed to the account of the said receiver.

I have carefully examined the said report and account, together with the vouchers submitted in support thereof, and find the same in all respects correct and true, and recommend that same be passed and allowed as filed.

The petition was filed herein on the ..... day of ....., 19... The bankrupt was adjudicated on the ..... day of ....., 19... The said temporary receiver was duly appointed ....., 19..., and immediately qualified and took possession of the bankrupt's property and effects. .... was appointed trustee ....., 19...

The bankrupt was engaged in business as a ..... and had ..... places of business, one at ....., and another at ..... both in the City of ..... The receiver, pursuant to order of the court, sold all the property of the bankrupt found in the stores mentioned at public auction. The gross amount realized from this sale was \$. .... From this the auctioneer deducted, for his services and disbursements, the sum of \$. ...., leaving as the net result of the sale, \$. .... This is all that the estate has as yet recovered, although it appears that the receiver and his attorneys believe that further sums may be recoverable.

A summary account of the receiver's cash is as follows: He has received in all the sum of ..... \$. .... and he has disbursed in all the sum of ..... \$. ...., leaving a balance in his hands of ..... \$. ....

I think that the receiver discharged all the duties required of him as such in a satisfactory manner. His attorney also acted with diligence in the discharge of the duties required of him. Much of the services shown by the receiver's attorney consists of examination of the bankrupt and others, for the purpose of discovering assets and obtaining evidence upon which to base proceedings for the recovery of property believed to have been wrongfully taken from the estate. These services seem to have been rendered with diligence.

I, therefore respectfully recommend that the said receiver make the following disposition of the funds in his hands:

1. That he shall retain in full compensation by way of commission for his services as receiver as aforesaid, the sum of ..... \$. ...., and in addition thereto, the sum of ..... \$. .... for disbursements, in all the sum of ..... \$. ....

2. That he shall pay to ....., for his services as attorney for the said receiver, the sum of ..... \$. ...., and in addition thereto the sum of ..... \$. .... for his disbursements, making in all the sum of ..... \$. ....

3. That he pay to each of the appraisers herein, the sum of \$. .... in full compensation for services as such, making in all ..... \$. ....

4. That he shall pay to the undersigned, Special Master, in full compensation for his services and disbursements in this proceeding, the sum of

..... \$. . . . ., and that having made the aforesaid payments, he shall pay over the amount then remaining in his hands to . . . . ., as trustee in bankruptcy herein, and that upon making such payments, the said . . . . . be discharged as such receiver, and his bond cancelled.

All of which is respectfully submitted.

Dated . . . . ., 19...

.....,  
Special Master,  
(or Referee).

### Form No. 71c.

Notice of Motion to Confirm Report of Special Master on Receiver's Account.

[Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 81.]

In the District Court of the United States,  
for the . . . . . District of . . . . . :  
In Bankruptcy.

IN THE MATTER  
OF

No. ....

*Bankrupt.*

SIR:

You will please take notice, that upon the receiver's report, account, exceptions thereto and all the proceedings had herein, and upon the report of . . . . ., Esq., Special Master (or Referee), dated the . . . . . day of . . . . ., 19... , the undersigned will respectfully move this court at a stated term thereof to be held in the Federal Court House, City of . . . . ., on the . . . . . day of . . . . ., 19... , at . . . . . o'clock . . . . M., of said day, or as soon thereafter as counsel can be heard, for an order in all respects confirming the report of . . . . ., Esq., Special Master (or Referee), passing and allowing the receiver's accounts herein, overruling the exceptions thereto and fixing the compensation for services of the receiver, his counsel, the counsel for the petitioning creditors and the appraisers, and for such other and further relief as may be just and proper.

Dated . . . . ., 19...

Yours, etc.,

.....,  
Attorneys for Receiver,  
Office and P. O. Address,

..... St.,

To . . . . ., Esq.,  
Trustee,

.....  
.....

**Form No. 72.****Order Confirming Report of Special Master on Receiver's Accounts.**

(Hagar and Alexander's Bankruptcy Forms [2d. Ed.], No. 82.)

At a stated term of the District Court of the United States for the  
 ..... District of ....., held at the Court House, City of  
 ....., on ..... day of ....., 19...

Present: Hon. ...., District Judge.

IN THE MATTER OF

..... } No. ...  
*Bankrupt .*

....., temporary receiver of the above-named bankrupt, having presented his account and vouchers in support thereof, and having moved to confirm his report and that allowances be made to the said receiver and to his counsel for their services, and to the attorneys for the petitioning creditors, etc., and an application having thereupon been made to confirm and approve the said account and make such allowances, and the said matters having been referred to ....., Esq., as Special Master, and the said Special Master having filed his report thereon, dated..... day of ....., 19...,

Now after hearing ....., Esq., of counsel for the receiver, in support of said application, and due deliberation having been had thereon, upon reading and filing the report of the said Special Master, the account and report of ....., receiver herein, it is

Ordered:—That the report of ....., Esq., Special Master (or Referee) appointed herein, be, and the same hereby is in all respects confirmed and approved,

And it is further ordered:—That the account of ....., temporary receiver of the property, assets and effects of ....., bankrupt above named, be, and the same hereby is in all things allowed, approved and confirmed.

And it is further ordered:—That ....., temporary receiver herein, be, and he hereby is, allowed for his services the sum of \$. .... and that the disbursements expended by him in the safe administration and preservation of the estate and heretofore deducted by him, be and the same hereby are allowed.

And it is further ordered:—That . . . . ., temporary receiver herein, pay to . . . . . the sum of \$. . . . . as and for an allowance to them as attorneys for the receiver herein and the further sum of \$. . . . . disbursements incurred and expended on behalf of the receiver in the safe administration and preservation of the estate herein, and amounting in the aggregate to the sum of \$. . . . .

And it is further ordered:— That . . . . ., temporary receiver herein, pay to . . . . ., . . . . ., and . . . . ., the sum of \$. . . . . each for services rendered by them as appraisers herein.

And it is further ordered:— That . . . . ., temporary receiver herein, pay to . . . . ., Esq., the Special Master herein, the sum of \$. . . . . for his services and disbursements on this accounting.

And it is further ordered:—That . . . . ., temporary receiver herein, after making the payments as herein directed, pay the balance remaining in his hands to . . . . ., trustee in bankruptcy herein.

And it is further ordered:—That upon making such payments . . . . ., temporary receiver herein, be discharged as receiver of the property, assets and effects of the above-named bankrupt, and that the bond given by him for the faithful performance of his duties be canceled and discharged, and the sureties thereon released from any and all liability thereunder (and that the bond given by the petitioning creditor upon whose application the receiver was appointed herein under section 3, subdivision *e* of the bankruptcy act, be canceled and annulled, and the sureties thereon exonerated from any and all liability thereunder.)

. . . . .,  
D. J.

### Form No. 73.

#### Petition for Injunction Other than Against Suits.<sup>23</sup>

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

. . . . .

In Bankruptcy No. . . .

*Bankrupt .*

To . . . . ., Esq.,<sup>24</sup> Referee in Bankruptcy:

Your petitioner respectfully shows:

<sup>23</sup> For the validity of injunctions granted by referees, see, generally, Sections Two, Eleven and Thirty-eight. Read also General Order XII, which, however, refers only to injunctions against proceedings or

officers. See also *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224.

<sup>24</sup> If before adjudication, address to the judge.



That he is the receiver <sup>25</sup> herein.

That the above-named bankrupt was duly adjudged herein on the ..... day of ....., 19..., and, thereafter, the following proceedings were had:<sup>26</sup> .....

That <sup>27</sup> .....

That, unless the injunction hereinafter asked is granted, your petitioner and the creditors of said bankrupt will suffer irreparable injury.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore, your petitioner prays for a writ of injunction herein, forbidding the said ....., his attorneys, agents, and servants, from <sup>28</sup> ..... and for such other order as shall be just and lawful.

Dated, ....., ....., ....., ....., 19...

.....,  
Petitioner.

[Add verification as in Form No. 66.]

#### Form No. 74.

##### Referee's Stay and Show Cause Other than Against Suits.<sup>29</sup>

At a Court of Bankruptcy, held in and for the ..... District of ....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

Application having been made for a writ of injunction directed to ....., of the ..... of ....., in said district,

<sup>25</sup> Or "the bankrupt;" or "the trustee;" or "a creditor of the bankrupt."

<sup>26</sup> Recite the previous steps in the proceeding briefly.

<sup>27</sup> Here give the name and residence of the person sought to be enjoined, and the facts making the injunction necessary, as an imminent sale on a foreclosure where the equity of redemption is substantial; or, the giving of a voidable preference as defined in § 60, and proceedings by the creditor preferred which may result in the property getting into the hands of an inno-

cent holder for value, in this case specifying whether or not the property is in the possession of the bankrupt or an adverse claimant, and, if the latter, by what kind of a transfer and with what notice, if any, of the bankruptcy he holds. See, generally, "Injunctions other than against Suits," in Section Two, *ante*, and cases cited.

<sup>28</sup> Here state briefly the acts or transactions which the petitioner seeks to prevent.

<sup>29</sup> The referee may, it is thought, grant an injunction without a show cause. See

restraining him from <sup>30</sup> .....  
 .....  
 and it appearing that the same should be heard and decided by the judge,  
 and that the said ..... be so restrained meanwhile; now, on  
 motion of ....., Esq., attorney for ....., the  
 petitioner,

It is ordered:

That ....., his attorneys, agents, and servants, be, and they  
 are and each of them is hereby restrained and enjoined from <sup>31</sup> .....  
 .....until the hearing and decision of the show  
 cause hereinafter ordered.

That the said ..... show cause, before the Hon. ....  
 ...., District Judge, at the United States District Court Room, in  
 the ..... of ....., in said district, on the ..... day of .....,  
 19..., at ..... o'clock, .. M., or as soon thereafter as counsel can be heard,  
 why a writ of injunction should not issue out of said court restraining and  
 enjoining him, the said ....., from <sup>31</sup> .....  
 forever.<sup>32</sup>

Let service of this order on the said <sup>30</sup> ....., by delivery to  
 him personally of a copy of the same and of the petition on which it is  
 granted within ..... days previous to the day last hereinbefore mentioned,  
 be sufficient.<sup>34</sup>

.....,

*Referee in Bankruptcy.*

Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, and consult generally "Injunctions other than against Suits" in Section Two, *enfs.* If a show cause is not thought necessary use Form No. 107, or if the local practice does not call for the issuance of the writ of injunction, draw a referee's order restraining and enjoining the person named as suggested by the words of this form.

30. Make this recital fit the prayer of the petition.

31. Here state the acts or transactions which are enjoined.

32. Or until a time certain, specifying it, or "until further order."

33. Or "on ....., Esq., his attorney of record," if any; or "on either or both the said ..... and ....., his attorney," as the court may direct.

34. Service should never be by mail, or on any person other than here specified.

## Form No. 75.

Referee's Order that Writ of Injunction Issue.<sup>35</sup>

At a Court of Bankruptcy, held in and for the ..... District  
of ....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

## IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

Application having been made for a writ of injunction directed to  
....., of the ..... of ....., in said district, restrain-  
ing him from<sup>36</sup> .....;  
and it appearing that the same should be granted by the referee and not  
by the judge;<sup>37</sup> on motion of ....., Esq., attorney for  
.....,<sup>38</sup> and ....., Esq., also appearing for  
the said ..... and objecting thereto (or consenting),

It is ordered:

That a writ of injunction issue out of said court, and under its seal, and  
tested by its clerk,<sup>39</sup> restraining and enjoining the said .....,  
his attorneys, agents, and servants from<sup>40</sup> ..... forever.<sup>41</sup>

That, until such writ shall issue, the said ....., his  
attorneys, agents, and servants, be and they hereby are restrained and  
enjoined from the doing of said acts.

.....,

*Referee in Bankruptcy.*

<sup>35</sup>. See foot-note 29, Form No. 74.

<sup>36</sup>. See foot-note 30, to same form.

<sup>37</sup>. If brought on before the referee by stipulation (see Form No. 91) strike out this clause and substitute for it, "and the same being now moved by stipulation before the referee instead of before the judge."

<sup>38</sup>. Strike out to end of paragraph if there is no appearance in opposition.

<sup>39</sup>. See General Order III.

<sup>40</sup>. Here state the acts or transactions enjoined.

<sup>41</sup>. Or until a time certain, specifying it, or "until further order."

Form No. 76.

Order that Writ of Injunction Issue, After Referee's Stay and Show Cause.<sup>42</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

Whereas, application has been previously made for a writ of injunction directed to ....., of the ..... of ....., in said district, and a temporary injunction was granted thereon by ..... Esq., referee in bankruptcy of this court, and the said ..... required to show cause in this court why the same should not be continued forever,<sup>43</sup> and such show cause being this day moved by ..... Esq., attorney for the petitioner, and <sup>44</sup> after hearing ..... Esq., attorney for said ....., opposed:

It is ordered:<sup>45</sup> that a writ <sup>46</sup> of injunction issue out of this court, under its seal and tested by its clerk, restraining and enjoining the said ..... and his attorneys, agents, and servants, from <sup>47</sup> ..... forever.<sup>48</sup>

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the ..... day of ....., 19...

{ Seal of }  
{ the court }

.....,  
Clerk.

<sup>42</sup>. To be used only in cases where the referee grants a temporary injunction with show cause. See Form No. 74 and foot-note 29. Compare also Form No. 75.

<sup>43</sup>. Or recite the duration of the injunction as shown in the referee's order.

<sup>44</sup>. Strike out to end of paragraph if there is no appearance in opposition.

<sup>45</sup>. If application is denied, strike out

balance of form and add: "That such application be and the same hereby is denied, and such temporary injunction herein is vacated."

<sup>46</sup>. For form of writ, see works on Federal Practice.

<sup>47</sup>. Here state the acts or transactions enjoined.

<sup>48</sup>. See foot-note 43.

**Form No. 77.****Order Determining Exemptions When no Trustee Appointed.<sup>49</sup>**

At a Court of Bankruptcy, held in and for the ..... District  
of ....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

An order having been entered herein dispensing with a trustee, as provided in General Order XV; and it appearing, from the affidavit of the bankrupt filed on this application and Schedule B (5) filed with his petition herein, that he has duly claimed and is entitled to the exemptions hereinafter mentioned; now, on motion of ....., Esq., his attorney,

It is ordered that the said bankrupt's claim to exemptions be determined as follows:

That he is entitled, under ..... of the laws of the State of .....,  
to the following property:<sup>50</sup> .....  
.....  
and that the same be delivered to him forthwith.

.....,

*Referee in Bankruptcy.*

<sup>49</sup>. Consult, generally, Sections Six and Forty-seven. And see General Order XV and Form No. 27. See also §§ 2(11), 38(4). Forms Nos. 78, 79, 80 should also be noted.

<sup>50</sup>. Here say "that claimed by him in his said Schedule B (5)," or, if all of same are not set off to him, specify those that are set off.

## Form No. 78.

Exceptions to Trustee's Report Setting off Exemptions.<sup>51</sup>

In the District Court of the United States for the ..... District of.....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ...

Now comes ....., of ....., a creditor of the above-named bankrupt,<sup>52</sup> and excepts to the trustee's report setting off said bankrupt's exceptions, filed herein on the ..... day of ....., 19...,<sup>53</sup> in that such report<sup>54</sup> sets off to said bankrupt the following:<sup>55</sup> .....

.....  
for the following reasons:<sup>56</sup> .....

.....  
and prays that a hearing may be had upon such exceptions and that the same may be argued, as provided in General Order XVII.

Dated, ....., ....., ....., ....., 19...

.....,

*Excepting Creditor.<sup>57</sup>*

51. See, generally, Sections Six and Forty-seven, and for trustee's report on exemptions, Form No. 47, which, however, it is thought, should be verified and should specify the State statute under which the exemptions are set apart. The practice on exceptions will be found in General Order XVII. If the bankrupt is the party aggrieved he must ask a review. See Form No. 80.

52. If the exceptions are made by attorney add: "by ....., of the ..... of ....., in said district, his attorney, duly authorized to that end." For the authority required if the exceptions are not filed by a creditor, see § 1(9).

53. Or, if the exceptions are to the referee's order, strike out this clause and substitute: "and excepts to the order of ..... Esq., referee in bankruptcy herein, determining said bankrupt's claim to exemptions, entered on the .... day of ....., 19..."

54. "Or order," as the case may be.

55. Here copy in the set-off objected to, or phrase it in words so that the exception will be clearly indicated.

56. Here insert words showing the error excepted to.

57. If by an attorney, add "by ..... his attorney, address No. ...., ....., ....."

## Form No. 79.

Order Determining Exemptions After Trustee's Report.<sup>58</sup>

At a Court of Bankruptcy, held in and for the ..... District of  
 ....., at ....., this ..... day of ....., 19...

Before ....., Esq., Referee:

IN THE MATTER OF  .....  <i>Bankrupt .</i>	} In Bankruptcy No. ...
--	-------------------------

The trustee herein having, more than twenty days since, filed his report of exempted property, in accordance with General Order XVII, and no exceptions having been taken thereto,<sup>59</sup> now, on motion of ..... Esq., attorney for said bankrupt,

It is ordered:

That said trustee's report of exempted property be, and the same hereby is, in all things confirmed,<sup>60</sup> and the bankrupt's claim to exemptions is hereby determined accordingly.

That the property specified in such report be delivered to said bankrupt forthwith.

.....,

*Referee in Bankruptcy.*

<sup>58</sup>. See foot-note 51. This form can also easily be changed to fit a case where exceptions have been taken (Form No. 78) and argued.

<sup>59</sup>. If exceptions have been taken, change to fit the facts; if the report of the trustee

is not to be confirmed in whole or in part, here give the reasons.

<sup>60</sup>. Or, in case such report is not confirmed, in whole or in part, stop here and insert words indicating the decision.

## Form No. 80.

Petition by Bankrupt for Review of Referee's Order on Exemptions.<sup>61</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ...

To ....., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

. That he was adjudged a bankrupt herein on the ..... day of ....., 19..., and that a trustee of his estate was in such proceeding subsequently appointed.

That such trustee, on the ..... day of ....., 19..., filed a report of exempted property herein, and that, on the ..... day of ....., 19..., an order was entered determining your petitioner's claim to exempt property, as stated in such report.<sup>62</sup> .....

That such order was erroneous, for the following reasons:<sup>64</sup>

Wherefore, your petitioner, feeling aggrieved because of said order, prays that said trustee's report and the said order be reviewed, as provided in the bankruptcy law of 1898 and General Order XXVII.

Dated, ....., ....., ....., ....., 19...

.....,

*Bankrupt.*

[Add verification as in Form No. 66.]

<sup>61</sup> If granted, for Referee's Certificate on Review, see Form No. 159. See, generally, for practice on reviews, Section Thirty-nine, *ante*. A creditor can, of course, ask for a review. If so, see Forms Nos. 158 and 159.

<sup>63</sup> If confirmation was refused either in

whole or in part here state the substance of the referee's order.

<sup>62</sup> Or, if the referee's order modified the trustee's report, strike out "as stated in such report," and substitute "as follows: ....."

<sup>64</sup> Here indicate the reasons constituting the error complained of.



## Form No. 81.

Petition for Order Amending Schedules.<sup>65</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

To ....., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he was duly adjudicated a bankrupt herein on the ..... day of ....., 19..., and that his schedules, as required by § 7 (8) of the bankruptcy law of 1898, have been duly filed herein.

That the first meeting of your petitioner's creditors has been called for<sup>66</sup> the ..... day of ....., 19...

That, at the time your petitioner's schedule of creditors was prepared, by inadvertence,<sup>67</sup> the names and the statutory facts concerning the claims of certain creditors were omitted therefrom.<sup>68</sup>

That such names and facts are as follows:<sup>69</sup> .....

.....

That<sup>70</sup> the above-mentioned creditors have not been regularly notified of said first meeting of creditors.

That,<sup>71</sup> at the time your petitioner's schedule of property was prepared, by inadvertence, a certain interest in property vested in your petitioner was omitted therefrom, namely:<sup>72</sup> .....

.....

65. This petition can be adapted to a case where the petition and not the schedules needs amendment. See Section Eighteen, *ante*. Compare, generally, General Order XI, and Sections Seven and Eighteen.

66. If the meeting has been held, change to fit the facts.

67. Or give any other reason bringing the case within General Order XI.

68. Or state what was the act or omission which makes the amendment necessary.

69. If an amendment of Schedule A is desired, give the name of the creditor, his

residence, when and where the debt was contracted, and its consideration and amount, and if secured, etc., with the same particularity required by the appropriate page of Schedule A of Form No. 1.

70. Omit this, if notice has been sent them.

71. Use this paragraph only when the amendment of Schedule B is desired.

72. Here give a sufficient description to show all the facts required by the appropriate page of Schedule B of Form No. 1.

That no previous application has been made for the order hereinafter asked.

Wherefore, your petitioner prays for an order amending said schedules in the particulars above specified,<sup>73</sup> and that notice be given accordingly.

Dated at ....., ....., ....., ....., 19...

.....,

[Add verification as in Form No. 66.]

Petitioner.

### Form No. 82.

#### Order to Show Cause on Amendment of Schedules.<sup>74</sup>

At a Court of Bankruptcy, held in and for the ..... District of .....  
at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt .

On reading and filing the petition of ....., the bankrupt herein, wherein he prays for an order amending his schedules in certain particulars, now, on motion of ....., Esq., his attorney,

It is ordered:

That the creditors hereinafter named show cause before the undersigned, at ....., in the ..... of ....., in said district, on the ..... day of ....., 19..., at .... o'clock, .... M., or as soon thereafter as counsel can be heard, why the prayer of said petition should not be granted and why said petitioner's schedules, hereinafter mentioned, should not be amended by adding to Schedule A .....<sup>75</sup> the names and facts hereinafter set forth:<sup>76</sup> ..... and<sup>77</sup> by adding to Schedule B .....<sup>78</sup> the following statement of facts as to property:<sup>79</sup> .....

<sup>73</sup> If notice has been given, stop here.

<sup>74</sup> This form fits into Form No. 81. See foot-note 65 to same.

<sup>75</sup> Here insert (1), (2), (3), (4), or (5), dependent on the page of Schedule A sought to be amended.

<sup>76</sup> See foot-note 68, Form No. 81.

<sup>77</sup> See foot-note 71, Form No. 81.

<sup>78</sup> Here insert (1), (2), (3), (4), (5), or (6), dependent on the page of Schedule B sought to be amended.

<sup>79</sup> See foot-note 72, Form No. 81.

Let service of this order be made by mail, addressed to said persons at their places of residence as above stated, not later than ten days prior to the return day hereof.<sup>80</sup>

.....,

*Referee in Bankruptcy.*

**Form No. 83.**

**Order Amending Schedule.<sup>81</sup>**

At a Court of Bankruptcy, held in and for the ..... District of  
....., at ....., on the ..... day of ....., 19...

Present: ....., Esq., Referee.

**IN THE MATTER OF**

.....

In Bankruptcy No. ...

*Bankrupt .*

Application having been heretofore made for an order amending Schedule<sup>82</sup>  
....., previously filed herein and an order to show cause having been  
granted thereon on the ..... day of ....., 19..., and proof of mailing  
said order, as provided therein, now being made, and<sup>83</sup> .....  
.....  
.....  
now, on motion of ....., Esq., attorney for said bankrupt,

It is ordered:

That Schedule A ( )<sup>84</sup> herein be amended by adding thereto, in the  
proper columns, the following facts:<sup>85</sup> .....  
.....

<sup>80.</sup> If Schedule B only is to be amended, notice should be given the trustee, and this paragraph changed accordingly.

<sup>81.</sup> This order should be in triplicate, one for the clerk, one for the trustee, and one for the referee. Compare Forms Nos. 81 and 82. See also, generally, Sections Seven and Eighteen, *ante*, and General Order XI.

<sup>82.</sup> Here insert, for instance, "A (3)" or "B (2)," to fit the petition.

<sup>83.</sup> Recite whether there was appearance in opposition, and if so by what creditor or the trustee, and by what attorney represented.

<sup>84.</sup> See foot-note 82.

<sup>85.</sup> Indicate the columns on the appropriate page of schedule A by numeral as if in Schedule A (3) thus: (1) page 25, (2) John Smith, (3) 650 Broadway, New York, (4) New York, (5) Merchandise, (6) \$5,203.62."

That<sup>86</sup> Schedule B ( ) be amended by adding thereto the following words:<sup>87</sup> .....

.....,  
*Referee in Bankruptcy.*

**Form No. 84.**

**Affidavit to Schedule of Creditors When Bankrupt Cannot be Found.<sup>88</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF	}	In Bankruptcy No. ...
.....		
<i>Bankrupt .</i>		

STATE OF ....., }  
 County of ....., } ss.:  
 City of ....., }

....., of ....., being severally duly sworn, depose and say that they<sup>89</sup> are the petitioning creditors in the above proceeding; that the said ....., the bankrupt, is absent from the said district and cannot be found; that your petitioners have diligently inquired into his affairs for the purpose of ascertaining the names and places of residence of all of his creditors, and, according to the best of their information, such names and places of residence are set out in Schedule A, hereto annexed.

.....  
 .....  
 .....

Subscribed and sworn to before me, this ..... day of ....., 19...

.....,  
 .....

<sup>86</sup>. Use only if Schedule B is to be amended.

<sup>87</sup>. See foot-note 85, and indicate columns of appropriate page of Schedule B, as there indicated.

<sup>88</sup>. This practice is outlined in General Order IX. See also Sections Seven and Thirty-nine.

<sup>89</sup>. One petitioner acquainted with the facts can make this affidavit; if so, change the form accordingly.

**Schedule A.<sup>90</sup>****Unsecured Creditors.**

Names.	Residences.	Amounts.	
		Dolls.	Cts.

**Creditors Holding Securities.**

Names.	Residences.	Securities.	Values.		Amounts.	
			Dolls.	Cts.	Dolls.	Cts.

**Form No. 85.****Petition that Bankrupt Turn over Concealed Assets.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 119.)

United States District Court, for the ..... District of .....§

**IN THE MATTER OF**

.....

In Bankruptcy No. ...

*Bankrupt .*

To ....., Esq., Referee in Bankruptcy:

The petition of ..... respectfully shows:

1. That he is the trustee herein duly qualified and acting.
2. Petitioner respectfully alleges that through his attorney, he has examined the bankrupt and other witnesses in this proceeding and thoroughly investigated the books of the bankrupt and the circumstances connected with this bankruptcy.
3. Petitioner alleges, upon information and belief, that ....., the said bankrupt has in his possession or under his control the following

<sup>90.</sup> Attach this schedule to the affidavit, filling in names, residences, amounts, etc., with as much accuracy as possible.

property belonging to his said estate in bankruptcy: .....

That the said bankrupt is fraudulently concealing same from your petitioner as trustee.

4. That said property so concealed amounts in value to at least \$. .....

5. That the sources of petitioner's knowledge and the grounds of his belief as to this property are as follows:

[Here specify fully.]

6. No previous application has been made for an order herein.

Wherefore, your petitioner prays for an order directing the bankrupt to turn over and deliver forthwith to your petitioner, all of such property or moneys so concealed, and for such other and further relief as may be just and proper.

.....,  
Petitioner.

[Verification.]

#### Form No. 86.

#### Order that Bankrupt Turn over Concealed Assets.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 203.)

United States District Court, for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

....., the trustee herein, having made an application to compel ....., the bankrupt above named, to turn to his said trustee, the sum of \$. ....., proceeds of certain property belonging to his estate, alleged to be in the possession and control of said bankrupt and which the said bankrupt is fraudulently concealing from his said trustee, and the said ..... having filed his verified answer thereto and the matter having been duly heard and testimony taken, and the referee having rendered a decision thereon,

Now, upon reading and filing the petition of ....., trustee herein, verified the ..... day of ....., 19..., the answer of .....

bankrupt herein, verified the ..... day of ....., 19..., the testimony and all proceedings had herein, and after hearing ....., attorney for the said trustee, in support of said petition, and ..... , attorney for ....., in opposition thereto, it is, upon motion of ....., attorney for said trustee,

Ordered, that the prayer of the trustee's petition herein be, and it hereby is, in all respects granted, and

It is further ordered, that the said ....., bankrupt herein, account for and pay over within ..... days to ....., as trustee herein, the sum of \$..... belonging to his said estate in bankruptcy and found to be in his possession or under his control.

Dated, ....., 19...

.....,  
*Referee in Bankruptcy.*

**Form No. 87.**

**Petition for Order of Protection.<sup>91</sup>**

In the District Court of the United States for the ..... District of .....

<p><b>IN THE MATTER OF</b></p> <p>.....</p> <p><i>Bankrupt .</i></p>	}	<p>In Bankruptcy No. ...</p>
--	---	------------------------------

To ....., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he was adjudicated bankrupt herein on the ..... day of ....., 19..., and on the same day his proceeding in bankruptcy was duly referred.

That your petitioner has not yet made application for his discharge herein.

That your petitioner has reason to believe that he is liable to arrest upon civil process, other than in the cases specified in § 9-a of the bankruptcy law of 1898.

That no previous application has been made to this or any other court for the order hereinafter asked.

<sup>91</sup> See, generally, Section Nine, *ante*. Consult also General Order XII (1). The application often takes the form of a petition for an injunction against further

proceedings in a suit, on the theory that a body execution is a step in a suit. See Forms Nos. 89, 90, 91, 92, 93.

Wherefore, your petitioner prays for an order of protection from arrest, as provided in said § 9-a and General Order XII (1).

Dated, ....., 19...

.....,

*Petitioner.*

[Add verification as in Form No. 66.]

**Form No. 83.**

**Order of Protection.<sup>92</sup>**

At a Court of Bankruptcy, held in and for the ....., District of ....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

The above-named bankrupt having, on the ..... day of ....., 19..., applied for an order of protection, and it appearing that one year has not yet elapsed since the date of his adjudication, viz., the ..... day of ....., 19..., and that he has not yet been discharged herein, now, on motion of ....., Esq., attorney for said bankrupt,

It is ordered:

That all persons and officers be and they hereby are prohibited from arresting the said bankrupt on civil process, save in the cases specified in subdivisions (1) and (2) of § 9-a of the bankruptcy law of 1898, until twelve months after the date of such adjudication, or, if within that time the bankrupt applies for a discharge, then until the question of such discharge is determined.

.....,

*Referee in Bankruptcy.*

<sup>92</sup> This fits into Form No. 87. See foot-note 91 to that form. Consult, generally, Section Nine and General Order XII (2).



## Form No. 89.

Petition for Stay of Pending Suit.<sup>93</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

To ....., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he was duly adjudicated a bankrupt<sup>94</sup> herein on the ..... day of ....., 19..., and that he has not yet made application for a discharge.

That, among your petitioner's debts scheduled herein, is one for ..... dollars (\$.....), in favor of ....., and that such debt is of such a nature that a discharge in bankruptcy, as provided in the bankruptcy law of 1898 as amended, would be a release.

That, at the time of the filing of the petition on which said adjudication was made, a suit was pending on such debt in the ..... Court of ....., entitled ..... v. ...., in which action ....., Esq., of ....., in the ..... of ....., in said district, is the attorney of record of the plaintiff, and that the same is still pending therein;<sup>95</sup> and that, if such<sup>96</sup> ..... is allowed to proceed, injury will be done your petitioner,<sup>97</sup> for the following reasons:<sup>98</sup>.....

93. See, generally, Section Eleven, and compare Section Two and Forms Nos. 73, 74, 75 and 76, and the foot-notes to such forms, especially foot-note 23 to Form No. 73. Application may also be made for a stay of a suit begun after the bankruptcy (see, generally, Section Eleven), though the power to grant it flows rather from § 2(15). If such an application is to be made this form can easily be adapted to fit the facts. The form here given refers only to a stay asked by the bankrupt. It can be varied to fit the very diverse facts on which these stays may be granted. Any other form would, in the nature of things, be a mere skeleton of little value to the practitioner.

94. This petition may be made by the petitioning creditor, if before adjudication,

and, if after, by the trustee, and, if the latter, the allegations should be changed so as to show the trustee's appointment and qualification, and injury to the estate if the stay is not granted. The form given applies only to a case where the bankrupt desires to prevent the entry of a judgment.

95. Or in a proper case add: "that such suit has resulted in a judgment against your petitioner and that there is now pending before ..... Esq., as referee, a proceeding supplementary to execution," or as the facts may be.

96. "Suit" or "proceeding."

97. Or "your petitioner's estate in bankruptcy."

98. Set out the reasons carefully and clearly.

That no previous application has been made to this or any other court for the stay herein asked.

Wherefore, your petitioner prays that further proceedings in said suit<sup>99</sup> may be stayed for the time prescribed in § 11-a of said law, in particular,<sup>1</sup>  
 .....  
 and for such further order as shall be just and lawful.

Dated, ....., 19...

.....,

*Petitioner.*

[*Add verification as in Form No. 66.*]

### Form No. 90.

#### Referee's Stay and Show Cause on Pending Suit.<sup>2</sup>

At a Court of Bankruptcy, held in and for the ..... District of  
 ....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

• IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy No. ...

Application having been made for an order staying further proceedings in a certain suit in the ..... Court of ....., entitled ..... v. ...., and it appearing that the same should be heard and decided by the judge and such proceedings be stayed meanwhile; now, on motion of ..... Esq., attorney for the applicant,

It is ordered:

That ....., the plaintiff in said action, and his attorneys, agents, and servants, be, and they are, and each of them is, hereby stayed from any further proceedings therein, in particular from<sup>3</sup> .....  
 .....  
 until the hearing and decision of the show cause hereinafter ordered.

<sup>99</sup> Or, as the facts may be.

1. Here specify the particular act to which the stay is mainly directed.

2. Consult footnote 93 of Form No. 89

and see foot-note 29 to Form No. 74 for cross-references.

3. Here specify the particular act to which the stay is mainly directed.

That<sup>4</sup> the said . . . . ., the plaintiff in such action, show cause before the Honorable . . . . ., District Judge, at the United States District Court Room, in the . . . . . of . . . . ., in said district, on the . . . . . day of . . . . ., 19 . . . , at . . . . . o'clock, . . . m., or as soon thereafter as counsel can be heard, why this stay should not be continued for the space of twelve months from the date of the adjudication herein, or, if within that time the said bankrupt shall apply for a discharge, then until the question of such discharge shall be determined;<sup>5</sup> and then and there also show cause, if any, why a writ of injunction should not issue out of and under the seal of said court accordingly.

Let service of this order on said . . . . ., the plaintiff,<sup>6</sup> by delivering to him personally a copy of the same and of the petition on which it is granted, within . . . . . days previous to the day last hereinbefore mentioned, be sufficient.<sup>6</sup>

. . . . .,  
*Referee in Bankruptcy.*

### Form No. 91.

#### Stipulation that Show Cause be Heard by Referee.<sup>8</sup>

In the District Court of the United States for the . . . . . District of . . . . .

<p>IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy No. ...
--	---	-----------------------

It is hereby stipulated that the order to show cause previously granted herein, returnable before the Honorable . . . . ., District Judge, on the . . . . . day of . . . . ., 19 . . . , may be brought on before and be determined by . . . . ., Esq., Referee in Bankruptcy, who granted the same, instead of said judge; and that the same may be moved

4. If a show cause is not thought necessary use Form No. 93, or if the local practice does not call for the issuance of the writ of injunction, draw a referee's order restraining and enjoining the person named, as suggested by the words of this form.

5. If a writ is not asked for, stop this paragraph here.

6. Or "on . . . . ., Esq., his attorney of record," if any; or "on either or

both the said . . . . . and . . . . ., his attorney," as the court may direct.

7. Service should never be by mail, or on any person other than one here specified.

8. This form will be found useful when the residence of the judge is in another division or county from that of the bankrupt. Consult, generally, Section Eleven and Forms Nos. 89, 90, 92, and 93, and the foot-notes thereto.

before said referee at . . . . ., in the . . . . . of . . . . .,  
in said district, on the . . . . . day of . . . . ., 19 . . . . , at . . . . o'clock, . . . m.

Dated, . . . . ., . . . . ., . . . . ., . . . . ., 19 . . . .

. . . . .,

*Attorney for* . . . . .

. . . . .,

*Attorney for* . . . . .

### Form No. 92.

#### Decision and Report of Referee on Application for Stay Stipulated Before Him.<sup>9</sup>

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

. . . . .

} In Bankruptcy No. . . .

*Bankrupt* .

To the Hon. . . . ., District Judge:

Application having been made for a stay directed to . . . . ., plaintiff in an action in the . . . . . Court of . . . . ., entitled . . . . . v. . . . ., and a temporary stay having been previously granted, and the said . . . . . ordered to show cause before the district judge why such stay should not be continued, and such show cause having been moved before me, on stipulation of all parties, and the petitioning bankrupt appearing by . . . . ., Esq., his attorney, and . . . . ., said plaintiff, appearing by . . . . ., Esq., his attorney;

It is hereby found and recommended that an order be entered<sup>10</sup> directing a writ of injunction to issue to . . . . ., restraining and enjoining him from further proceedings in said suit in particular<sup>11</sup> . . . . .

. . . . .  
until twelve months after the date of the adjudication herein, unless the said bankrupt shall, previous to that time, apply for a discharge, and then until the question of such discharge shall be determined.

9. This form fits into Form No. 91, which, and the foot-notes thereto, see. Compare also Forms Nos. 89, 91, and 93. Consult, generally, Section Eleven.

10. If the recommendation is against the continuance of the stay, stop here, and add:

"denying such application and vacating the temporary stay previously granted herein."

11. Here specify the particular act to which the stay is mainly directed.

Herewith are handed up the petition and other papers used on such application and show cause.

Respectfully submitted,

.....,

*Referee in Bankruptcy.*

Dated, ....., ....., ....., ....., 19...

**Form No. 93.**

**Order that Writ of Injunction Issue.<sup>12</sup>**

In the District Court of the United States for the ..... District of .....

**IN THE MATTER OF**

.....

In Bankruptcy No. ...

*Bankrupt .*

Whereas application has been previously made herein for a stay directed to ....., plaintiff, in a suit in the ..... Court of ....., entitled ..... v. ...., and a temporary stay was granted by ....., Esq., Referee in Bankruptcy, and such application has been argued in the first instance, by stipulation, before such referee, and he having reported in favor<sup>13</sup> of such stay; now, on motion of ..... Esq., attorney for the petitioner, and<sup>14</sup> after hearing ..... Esq., attorney for said ....., opposed;

It is ordered:<sup>15</sup>

That such report and recommendation be approved, and that a writ<sup>16</sup> of injunction issue, directed to ....., restraining and enjoining him from further proceedings in such suit, in particular form,<sup>17</sup> .....

until twelve months after the date of the adjudication herein, unless the said

12. To be used only in cases where the referee grants a temporary injunction with show cause. See Form No. 90, foot note 2. It is thought also that the referee can on a stipulation bringing the show cause on before him, issue an order directing the clerk to issue the writ, thus avoiding the circumlocution resulting from Form No. 92. If so, Form No. 93 can be adapted to the usual form of a referee's order; see Form No. 75. Consult, generally, Section Eleven.

13. Or "against the continuance."

14. Strike out to end of paragraph if there is no appearance in opposition.

15. If the application is denied, follow foot-note 45, Form No. 76.

16. For form of writ, see works on Federal Practice.

17. Here specify the particular act to which the stay is directed.

bankrupt shall, previous to that time, apply for a discharge, and then until the question of such discharge shall be determined.

Witness the Honorable ....., Judge of said court and the seal thereof, at the city of ....., in said district, this ..... day of ....., 19...

{ Seal of  
the court }

.....,  
Clerk.

### Form No. 84.

#### Offer of Composition.<sup>18</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF	}	
.....		In Bankruptcy No. ...
<i>Bankrupt</i> .		

To ....., Esq., Referee in Bankruptcy, and the creditors of ....., a bankrupt:

The undersigned, who was adjudicated a bankrupt herein on the ..... day of ....., 19..., and whose schedules of creditors and property have been previously filed at ....., with ....., Esq., the referee in bankruptcy in charge, and who was examined in open court herein on the ..... day of ....., 19...,<sup>19</sup> does hereby offer a composition at ..... per cent. (....%) of the claims of his creditors, allowed or to be allowed, except those entitled to priority, in this proceeding.

This<sup>20</sup> offer is to be effective only after the examination of the undersigned in open court, as provided in § 12-a of the bankruptcy law of 1898.

Dated, ....., 19...

.....,  
*Bankrupt.*

<sup>18</sup>. This is the first step in composition. The practice suggested by Form No. 60 applied under the law of 1867, but does not under that of 1898. See, generally, Section Twelve; Form No. 61, together with Forms Nos. 94, 96, 97, 98, 99, 100, 101, 102, and 103, are thought to outline a complete practice on this increasingly important branch

of bankruptcy law. For substitute for Forms Nos. 62 and 63, see Form No. 102.

<sup>19</sup>. If the examination has not been held but is to be, specify the date and then use the paragraph referred to in foot-note 20.

<sup>20</sup>. Omit this if the bankrupt has already been examined.

STATE OF ..... , }  
 County of ..... , } ss.:  
 City of ..... , }

On this ..... day of ..... , 19... , the above-named .....  
 ..... appeared before me and acknowledged the execution of the fore-  
 going offer of composition.

..... ,  
 .....

**Form No. 95.**

**Notice to Creditors.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 294.)

United States District Court, for the ..... District of .....

**IN THE MATTER OF**

.....

In Bankruptcy No. ...

*Bankrupt .*

To the creditors of ..... , bankrupt:

Notice is hereby given that the above-named bankrupt has filed his peti-  
 tion, verified the ..... day of ..... , 19... , setting forth among  
 other things that he has offered terms of composition, which terms have been  
 accepted in writing by a majority in number of all creditors whose claims  
 have been allowed, and which number represents a majority in amount of  
 such claims, that the consideration to be paid by the bankrupt to his creditors  
 and the money necessary to pay all debts which have priority and the costs  
 of the proceedings have been duly deposited in a duly designated depository,  
 and asking that said composition may be confirmed by the court.

Notice is hereby given that all creditors and other persons are ordered to  
 attend at the hearing before the Honorable Judge of the United States  
 District Court in the United States Court House, on ..... , ..... ,  
 19... , at .... M., and then and there show cause, if any they have, why the  
 prayer of said petitioner should not be granted, and also to attend the  
 examination of the bankrupt thereon.

Dated ..... , ..... , 19...

..... ,  
*Referee in Bankruptcy.*  
 No. .... Street,  
 City of .....

[Annex proof of publication as on discharge proceeding.]

## Form No. 96.

Acceptance of Composition.<sup>21</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt* .

In Bankruptcy No. ...

To ....., Esq., Referee in Bankruptcy, and the bankrupt  
above named:

The undersigned creditors, whose signatures, residences, claims, and the amount at which the same have been allowed, are hereafter set out, do hereby accept the offer of composition at ..... per cent. (....%) made herein by ....., the above-named bankrupt, on the ..... day of ....., 19...; this<sup>22</sup> acceptance, however, to be effective only after such bankrupt shall be examined in open court.

Dated, ....., ....., 19...

Signatures of creditors. <sup>23</sup>	Residences.	Debts allowed.	
		Dolla.	Cts.

STATE OF .....,  
County of .....,  
City of .....,

} ss.:

On this ..... day of ....., 19..., the above-named .....  
..... and .....  
..... and .....  
appeared before me and severally acknowledged the execution of the foregoing acceptance of offer of composition.

.....,

.....

<sup>21</sup>. See foot-notes to Form No. 94 and consult, generally, Section Twelve.

<sup>22</sup>. Strike this clause out if bankrupt has already been examined.

<sup>23</sup>. The creditors should sign here, using

their business names, and, in case of partnerships, corporations, and the like, the person who actually signs should add his own name: thus, "Smith & Co., by John Smith, one of such partnership."



**Form No. 97.****Referee's Certificate in Composition.<sup>24</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ...

To the Honorable ....., District Judge:

I, ....., one of the referees in bankruptcy of your court, do hereby certify as follows:

*First:* That ....., the bankrupt herein, was duly adjudicated such on the ..... day of ....., 19..., and that he filed his schedules of creditors and property herein, as provided by § 7 (8) of the bankruptcy law of 1898, on the ..... day of ....., 19....

*Second:* That the first meeting of creditors was held herein on the ..... day of ....., 19..., and the bankrupt was then examined in open court; and that such examination was taken by a stenographer, reduced to writing, and forms a part of the record-book handed up herewith.

*Third:* That, at such first meeting of creditors, claims of creditors, aggregating ..... dollars (\$....) in amount, and ..... (....) in number, were duly allowed, and that the names and residences of such creditors and the amounts at which their claims were allowed, are set forth in Schedule A hereto annexed and made a part of this report.

*Fourth:* That, at such first meeting of creditors, claims of creditors entitled to priority, amounting to ..... dollars (\$....) in amount, and ..... (....) in number, were duly allowed, and that the names and residences of such creditors and the amounts at which their claims were allowed as entitled to priority, are set forth in Schedule B hereto annexed and made a part of this report.

*Fifth:* That, at the date of this certificate, the claims of certain creditors duly scheduled have not yet been presented for allowance, and that the names and residences of such creditors and the amounts of their claims as so scheduled are set out in Schedule C hereto annexed and made a part of this report.

<sup>24</sup> Since the referee cannot confirm a composition, and practically all the papers are on file with him, this certificate is necessary. See, generally, Section Twelve.

*Sixth:* That the cost of this proceeding, as shown by said record-book, is, to this date, ..... dollars (\$....).

*Seventh:* That appraisers were appointed herein and have filed a report, showing the value of the assets of said bankrupt to be ..... dollars (\$....), and that the basis of their valuation in such report is as follows:<sup>25</sup>

.....  
*Eighth:* That the said bankrupt, after he had been so examined and so filed said schedules, offered terms of composition to his creditors at ..... per cent. (....%), as shown by his offer handed up herewith.

*Ninth:* That a majority in number of all of said creditors whose claims have been allowed, viz.: ..... (....) creditors, whose claims represent a majority in amount of all such allowed claims, viz.: ..... dollars (\$....), have accepted in writing said bankrupt's offer of composition; all as is shown by such acceptances, handed up herewith.

*Tenth:* That, so far as appears from the files and records herein, said composition will be for the best interests of the creditors and is made in good faith and not procured by any means, promises, or acts prohibited by said bankruptcy law, nor has the bankrupt been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge.<sup>26</sup>

I hand up herewith, for the information of the judge:

- (1) The record-book of this proceeding to the date of this certificate.
- (2) All claims allowed or refused allowance.
- (3) The appraisal, above mentioned.
- (4) The offer of composition.
- (5) The acceptances of creditors.
- (6) All other papers filed with me herein.

Respectfully submitted,

.....,  
*Referee in Bankruptcy.*

Dated, ....., ....., ..... 19...

**Schedule A.**

**Claims Allowed.**

Names of creditors.	Residences.	Amount allowed.	
		Dolla.	Cts.

<sup>25</sup> For instance: Sixty per cent. of cost, or cost price, or, as the facts may be.

<sup>26</sup> This paragraph may be modified to

fit the facts, and should not be inserted if the referee is in doubt on any of the matters mentioned therein. See § 12-d.

**Schedule B.****Priority Claims Allowed.**

Names of creditors.	Residences.	Amount allowed.	
		Dolla.	Cts.

**Schedule C.****Claims Not Yet Allowed.**

Names of creditors.	Residences.	Amount scheduled.	
		Dolla.	Cts.

**Form No. 98.****Order to Show Cause in Composition.<sup>27</sup>**

In the District Court of the United States for the . . . . . District of . . . . .

<b>IN THE MATTER OF</b>  .....  <i>Bankrupt .</i>	} In Bankruptcy No. ...
---	-------------------------

Whereas, application has been made for the confirmation of the composition offered by the above-named bankrupt, and it appears that such composition has been accepted in writing by a majority in number of all of his creditors whose claims have been allowed, which majority represents a majority in amount of such claims, and that the consideration for such composition required by § 12-b of the bankruptcy law of 1898 has been duly deposited; now, on motion of . . . . ., Esq., attorney for such bankrupt,

It is ordered:

<sup>27</sup>. The application for this order may be made by Form No. 61, which, however, should be verified. Consult, generally, Sec-

tion Twelve, *ante*. See also forms just *ante* and *post*.

That all creditors of . . . . ., a bankrupt, as well as all other parties in interest, show cause, at a hearing to be had on such application before the District Court of the United States for the . . . . . District of . . . . ., at . . . . ., in the . . . . . of . . . . ., in said district, on the . . . . . day of . . . . ., 19 . . . ., at . . . . o'clock, . . m., or as soon thereafter as such hearing is called, why such application should not be granted.

That notice of such hearing be given by mailing a copy of this order to each of the creditors, parties in interest and attorneys entitled to notice in this proceeding, and by publishing a copy hereof in the designated newspaper of the county district of such bankrupt's residence, as provided by such law.

That such notice be so given by or under the direction of the referee in charge of this proceeding.<sup>28</sup>

Witness, the Honorable . . . . ., Judge of the said court, and the seal thereof, at the city of . . . . ., in said district, on the . . . . . day of . . . . ., 19 . . . .

{ Seal of  
the court. }

. . . . .,  
*Clerk.*

#### Form No. 99.

#### Appearance of Objecting Creditor in Composition.<sup>29</sup>

In the District Court of the United States for the . . . . . District of . . . . .

<p>IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	<p>In Bankruptcy No. ...</p>
--	---	------------------------------

To the District Court of the United States for the . . . . . District of . . . . .:

The clerk of this court will please enter my appearance as attorney for . . . . ., of . . . . ., . . . . ., a creditor of . . . . ., the above-named bankrupt, who desires to file a specification of objection to the confirmation of his proposed composition herein.

Dated, . . . . ., . . . . ., . . . . ., . . . . ., 19 . . . .

. . . . .,  
*Attorney for* . . . . .,  
*Objecting Creditor.*

*Address.* . . . . .

<sup>28</sup> Or, if that is the local practice, by the clerk.

<sup>29</sup> Consult, generally, Section Twelve.

See also General Order XXXII. for time within which this appearance must be entered, and compare Equity Rule XVII.

Form No. 100.

Specification of Objection in Composition.<sup>30</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ...

Now comes ....., of ....., a creditor and person interested in the estate of ....., the above-named bankrupt, and does hereby oppose and object to the confirmation of the composition offered by said bankrupt, and, for grounds of such opposition and objection, does file the following specification.<sup>31</sup>

That<sup>32</sup> such confirmation is not and will not be for the best interests of the creditors of said bankrupt because of the following facts, which the undersigned charges to be true, viz.:<sup>33</sup>

.....  
.....  
.....

Wherefore, objection is made to such confirmation and a hearing and the judgment of the court is asked thereon.

.....,  
*Objecting Creditor.*

[by

.....,  
*his attorney.*

Address, .....]

STATE OF ....., }  
County of ....., } ss.:  
City of ....., }

I, ....., the objecting creditor mentioned and described in the foregoing specification of objection, do hereby make solemn oath that

30. Consult for available objections Section Twelve, *ante*. See also General Order XXXII.

31. There may, of course, be more than one objection.

32. Or specify any other objection mentioned in § 12-d.

33. Here set out facts as in any other pleading, showing them in sufficient detail to give the bankrupt proper notice of the issue he must meet.

the statements of fact contained therein are true, according to the best of my knowledge, information, and belief.<sup>24</sup>

.....

Subscribed and sworn to before me, this ..... day of ....., 19...

.....

.....

**Form No. 101.**

**Order of Reference to Special Master in Composition.<sup>25</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ...

Whereas, application has been made for the confirmation of a composition offered by the above-named bankrupt and a hearing set to consider the same, and ....., a creditor of said bankrupt, having appeared by ....., Esq., his attorney, and filed a specification of objection to such confirmation; now, on motion of ....., Esq., attorney for .....,

It is ordered:

That the issue made by such application and such specification of objection be referred to ....., Esq., as special master, to ascertain and report the facts, with his conclusions thereon.

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the ..... day of ....., 19...

{ Seal of  
the court }

.....,

*Clerk.*

<sup>24</sup>. If the specification is made by the creditor's attorney, the latter's affidavit should show why the creditor does not verify and how the attorney is acquainted with the facts; also that he is authorized

by the creditor to file the specification and verify for him.

<sup>25</sup>. This form will not be used if the judge determines to hear the matter himself. See Section Twelve, generally, and the foot-notes to forms just *ante* and *post*.

Form No. 102.

Report of Special Master in Composition.<sup>38</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF  
.....  
  
*Bankrupt* .

In Bankruptcy No. ...

To the Honorable ....., District Judge:

I, ....., special master, appointed herein by an order of your court, dated the ..... day of ....., 19..., do hereby report as follows:

On receipt of said order, I set<sup>37</sup> the ..... day of ....., 19..., at ..... o'clock, .. M., at ....., in the ..... of ..... in said district, as the time and place at which such reference should be proceeded with, and notified the respective attorneys; that, at such time and place, the bankrupt was represented by ....., Esq., his attorney, and the objecting creditor by ....., Esq., his attorney, and<sup>38</sup> that there were the following additional appearances: .....

That, thereafter, the proceedings were as indicated in the record-book of such reference, which, with the testimony taken and the depositions used, is handed up herewith.

That, in accordance with such proceedings, and after due consideration, I do find the facts to be as follows:<sup>39</sup>

.....  
.....

That, on such facts, it is my opinion, and I do, therefore, recommend, that:<sup>40</sup> .....

.....

38. See foot-note 35 to Form No. 101. This form can also be used for the several reports by a special master referred to in the text and post.

37. For practice on references to special masters, see Equity Rules LXXIII to LXXXIV.

38. If there were no additional appearances strike this out.

39. The referee usually prepares his own findings. They should be stated with sufficient particularity to inform the judge as to the issue, and, if possible, refer to the testimony by page number and to depositions by name of deponent and date.

40. Here state the conclusion and recommendation in a single sentence.

My fees on such reference are ..... dollars (\$....), and my disbursements are ..... dollars (\$....), a total of ..... dollars (\$....), which have been paid to me by the petitioning bankrupt.<sup>41</sup>

I hand up herewith:

(1) The record-book on this reference, including the testimony of witnesses therein.

(2) The petition.

(3) The specification of objection.

(4) The depositions used on such reference.

(5) The exhibits referred to in such record-book.

(6) All other papers filed or used on such reference.

Dated, ....., ....., ....., ....., 19...

Respectfully submitted,

.....,  
*Special Master.*

**Form No. 103.**

**Order Confirming (or Refusing to Confirm) Composition.<sup>42</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy No. ....;

Whereas, an application for the confirmation of the composition at ..... per cent. (....%), offered by the bankrupt to his creditors, has been made herein, and it appearing that such composition has been accepted by a majority in number of all of the creditors whose claims have been allowed, and that such number represents a majority in amount of such claims, and the consideration required by § 12-b of the bankruptcy law of 1898 having been deposited in the place designated by this court; and an order having been previously granted requiring creditors to show cause why such composition should not be confirmed, and due notice having been given as required by § 58-a (2), and no specification of objections to such confirmation having

41. Or "the objecting creditor," as the case may be.

42. This form accomplishes the same as Forms Nos. 62 and 63, and also formally dismisses the proceeding. Consult, gener-

ally, Section Twelve, and for effect of confirmation, see §§ 14-c, 21-f-g, and 70-f. See also General Orders XII(3), XXIX, and XXXII.



been filed,<sup>43</sup> and the court being satisfied in all of the particulars specified in § 12-d of said law.<sup>44</sup>

It is ordered that<sup>45</sup> said composition be, and the same hereby is, in all things confirmed.

It is further ordered that distribution of said consideration shall be made by . . . . ., the trustee herein,<sup>46</sup> and that he, first, pay from said deposit the claims of creditors entitled to priority, as fixed by the files and records of this proceeding or as may hereafter be ordered;<sup>47</sup> second, pay the costs of this proceeding<sup>48</sup> in the sums and to the persons as likewise so fixed; third, pay, according to the terms of said composition, the claims of the general creditors<sup>49</sup> allowed herein, as shown by the files and records of this proceeding and as may hereafter be ordered; and fourth, if any balance shall remain, that the same continue on deposit until twelve months from this date, subject to such subsequent orders as may be granted herein during that period, and then, if any of said consideration shall remain, that the same be distributed by the person above designated *pro rata* among such creditors as, prior to that time, shall have proven and had their claims allowed herein.<sup>50</sup>

It is further ordered that said proceeding in bankruptcy against the above-named bankrupt be, and the same hereby is dismissed.

Witness, the Honorable . . . . ., Judge of the said court, and the seal thereof, at the city of . . . . ., in said district, on the . . . . . day of . . . . ., 19 . . . .

{ Seal of  
the court }

. . . . .,  
Clerk.

43. Or if a specification of objections was filed, strike out this clause and substitute "and a specification of objection having been filed by . . . . ., and the same having been duly heard," reciting the reference to the special master, if any, and the filing of his report and its recommendation; for such recitals, see Form No. 116.

44. If confirmation is denied, change this recital to fit the facts.

45. In that event also stop here and add:

"confirmation of such composition be and the same hereby is refused; and the referee in charge is directed to proceed with the administration of said estate," concluding with the *teste* clause at the end of the form.

46. Or by the referee or the clerk, as the court may order.

47. See § 64-a-b.

48. See §§ 62 and 64-b(3).

49. See § 57.

50. See § 66.

## Form No. 104.

## Petition to Set Aside a Composition.

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 271.)

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....  
*Bankrupt.*

To the District Court of the United States, for the ..... District of .....:

The petition of ..... respectfully shows to this court and alleges:

1. That he is a creditor and party in interest herein, whose claim has been duly filed and allowed in this proceeding.

2. That on the ..... day of ....., 19..., the bankrupt herein, after he had been examined before the referee, duly offered a composition in said proceeding to his creditors upon the following terms and conditions:

.....  
That said offer was thereafter duly accepted by petitioner and other creditors of said bankrupt, upon the terms and conditions as offered and on the ..... day of ....., 19..., the said composition was duly confirmed by the district judge in the manner and form as offered and accepted.3. That said composition was offered and accepted and confirmed upon statements that all the creditors should share equally in said composition and receive the same *pro rata* amounts upon their said several claims.4. That since the entry of the order confirming said composition and within a period of six months thereafter your petitioner has discovered that statements upon which the said composition was procured were false and untrue and that fraud was practiced by the said bankrupt in procuring the said composition in the following particulars: [*Here allege specifically the fraudulent acts of bankrupt by which it is claimed the composition is vitiated.*]

5. That all of the above facts and circumstances were not known to petitioner prior to the confirmation of the composition herein.

6. That your petitioner relied upon the representations of the bankrupt and would not have accepted said composition had he known the exact situation and the fraudulent acts of the bankrupt, as above stated.

7. No previous application for the order asked for herein has been made.

Wherefore, your petitioner prays that the said composition be vacated and set aside, the proceeding reinstated and the property returned to the trustee for distribution, according to the bankruptcy law.

.....,  
Petitioner.

[Verification.]

been filed,<sup>43</sup> and the court being satisfied in all of the particulars specified in § 12-d of said law.<sup>44</sup>

It is ordered that<sup>45</sup> said composition be, and the same hereby is, in all things confirmed.

It is further ordered that distribution of said consideration shall be made by . . . . ., the trustee herein,<sup>46</sup> and that he, first, pay from said deposit the claims of creditors entitled to priority, as fixed by the files and records of this proceeding or as may hereafter be ordered;<sup>47</sup> second, pay the costs of this proceeding<sup>48</sup> in the sums and to the persons as likewise so fixed; third, pay, according to the terms of said composition, the claims of the general creditors<sup>49</sup> allowed herein, as shown by the files and records of this proceeding and as may hereafter be ordered; and fourth, if any balance shall remain, that the same continue on deposit until twelve months from this date, subject to such subsequent orders as may be granted herein during that period, and then, if any of said consideration shall remain, that the same be distributed by the person above designated *pro rata* among such creditors as, prior to that time, shall have proven and had their claims allowed herein.<sup>50</sup>

It is further ordered that said proceeding in bankruptcy against the above-named bankrupt be, and the same hereby is dismissed.

Witness, the Honorable . . . . ., Judge of the said court, and the seal thereof, at the city of . . . . ., in said district, on the . . . . . day of . . . . ., 19 . . .

{ Seal of  
the court }

. . . . .,  
Clerk.

43. Or if a specification of objections was filed, strike out this clause and substitute "and a specification of objection having been filed by . . . . ., and the same having been duly heard," reciting the reference to the special master, if any, and the filing of his report and its recommendation; for such recitals, see Form No. 116.

44. If confirmation is denied, change this recital to fit the facts.

45. In that event also stop here and add:

"confirmation of such composition be and the same hereby is refused; and the referee in charge is directed to proceed with the administration of said estate," concluding with the *teste* clause at the end of the form.

46. Or by the referee or the clerk, as the court may order.

47. See § 64-a-b.

48. See §§ 62 and 64-b(3).

49. See § 57.

50. See § 66.

## Form No. 104.

## Petition to Set Aside a Composition.

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 271.)

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....  
*Bankrupt.*

To the District Court of the United States, for the ..... District of .....

The petition of ..... respectfully shows to this court and alleges:

1. That he is a creditor and party in interest herein, whose claim has been duly filed and allowed in this proceeding.

2. That on the ..... day of ....., 19..., the bankrupt herein, after he had been examined before the referee, duly offered a composition in said proceeding to his creditors upon the following terms and conditions:

.....  
That said offer was thereafter duly accepted by petitioner and other creditors of said bankrupt, upon the terms and conditions as offered and on the ..... day of ....., 19..., the said composition was duly confirmed by the district judge in the manner and form as offered and accepted.3. That said composition was offered and accepted and confirmed upon statements that all the creditors should share equally in said composition and receive the same *pro rata* amounts upon their said several claims.4. That since the entry of the order confirming said composition and within a period of six months thereafter your petitioner has discovered that statements upon which the said composition was procured were false and untrue and that fraud was practiced by the said bankrupt in procuring the said composition in the following particulars: [*Here allege specifically the fraudulent acts of bankrupt by which it is claimed the composition is vitiated.*]

5. That all of the above facts and circumstances were not known to petitioner prior to the confirmation of the composition herein.

6. That your petitioner relied upon the representations of the bankrupt and would not have accepted said composition had he known the exact situation and the fraudulent acts of the bankrupt, as above stated.

7. No previous application for the order asked for herein has been made.

Wherefore, your petitioner prays that the said composition be vacated and set aside, the proceeding reinstated and the property returned to the trustee for distribution, according to the bankruptcy law.

.....  
Petitioner.

[Verification.]

**Form No. 104-A.****Order Setting Aside a Composition.**

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 310.)

At a State Term of the District Court of the United States, held in  
and for the District of ....., at the Court House, in the  
City of ....., on the ..... day of ....., 19...

Present:

Hon. ....,  
District Judge.

IN THE MATTER OF

.....  
*Bankrupt.*

....., a creditor of the above named bankrupt, having  
filed a petition herein, verified the ..... day of ....., 19..., praying  
that the composition of said bankrupt with his creditors, confirmed by order  
of this court dated the ..... day of ....., 19..., be vacated and  
set aside for fraud in procuring same, and the proceeding reinstated, and an  
order to show cause having been issued thereon on the ..... day of  
....., 19..., and the said motion having come on for hearing before  
this court on the ..... day of ....., 19..., (and a trial had),

Nok, upon reading and filing the petition of ..... aforesaid,  
and upon all the pleadings and proceedings herein, and after hearing  
....., Esq., in support of said motion, and .....  
Esq., in opposition thereto, and due deliberation having been had thereon,  
it is, on motion of ....., attorney for said petitioner.

Ordered, adjudged and decreed that the composition of the bankrupt with  
his creditors herein, confirmed by this court by order made and entered on  
the ..... ay of ....., 19..., be and the same hereby is in all  
respects vacated and set aside and the bankruptcy proceeding reinstated.

And it is further ordered that the property of the said bankrupt be and  
hereby is restored to the trustee herein and the said trustee directed to pro-  
ceed with the administration of this estate, as provided in the Bankruptcy  
Act.

D. J.

**Form No. 105.****Petition for Extension of Time to Apply for Discharge.<sup>51</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....  
*Bankrupt.*

To the Honorable ....., District Judge:

Your petitioner respectfully shows:

That he is the bankrupt herein.

<sup>51</sup>. Consult Section Fourteen, generally.

That more than twelve and less than eighteen months have elapsed since the ..... day of ....., 19..., when he was adjudicated bankrupt.

That he was unavoidably prevented from filing an application for a discharge within twelve months after such adjudication for the following reasons:<sup>53</sup> .....

That he desires to file such application and secure a discharge.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore your petitioner prays for an order extending his time to file such petition for discharge until the expiration of eighteen months from the date of such adjudication.

Dated, ....., ....., ....., ....., 19...

.....,  
*Petitioner.*

[Add verification as in Form No. 66.] .

### Form No. 106.

#### Referee's Certificate on Application for Extension of Time.<sup>53</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....  
*Bankrupt.*

To the Honorable ....., District Judge:

I, ....., referee in bankruptcy in charge of this proceeding, do hereby certify:

That the above-named bankrupt was adjudicated herein on the ..... day of ....., 19...

That, from the files and records of such proceeding and any information possessed by me, there appears no reason why such bankrupt's petition for an extension of time to file application for a discharge should not be granted;<sup>54</sup> and that, in my opinion, such bankrupt has not been guilty of laches in applying for his discharge.

I, therefore, recommend that his petition for extension of time be granted.

Dated, ....., ....., ....., ....., 19...

.....,  
*Referee in Bankruptcy.*

<sup>53</sup> Here give reasons as, for instance, lack of funds to pay expenses, illness, absence, etc. See § 14-a.

<sup>54</sup> This certificate is not required, but is often applied for, the referee having all the facts before him.

<sup>54</sup> Or, if reasons against the granting of the petition or any facts which should be brought to the attention of the judge exist, state them here. Consult Section Fourteen.

## Form No. 107.

Order Extending Time to Apply for Discharge.<sup>55</sup>

In the District Court of the United States for the ..... District of.....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ...

Whereas, a petition for an extension of time to apply for discharge, as provided in § 14-a of the bankruptcy law of 1898, has been filed by the above-named bankrupt, and an order to that effect is recommended by ....., Esq., the referee in bankruptcy in charge of this proceeding; now, on motion of ....., Esq., attorney for said bankrupt,

It is ordered:

That the time of ....., the bankrupt herein, to apply for a discharge be, and the same hereby is, extended until the expiration of eighteen months from the ..... day of ....., 19..., the date of his adjudication herein.

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the ..... day of ....., 19...

{ Seal of  
the court }

.....,  
*Clerk.*

<sup>55</sup> This order usually follows the petition and certificate, Forms Nos. 105 and 106. Consult Section Fourteen, *ante*; and for other forms on proceedings for a dis-

charge, see Forms Nos. 57, 58 and 59, as supplemented by Forms Nos. 108, 109, 110, 111, 113, 114, and 115. See also General Order XXXI.

## Form No. 108.

Order to Show Cause on Application for Discharge.<sup>56</sup>

In the District Court of the United States for the ..... District of.....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ...

Whereas, application has been made by the above-named bankrupt for a discharge, as provided by § 14-a of the bankruptcy law of 1898; now, on motion of ....., Esq., attorney for such bankrupt,

It is ordered:

That all creditors of <sup>57</sup> ....., a bankrupt, as well as all other parties in interest, show cause, at a hearing to be had on such application before the District Court of the United States for the ..... District of ....., at ....., in the ..... of ....., in said district, on the ..... day of ....., 19..., at .... o'clock, .. M., or as soon thereafter as such hearing may be had, why such application should not be granted.

That notice of such hearing be given by mailing a copy of this order at least ten days prior to the date set for such hearing to each of the creditors, parties in interest and attorneys <sup>58</sup> entitled to notice of proceedings herein, and by publishing a copy hereof in the designated newspaper of the county district of such bankrupt's residence, not later than one week prior to such date.<sup>59</sup>

That such notice be so given by or under the direction of, the referee in bankruptcy in charge of this proceeding.<sup>60</sup>

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the ..... day of ....., 19...

{ Seal of }  
{ the court }

.....,  
Clerk.

<sup>56</sup> This form is intended as a substitute for the "Order of Notice" which is a part of Form No. 57. For criticisms of same, see Sections Fourteen and Fifty-eight.

<sup>57</sup> In partnership cases, substitute: "of ....., a partnership and ....."

and ....., as individuals, members of such copartnership, bankrupts."

<sup>58</sup> For instance those designated by creditors under General Order XXI(2).

<sup>59</sup> See § 58-b, and compare § 58-a(2).

<sup>60</sup> Or by the clerk, as is the practice in each district.



## Form No. 109.

Referee's Certificate of Conformity on Discharge.<sup>61</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ...

To the Honorable ....., District Judge:

I, ....., referee in bankruptcy in charge of this proceeding, do hereby certify:

That I have given the notice of the hearing on the application of the bankrupt for a discharge, as directed by an order dated the ..... day of ....., 19..., herein, as appears by the affidavit of mailing<sup>62</sup> ....., and the affidavit of publication, hereto attached and made a part hereof.

That, from the files and record-book of this proceeding, it appears that ..... was adjudicated bankrupt herein on the ..... day of ....., 19...

That the administration of said bankrupt's estate is closed.<sup>63</sup>

That from such files and record-book, it satisfactorily appears that such bankrupt has not committed any of the offenses or done any of the acts which would be an objection to his discharge, and that, in my opinion, such application should be granted.<sup>64</sup>

Dated, ....., ....., ....., ....., 19...

.....,

*Referee in Bankruptcy.*

<sup>61</sup> This form conforms to the practice in those districts where the referee, and not the clerk, gives the notice of application for a discharge. It is usually drawn by the referee. Consult Section Fourteen, generally, for practice. See also forms just *ante* and *post*.

<sup>62</sup> Or "my certificate of mailing" if the referee mails the notices himself.

<sup>63</sup> Or, if the case is not closed, state the facts, as: "not closed, but has proceeded to a first meeting and choice of trustee, and the bankrupt's examination is completed;" or "to a first dividend."

<sup>64</sup> If the contrary is true, or there is any reason why the hearing should be postponed, state the facts and make the proper recommendation.

## Form No. 110.

Appearance by Objecting Creditor on Discharge.<sup>65</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt* .

In Bankruptcy No. ...

To the District Court of the United States for the ..... District of .....:

The clerk of this court will please enter my appearance as attorney for  
 ....., of ....., ....., a creditor of .....,  
 the above-named bankrupt, who desires to file a specification of objection to  
 the application of such bankrupt for a discharge.

Dated, ....., ....., ....., 19...

.....,

*Attorney for Objecting Creditor.*

Address, .....

.....

## Form No. 111.

Specification of Objection to Discharge.<sup>66</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt* .

In Bankruptcy No. ...

Now comes ....., of ....., ....., a creditor and  
 person interested in the estate of ....., the above-named  
 bankrupt, and opposes and objects to the granting of such bankrupt's appli-

<sup>65</sup>. Consult, generally, Section Fourteen, *ante*. See also General Order XXXII, for time within which this appearance must be entered, and compare Equity Rule XVII.

<sup>66</sup>. Consult, generally, Section Fourteen, *ante*, and General Order XXXII. This form is thought more in accord with § 14-b and such general order than is Form No. 58. See also forms just *ante* and *post*.

ation for a discharge, and, for grounds of such opposition and objection, does file the following specification:

I. That such application should not be granted, because of the following facts, which the undersigned charges to be true, viz.:<sup>67</sup> .....

II. That such application should not be granted, because of the following facts, constituting an additional ground, which the undersigned charges to be true, viz.:<sup>68</sup> .....

Wherefore, objection is made to the granting of such application for a discharge and a hearing and the judgment of the court is asked thereon.

.....,  
*Objecting Creditor.*

[by

.....,  
*his Attorney.*<sup>70</sup>

Address,.....

[Add verification as in Form No. 100.]

.....]

### Form No. 112.

#### Exceptions to Specifications.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 275.)

United States District Court, ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt.*

....., the bankrupt herein, by ....., his attorney, hereby excepts to the specifications filed herein in behalf of ....., as follows:

67. For instance. "That such applicant was granted a discharge in a voluntary proceeding within six years prior to this application, to wit: In the District Court of the United States for the .... District of ....., on the .... day of ..... 19..."

68. If a second ground is alleged insert it here, for instance: "Such applicant has committed one of the offenses punishable by imprisonment specified in § 29-b of the bankruptcy law of 1898, in that" specifying the offense charged, giving time, place, and transaction.

70. See foot-note 34 to Form No. 100.

1. He excepts to the first of the said specifications on the ground that the same is indefinite, insufficient, and does not state an offense under the United States bankruptcy act which would be a bar to the discharge of the bankrupt, to wit: .....

2. He excepts to the specification numbered "....." on the ground that the allegations contained in the same do not contain any specific averment of fact; that the said specification is vague, indefinite and general; that the said specification does not raise any issue that can be met by the bankrupt herein, as the said specification fails to state what statements were made by the bankrupt which are stated to have been knowingly false when made.

3. That the said specifications hereinbefore excepted to should be dismissed and stricken out.

Dated ....., 19...

.....,  
Counsel for bankrupt,  
..... Street,  
.....

### Form No. 113.

#### Order of Reference to Special Master on Discharge.<sup>71</sup>

In the District Court of the United States for the ..... District of .....

<p>IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	<p>} In Bankruptcy No. ...</p>
--	--------------------------------

Whereas, application has been made by the above-named bankrupt for a discharge herein and a hearing set to consider the same, and ....., a creditor of said bankrupt, having appeared by ....., Esq., his attorney, in opposition, and filed a specification of objection thereto; now, on motion of ....., Esq., attorney for .....

It is ordered:

That the issue made by such application and such specification of objec-

<sup>71</sup> Consult, generally, Section Fourteen, and the forms just *ante* and *post*. This form will not be used if the judge determines to hear the matter himself.

tion be referred to . . . . ., Esq., as special master, to ascertain and report the facts, with his conclusions thereon.

Witness, the Honorable . . . . ., Judge of the said court, and the seal thereof, at the city of . . . . ., in said district, on the . . . . . day of . . . . ., 19...

{ Seal of  
the court. }

. . . . .,  
Clerk.

### Form No. 114.

#### Notice of Hearing Before Special Master.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 279.)

United States District Court, . . . . . District of . . . . .

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy No. ...

Please take notice that the issues raised by the specifications of objection to the discharge of the above-named bankrupt, filed by . . . . ., have been duly referred to . . . . ., Esq., as special master (or referee) for examination, testimony and report and that a hearing will be held upon said specifications at the office of the said special master (or referee) No. . . . ., city of . . . . ., on the . . . . . day of . . . . ., 19..., at . . . . . o'clock, . . . m., and a motion made to dismiss the said specifications, and for such other and further relief as to the court may seem just and proper.

Dated . . . . ., . . . . ., 19...

. . . . .,  
Attorney for bankrupt,  
. . . . . Street,  
City of . . . . .

To

. . . . ., Esq.,  
*Attorney for creditors,*

. . . . .

**Form No. 115.****Report of Special Master on Discharge.<sup>72</sup>**

See Form No. 102, and the foot-notes thereto. Such form is equally available in a proceeding for discharge.

**Form No. 116.****Order Denying Discharge, After Reference to Special Master.<sup>73</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy No. ...

Whereas, application has been made by ....., a bankrupt, for a discharge herein, and a specification of objection having been filed thereto by ....., a creditor and party in interest, and such specification having been referred to ....., Esq., as special master, to ascertain and report the facts with his opinion, and such special master having reported and recommended that such specification be sustained, and exceptions<sup>74</sup> to such report having been duly filed by said bankrupt, and the same having been argued; now, on motion of ....., Esq., attorney for such objecting creditor, ....., Esq., attorney for the bankrupt, appearing in opposition,

It is ordered:

That the specification of objection of ....., a creditor and party in interest herein, be, and the same hereby is, sustained.

That the application of the said ....., a bankrupt, be, and the same hereby is, denied.

That<sup>75</sup> the objecting creditor herein recover and have judgment against

<sup>72</sup> For practice, consult Section Fourteen, and the forms just *ante* and *post*.

<sup>73</sup> This order is the converse of Form No. 59, and, in cases of hearings before a special master resulting in a report recommending a discharge and awarding costs,

etc., can, it is thought, be adapted to it. Consult, generally, Section Fourteen, *ante*.

<sup>74</sup> If no exceptions were filed, leave this clause out. For practice on exceptions, see Equity Rules LXXXIII and LXXXIV.

<sup>75</sup> If costs are allowed, add this.

the bankrupt for<sup>76</sup> ..... dollars (\$.....), being ..... dollars (\$.....), less costs, and ..... dollars (\$.....), his disbursements herein.

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the ..... day of ....., 19...

{ Seal of  
the court }

.....,  
Clerk.

### Form No. 117.

#### Voluntary Petition of Partnership, All Partners Not Joining.<sup>77</sup>

To the Honorable ....., Judge of the District Court of the United States, for the ..... District of .....

The petition of ....., and ....., of the ..... of ....., in the county of ....., in said district, by occupation respectively ..... and ....., respectfully shows:

That your petitioners and ..... are and have been partners under the style of ....., which partnership has had its principal place of business at the ..... of ....., in the county of ....., in said district,<sup>78</sup> for the greater portion of the six months immediately preceding the filing of this petition; and that said partnership is insolvent and owes debts in excess of one thousand dollars (\$1,000).

That your petitioners as individuals each owes debts which he is unable to pay in full.

That such partnership and your petitioners are willing to surrender its and their property for the benefit of its and their creditors, respectively, except such as is exempt by law, and desire to obtain the benefits of the bankruptcy law of 1898, as amended.

That the said ....., whose place of residence is in the ..... of ....., in the ..... district of ....., has refused and still refuses to join in this petition; that he is neither a wage-earner nor a person engaged chiefly in farming or the tillage of the soil, and as an individual, owes debts which he is unable to pay in full.

That<sup>79</sup> such partnership has been dissolved, but there has as yet been no final settlement thereof.

76. The disbursements should be shown by affidavit at time application for costs is made.

77. This form can be adapted to a case where all the partners join, and then used as a substitute for Form No. 2, if desired. Consult, generally, Sections Five and Eighteen, and see General Orders VI, VII, and VIII.

78. If the petition is filed in the district of the domicile or residence of one of the partners, here add an allegation to show the fact.

79. If there has been a dissolution, use this clause, modifying slightly the previous allegations to fit; if not, leave it out. See § 5-a.

That the schedule hereto annexed marked A, and verified by your petitioners' oaths, contains a full and true statement of all the debts of said partnership, and (so far as it is possible to ascertain) the names and residences of its creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked B, and verified by your petitioners' oaths, contains an accurate inventory of all of the property of said partnership, both real and personal, and such further statements<sup>80</sup> concerning said property as are required by said law.

That the schedule hereto annexed marked C, and verified by the oath of your petitioner . . . . ., contains a full and true statement of all of his individual debts, and (so far as it is possible to ascertain) the names and places of residence of his individual creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked D, and verified by the oath of your petitioner . . . . ., contains an accurate inventory of all of his individual property, both real and personal, and such further statements concerning said property as is required by said law.<sup>81</sup>

Wherefore, your petitioners pray<sup>82</sup> that such partnership and your petitioners as individuals may be adjudged bankrupt within the purview of such bankruptcy law of 1898, as amended, and that service of this petition with a subpoena be made upon . . . . ., such nonconsenting partner, and that such proceedings be had as are provided in said law and General Order VIII of the Supreme Court and as the court may order.

. . . . .,  
 . . . . .,

*Petitioners.*

. . . . .,

*Attorney of Petitioners.*

STATE OF . . . . ., }  
 County of . . . . ., } ss.:  
 City of . . . . ., }

We, . . . . . and . . . . ., the petitioning debtors mentioned and described in the foregoing petition, do severally make solemn

80. If exemption is claimed in the partnership assets, insert a reference to such claim here. See Section Six, *ante*.

81. Repeat the last two paragraphs as to each partner, numbering the schedules, Schedule E and F, G and H, etc.

82. Prayer should ask for an adjudication of the individuals as well as of the firm. *In re Wing Yick Co.* (D. C., Hawaii), 13 Am. B. R. 757.



oath that the statements of fact contained therein are true, according to the best of our knowledge, information, and belief.

.....  
.....

Subscribed and sworn to before me, this ..... day of ....., 19...  
.....,  
.....

[Attach schedules<sup>83</sup> and summary statements for each the partnership and the petitioning partners, using those suggested by Form No. 1, but changing their lettering to correspond to the allegations of the petition.]

**Form No. 118.**

**Involuntary Petition by Three Creditors.<sup>84</sup>**

To the Honorable ..... Judge of the District Court of the  
United States, for the ..... District of .....

The petition of ....., of ....., and .....  
....., of ....., and ..... of .....  
....., respectfully shows:<sup>85</sup>

That ..... of the ..... of ....., in said district,  
has, for the greater portion of the six months next preceding the date of the  
filing of this petition, had his principal place of business<sup>86</sup> at the .....  
of ....., in the county of ....., in said district, and is by occupation  
a .....

That the said ..... owes debts to the amount of one  
thousand dollars (\$1,000) and over, is insolvent, and is neither a wage-earner  
nor a person engaged principally in farming or the tillage of the soil.<sup>87</sup>

(That<sup>88</sup> the said ..... is a corporation, organized under  
the laws of the State of ....., and that it is engaged principally in  
trading and mercantile pursuits.)

<sup>83.</sup> Schedules should be complete both for the firm and for each partner. In re Gay (D. C., N. H.), 3 Am. B. R. 529, 98 Fed. 870.

<sup>84.</sup> This form should be executed in duplicate. It is intended as a substitute for Form No. 3, which is clearly demurrable. See Sections Three, Four, Five, Eighteen, and Fifty-nine, and the forms for involuntary proceedings, immediately post.

<sup>85.</sup> If petitioners are corporations, indicate under what laws; if copartnerships,

set out the firm name and add: "composed of ..... and ....., etc.

<sup>86.</sup> Or "resided" or "had his domicile," as the case may be.

<sup>87.</sup> If the bankruptcy of a partnership is asked, modify this paragraph and those preceding so as to show the jurisdictional allegations as to the partnership and the individuals composing it, suggested by Form No. 143.

<sup>88.</sup> If the alleged bankrupt is a corporation, insert this paragraph, modifying the previous allegations where necessary.

(That,<sup>89</sup> upon information and belief, the said ..... has less than twelve creditors.)

That your petitioners are creditors of said ....., having provable claims against him which amount in the aggregate, in excess of the value of securities held by them, to five hundred dollars (\$500); and that neither of your petitioners is entitled to priority of payment on his said claim, within the meaning of § 64-b of the bankruptcy law of 1898, nor has either of your petitioners received a preference within the meaning of § 60-a-b of such law, as amended.<sup>90</sup>

That the nature and amount of your petitioners' claims and the securities held by them, if any, are as follows:<sup>91</sup> .....

That, within four months preceding the filing of this petition, viz.: on the ..... day of ....., 19...,<sup>92</sup> the said ....., while insolvent, committed an act of bankruptcy in that he did<sup>93</sup> .....

(That<sup>94</sup> your petitioners have made diligent effort to find the said ..... within said district; that he is not, and has not for ..... days been at his place of business; nor has he during the same time been at his usual place of abode; that, according to your petitioners' best information and belief, the said ..... has absconded; and that personal service of a subpoena cannot be made on him in said district.)

Wherefore,<sup>95</sup> your petitioners pray that service of this petition, with a subpoena, may be made upon ....., as provided by said bankruptcy law of 1898 as amended, and that he may be adjudged bankrupt within the purview of such law.

.....,

.....,

.....,

*Petitioners.*

.....,

*Attorney for Petitioners.*

89. Use only if petition is by one creditor.

90. Or as the case may be. See § 59-b.

91. Set out sufficient facts to inform the court as to amount, consideration, and the like.

92. If the act of bankruptcy was evidenced by an instrument that was required to be recorded or might be recorded, see § 3-b(1), and modify this allegation to fit the facts.

93. Here set out the act of bankruptcy clearly, giving sufficient facts as to time,

place, transaction, etc., to show unequivocally the commission of an act or acts bringing the case within one of the subdivisions of § 3-a.

94. Use only when order of publication is to be asked. Change facts in form to fit the facts of each case.

95. If the bankruptcy of a partnership is desired, modify this clause so that it will ask adjudication of both the partnership and the individuals. See Form No. 117.

STATE OF ..... , }  
County of ..... , } ss.  
City of ..... , }

..... and .....<sup>96</sup> the petitioning creditors mentioned and described in the foregoing petition, do hereby severally make solemn oath that the statement of fact contained in the foregoing petition are true, according to the best of their knowledge, information, and belief.<sup>97</sup>

..... ,  
..... ,  
.....

Subscribed and sworn to before me, this ..... day of ..... , 19...  
..... ,  
.....

Form No. 119.

Involuntary Petition by One Creditor Against a Partnership.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 9.)

To the Honorable ..... ,  
Judge of the District Court of the United States, for the .....  
District of ..... :

The petition of ..... , of ..... , respectfully shows:

*First.* That ..... and ..... are and have been copartners, doing business under the firm name and style of ..... , and have had their principal place of business at ..... , State and district aforesaid, for the greater portion of the six months next preceding the date of the filing of this petition; that the said partnership is insolvent and owes debts to the amount of one thousand dollars and upwards and is neither a wage-earner nor a person engaged principally in farming or the tillage of the soil.

*Second.* That upon information and belief, the said partnership ..... has less than twelve creditors.

*Third.* That your petitioner is a creditor of said ..... and ..... composing the partnership firm of ..... , having a provable claim against said partnership, amounting in the aggregate in excess of securities held by him to the sum of five hundred dollars; that

96. If verified by members of a partnership or officers of a corporation, describe the affiants properly.

97. If, for any reason, this verification is made by attorney, change to fit the facts, and bring it within the cases cited on p. 218, *ante*.

your petitioner is not entitled to priority of payment of his said claim within the meaning of section 64 (b) of the United States bankruptcy act and the amendments thereof, nor has he received a preference within the meaning of section 60 (a-b) of such law as amended.

*Fourth.* That the nature and amount of your petitioner's claim is as follows:

.....  
 .....

No part of said claim has been paid though duly demanded.

*Fifth.* Your petitioner represents that the said ..... and ..... , composing the partnership firm of ..... , while insolvent and within four months next preceding the date of this petition, committed an act of bankruptcy in that they did heretofore, to wit:

[*Here specify act, giving facts, bringing under section 8-a.*]

Wherefore your petitioner prays that service of this petition with a subpoena may be made upon the said ..... and ..... individually and as copartners doing business under the firm name and style of ..... , as provided in the acts of Congress relating to bankruptcy and that they as individuals and the firm of ..... may be adjudged bankrupt within the purview of said acts.

Dated, ....., ....., 19...

.....,  
*Petitioner.*

.....,  
*Attorney for Petitioner,*  
 Office and Post Office Address,  
 ..... Street,  
 .....

[*Verification.*]

## Form No. 120.

## Petition for Service by Publication.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 44.)

United States District Court, ..... District of .....,

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Alleged Bankrupt .*

To the Honorable ....., Judge of the District Court of the United States for the ..... District of .....

The petition of Messrs. .... respectfully shows to this court and alleges:

1. That your petitioners are the attorneys for the petitioning creditors herein. That a petition in bankruptcy was duly filed and an application for the appointment of a receiver was made, which application was granted, and the receiver is now in possession of assets of the above-named alleged bankrupt.

2. A subpoena was issued to the marshal and a return thereto was made, and the marshal returned that he was unable to serve the alleged bankrupt personally as he was without the jurisdiction of this court.

3. That the above-named alleged bankrupt (is a corporation organized under the laws of the State of ..... ) resides, (or has its principal office and place of business) at No. ...., city of .....

4. Your petitioners further allege that the above-named alleged bankrupt has not designated a person upon whom process might be served in the State of .....

5. Your petitioners further allege that the alleged bankrupt is without the jurisdiction of this court and has absconded. That by reason thereof, personal service of the subpoena herein upon the alleged bankrupt is impossible.

Wherefore, your petitioners pray that an order may be made herein permitting service by publication upon the above-named alleged bankrupt. And your petitioners will ever pray.

Dated, ....., ....., ....., ....., 19...

.....,

*Petitioner.*

[Verification.]

## Form No. 121.

Order Directing Service by Publication.<sup>88</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

Whereas, a petition was, on the ..... day of ....., 19..., filed herein for an adjudication of bankruptcy against ....., and it appears therefrom that said bankrupt is not within the district and that personal service of the subpoena herein cannot be made on him therein; now, on motion of ....., Esq., attorney for said petitioner,

It is ordered:

That service of such subpoena be made by publishing this order, together with said subpoena, in ....., a newspaper published at ....., in said district, once a week for two consecutive weeks, the last of such publications to be on the ..... day of ....., 19...; and by mailing a copy of this order and said petition and subpoena to the last known place of abode of the said ....., in said district, on or before the day of the first publication.

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the ..... day of ..... 19...

{ Seal of  
the court }

.....,

*Clerk.*

<sup>88</sup>. This form is thought to be in accordance with the new method of service by publication, provided by the amendatory

act of 1908. See Section Eighteen. The subpoena should be made returnable at least "ten days after the last publication."

## Form No. 122.

General Appearance in Involuntary Case.<sup>99</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

To the District Court of the United States, for the ..... District of ..... :

The clerk of this court will please enter my appearance as attorney for ..... of ....., the alleged bankrupt<sup>1</sup> who desires to plead herein in response to the petition of ..... and ..... and ....., that the said ..... be adjudicated bankrupt.

Dated, ....., ....., 19...

.....,

Attorney for .....,

Address, .....

.....

<sup>99</sup>. This appearance must now be filed within five days after the return day. See § 18-b, as amended. Consult Section Eighteen, *ante*, and see General Order IV and Equity Rule VII.

1. Or "a creditor of the alleged bankrupt," if a creditor, and not the bankrupt, appears.

## Form No. 123.

Appearance by Intervening Creditor.<sup>2</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

To the District Court of the United States for the ..... District of .....:

I, ....., a creditor of ....., against whom a petition for an adjudication in bankruptcy, filed by ....., on the ..... day of ....., 19..., is pending, desire to appear in such proceeding; and, to that end, the clerk of this court will please enter my presence, by ....., Esq., of No. .... St., ....., whom I hereby appoint as my attorney for such proceeding, and take note that I join in such petition as provided in § 59-f of the bankruptcy law of 1898.

Dated, ....., 19...

.....,  
*Intervening Creditor.*

Address .....,

.....

STATE OF .....,  
 County of ....., } ss.:  
 City of ....., }

On this ..... day of ....., 19..., before me appeared .....  
 ....., the intervening creditor above mentioned, and acknowledged the execution of the above.

.....,

.....

<sup>2</sup>. Consult, generally, Sections Eighteen and Fifty-nine, especially the latter. See

also numerous forms for involuntary cases immediately ante and post.



## Form No. 124.

## Petition to Intervene.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 12.)

United States District Court, or the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Alleged Bankrupt .*To the Honorable ....., Judge of the District Court of the  
United States, for the ..... District of .....The petition of ..... respectfully alleges and shows on in-  
formation and belief:

1. That your petitioner, ....., is a creditor of the above  
named, ....., having a provable claim against the same  
amounting to ..... in excess of securities held by him. That  
the nature and amount of your petitioner's claim is for: .....

.....  
and that no part of said claim has been paid, although duly demanded.

2. That on or about the ..... day of ....., 19..., .....  
..... filed in the office of the clerk of this court a petition that .....  
..... be adjudged an involuntary bankrupt. That the said petition  
is still pending and that your petitioner desires to join in the petition of the  
said ....., that the said ..... be adjudged an  
involuntary bankrupt.

Wherefore, your petitioner would respectfully pray that he be allowed to  
join in the said petition of ....., that the said .....  
..... be adjudged a bankrupt within the purview of the bankruptcy act  
of 1898 and the amendments thereof.

.....,

*Petitioner.*

[Verification.]

**Form No. 125.****Order Allowing Intervention.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 14.)

At a stated term of the District Court of the United States, for the .....  
 ..... District of ....., held at the United States  
 Court House, City of ....., on the ..... day  
 of ....., 19...

Present: Hon. ...., District Judge.

**IN THE MATTER OF**

.....

} In Bankruptcy No. ...

*Alleged Bankrupt .*

Upon reading and filing the annexed petition of .....  
 verified ....., 19..., praying that he be joined as a petitioning creditor  
 in the above-entitled proceeding, and upon the petition in bankruptcy and  
 all proceedings heretofore had herein, and upon motion of .....,  
 attorney for said petitioner, it is

Ordered, that ..... be and he hereby is allowed to intervene  
 herein, and is hereby joined and made a petitioning creditor, in the  
 petition praying for the involuntary adjudication of .....  
 filed in the office of the clerk of the district court of the United States, for  
 the district of ....., on the ..... day of ....., 19 ...

.....,

*D. J.*

**Form No. 126.****Application for Jury Trial in Involuntary Case.<sup>3</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

I, ....., of the ..... of ....., in said district, the alleged bankrupt, who have this day filed an answer to the petition herein for an adjudication in bankruptcy, do hereby apply for and demand a trial by jury in respect to those questions concerning which I am entitled thereto by the terms of § 19-a of the bankruptcy law of 1898.

Dated, ....., ....., ....., ....., 19...

.....,

*Answering Bankrupt.<sup>4</sup>*

**Form No. 127.****General Answer in Involuntary Case.<sup>5</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

Now comes ....., of ....., the person against whom a petition for an adjudication in bankruptcy has been filed

3. Consult, generally, Sections Eighteen and Nineteen. See also Form No. 6. This application can be made only by the alleged bankrupt. For the time within which it must be filed, see § 19-a.

4. This application should be made by the alleged bankrupt, and not by his attorney.

5. This form supplements Form No. 6. Consult, generally, Section Eighteen; and for available grounds for an answer see §§ 3-a-b, 4, 5, and 59. For form for adjudication, see Form No. 12; for dismissal, see Form No. 11. See also, generally, the Equity Rules.

herein,<sup>6</sup> and does hereby controvert such petition and file the following answer:<sup>7</sup>

I. That<sup>8</sup> the said ..... did not commit an act of bankruptcy as alleged in such petition, but, on the contrary, the undersigned charges the facts to be: that<sup>9</sup> .....

II. That<sup>8</sup> ..... and ..... and .....  
 ....., the petitioning creditors herein, have not provable claims against the said ..... which amount in the aggregate, in excess of the value of securities held by them, to five hundred dollars (\$500), but, on the contrary, the undersigned charges the facts to be: that<sup>10</sup> .....

Wherefore, answer is made to such petition and a hearing<sup>11</sup> and the judgment of the court is asked thereon.

.....,  
*Answering Bankrupt.*<sup>12</sup>  
 [by  
 .....  
*his Attorney.*<sup>13</sup>  
 Address .....,  
 .....]

[*Add verification as in Form No. 100, changing to fit the facts, as, for instance, substituting "answer" for "specification of objection," therein.*]

6. Or "a creditor of ....., against whom," showing clearly the possession of a provable debt (§ 63, as interpreted by § 57).

7. There may, of course, be several counts in the answer. Careful pleading seems to require one for at least each material fact at issue.

8. The two objections here suggested are

but samples. Each answer should be adapted to the facts relied on.

9. Here the facts relied on by the answering bankrupt or creditor should be pleaded.

10. Id.

11. Or "trial."

12. Or "creditor."

13. See foot-note 34 to Form No. 100.

Form No. 128.

Answer Alleging More Than Twelve Creditors.<sup>14</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF  .....  <i>Bankrupt</i> .	} In Bankruptcy No. ...

Now comes ....., of ....., the person against whom a petition for an adjudication in bankruptcy has been filed herein,<sup>15</sup> and does hereby controvert such petition and file the following answer:

That the creditors of the said ..... are twelve and more in number.

That annexed hereto is a list of all such creditors, with their addresses, under oath, as required by § 59-d of the bankruptcy law of 1898.

Wherefore, answer is made to such petition, and a hearing<sup>16</sup> and the judgment of the court is asked thereon.

.....,  
*Answering Bankrupt.*<sup>17</sup>  
[by  
.....,  
*his Attorney,*  
Address .....,  
.....]

List of Creditors and Addresses.

The following is the list of the creditors and their addresses, referred to in the foregoing answer:

Names of creditors.	Addresses.

.....,  
*Answering Bankrupt.*<sup>17</sup>

14. Only available where the petition is within § 59-d. Consult, generally, Sections Fifty-nine and Eighteen. See foot-notes just *ante* and *post*.

15. See foot-note 6 to Form No. 127.  
16. A jury trial cannot be demanded on the issue raised by this answer.  
17. Or "creditor."

STATE OF ....., }  
 County of ....., } ss.:  
 City of ....., }

I, ....., the answering bankrupt<sup>18</sup> mentioned and described in the foregoing answer, do hereby make solemn oath that the statements of fact contained in such answer are true, according to the best of my knowledge, information, and belief; and also that the list annexed thereto and therein referred to comprises all of the creditors of the said ..... and gives their addresses, so far as they are known or can be ascertained.<sup>19</sup>

.....

Subscribed and sworn to before me, this ..... day of ....., 19...

.....,  
 ....., .....,

### Form No. 129.

#### Demurrer to Petition.

(Hagar and Alexander's Bankruptcy Forms, No. 14.)

United States District Court, for the ..... District of .....

IN THE MATTER OF

.....

} In Bankruptcy No. ...

*Alleged Bankrupt* .

Now comes ....., the above-named alleged bankrupt, (or a creditor of alleged bankrupt,) by ....., his attorney, by protestation, not confessing or acknowledging all or any of the matters or things in said petition in bankruptcy set forth to be true in such manner and form as the same are therein set forth and alleged, and demurs to the petition of ....., filed herein ....., 19..., upon the following grounds:

*First:* That it appears on the face of the said petition that the court is without jurisdiction to grant the relief prayed for in said petition.

*Second:* That said petition is wholly without equity.

18. See foot-note 34 to Form No. 100.

19. If the affidavit is made by an answering creditor, his efforts to ascertain the

names and addresses of the creditors should be given.

*Third:* That said petition does not state facts sufficient to warrant the granting of the relief prayed for therein.

*Fourth:* That the petitioners have not by their said petition shown themselves entitled to the relief therein prayed for, or any part thereof.

.....,  
*Attorney for* .....  
*Alleged Bankrupt (or Creditor).*

STATE OF ..... }  
County of ..... } ss.:  
City of ..... }

....., being duly sworn, deposes and says: That he is the ..... herein; that the foregoing demurrer is not interposed for delay.

Sworn to before me this ..... day of ....., 19...

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

Dated ....., ....., 19...

.....,  
*Attorney for* .....

**Form No. 130.**

**Notice of Argument of Demurrer.**

United States District Court, for the ..... District of .....

<p>IN THE MATTER OF</p> <p>.....</p> <p><i>Alleged Bankrupt .</i></p>	<p>In Bankruptcy No. ...</p>
---	------------------------------

Please take notice that the demurrer of ....., alleged bankrupt (or creditor herein) to the petition filed herein on the ..... day of ....., 19..., will be brought on for argument before the Hon. ...., United States District Judge, for the District of ..... at the United States Court House, in the city of ....., on the ..... day of ....., 19..., at .... o'clock in the ..... noon of said day

and a motion made to overrule said demurrer with costs and for such other or further relief as to the court may seem just and proper.

Dated ....., ....., 19...

.....,

*Attorney for Petitioning Creditors,*

No. .... Street,

City of .....

To ....., Esq.,

*Attorney for Alleged Bankrupt,*

(or Creditor.)

### Form No. 131.

#### Order of Reference to Special Master in Involuntary Case.<sup>20</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ...

Whereas, a petition has been filed herein asking an adjudication in bankruptcy of the above-named bankrupt, and ....., the said bankrupt,<sup>21</sup> having appeared by ....., Esq., his attorney, and filed an answer to such petition; now, on motion of ....., Esq., attorney for .....,

It is ordered:

That the issue made by such petition and answer be referred to ....., Esq., as special master, to ascertain and report the facts, with his conclusions thereon.

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the ..... day of ....., 19...

{ Seal of  
the court }

.....,

*Clerk.*

<sup>20</sup> See foot-note 36 to Form No. 101. Consult, generally, Section Eighteen, and the forms just ante and post.

<sup>21</sup> Or "a creditor of such bankrupt."



## Form No. 132.

## Notice of Hearing Before Special Master.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 33.)

United States District Court, for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Alleged Bankrupt .*

SIR:

Please to take notice, that a hearing under the order of reference entered on ....., in the above entitled proceeding, will be brought on before ....., Esq., as special master, at his office, No. .... street, city of ....., on the ..... day of ....., 19..., at .... o'clock, .. M. of that day, or soon thereafter as counsel can be heard.

Dated the ..... day of ....., 19...

Yours, etc.,

.....  
Attorney for .....

To

....., Esq.,  
Attorney for .....

.....

**Form No. 133.****Notice of Trial in Involuntary Proceeding.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 24.)

United States District Court, for the ..... District of .....

IN THE MATTER OF

..... In Bankruptcy No. ...

*Alleged Bankrupt. .*

Please take notice that the issues raised by the petition and answer filed herein will be brought on for a trial and a motion will be made for judgment as prayed for in the petition or to dismiss the petition herein, at a term of this court, to be held in and for the ..... district ....., at the court room, in the United States Court House, in the city of ....., ....., on the ..... day of ....., 19..., at .... o'clock in the ..... noon of that day, or as soon thereafter as counsel can be heard.

Dated, ....., ....., 19...

Yours, etc.,

.....,  
*Attorneys for Petitioners,*  
*[or Alleged Bankrupt.]*  
 ..... Street,  
 .....

To

Messrs. ....

*Attorneys for* .....

.....

**Form No. 134.****Report of Special Master in Involuntary Case.<sup>22</sup>**

See Form No. 102, and the foot-notes thereto. With slight changes in the recitals, such form is equally available on a reference in an involuntary case.

<sup>22</sup> For practice, consult Section Eighteen, and the forms just *ante* and *post*.

## Form No. 135.

Exceptions to Report of Special Master in Involuntary Case.<sup>23</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

Now comes ....., of ....., .....,<sup>24</sup> who previously filed herein an answer to the petition for an adjudication in bankruptcy of the above-named bankrupt,<sup>25</sup> and excepts to the report of ....., Esq., as special master, appointed by an order made herein on the ..... day of ....., 19..., in that such report<sup>26</sup> .....  
 .....  
 for the following reasons:<sup>27</sup> .....

And prays that the same may be heard, as provided in Equity Rule LXXXIII.

Dated, ....., ....., 19...

.....,  
*Excepting Creditor.*

[or

.....,  
*Attorney for Excepting* .....  
 Address .....,  
 .....]

23. For practice, see Equity Rules LXXXIII and LXXXIV. Consult, generally, Section Eighteen. For form for adjudication, see Form No. 12; for dismissal, see Form No. 11; for costs, see General Order XXXIV and § 2(18).

24. If exceptions are filed by attorney, as is usual, add "by ....., his attorney herein."

25. Or if the exceptions are taken by the petitioning creditor, change to fit the facts.

26. Here state the error or errors excepted to.

27. Here give the grounds of the exceptions, that the court and the opposing attorney may know fully the issue to be determined on the hearing on the exceptions.

## Form No. 136.

## Order Upon Report of Special Master Dismissing Petition, Etc.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 36.)

At a stated term of the District Court of the United States for the  
 ..... District of ....., held at the United  
 States Court House, City of ....., on the .....  
 day of ....., 19...

Present: Hon. ...., District Judge.

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Alleged Bankrupt.*

A motion having been made herein by ..... for an order confirming the report of ....., Esq., special master, appointed herein under an order dated ....., 19..., and dismissing the petition in bankruptcy heretofore filed herein with costs and for an order vacating and discharging the order of ....., 19..., appointing a temporary receiver herein and for other and further relief, and the said motion having duly come on for argument, now on the involuntary petition in bankruptcy filed herein ..... 19..., by ....., and ....., creditors, the answers filed thereto by ....., a creditor, and by ....., the alleged bankrupt, the order of this court dated ....., 19..., appointing ....., receiver of the estate of said alleged bankrupt, the order of reference herein dated ....., 19..., and the report of said special master dated ....., 19..., and notice of this motion with proof of due service thereof, and the report and petition of said ....., verified ....., 19..., for an allowance for his services and disbursements to be paid by the petitioning creditors, and for his discharge as such receiver, and for further relief, and the petition of ....., attorney for said receiver, verified ....., 19..., for an allowance for his services and disbursements as attorney for said receiver, and on all the proceedings had herein, after hearing ....., Esq., of counsel for ....., alleged bankrupt herein, ....., Esq., attorney for the petitioning creditors herein, and ..... Esq., attorney for the receiver herein, and due deliberation having been had, it is

Ordered, that the report of said special master herein be and hereby is in all respects confirmed and that the petition in bankruptcy filed herein ..... , 19... , praying that said ..... be adjudged an involuntary bankrupt, be and the same hereby is dismissed with \$. . . . . costs and disbursements, as taxed, which said sum, ..... , ..... and ..... are hereby directed to pay to the said ..... , alleged bankrupt, and it is further

Ordered, that the matters of the said report, application and petition of ..... , Esq., temporary receiver herein, and the petition of his said attorneys filed herein ..... , 19... , be and the same hereby are referred to ..... , Esq., as special master for examination, testimony and report thereon with all convenient speed.

..... ,  
D. J.

**Form No. 137.**

**Petition of Petitioning Creditors for Dismissal in Involuntary Case.<sup>28</sup>**

In the District Court of the United States for the ..... District of .....

<p><b>IN THE MATTER OF</b></p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	<p>In Bankruptcy No. ...</p>
--	---	------------------------------

To the Honorable ..... , District Judge:

Your petitioners<sup>29</sup> respectfully show:

That, on the ..... day of ..... , 19... , they filed a petition herein for an adjudication in bankruptcy against ..... , of the ..... of ..... , in said district.

That, since that time, the following proceedings have been had:<sup>30</sup> .....

That your petitioners desire and consent that said petition and proceeding be dismissed.

That annexed hereto is a list of all the creditors of the said ..... , with their addresses, so far as your petitioners know or have been able to ascertain.

<sup>28</sup>. Consult, generally, Sections Fifty-nine, Fifty-eight, and Eighteen.  
<sup>29</sup>. This petition can, of course, be made by the bankrupt, with the consent of the petitioning creditors, or for want of prosecu-

tion, and, if so, the allegations should be changed to fit the facts.  
<sup>30</sup>. Here give a brief summary of the steps in the proceeding to date.

That no previous application has been made for the order hereinafter asked.

Wherefore, your petitioners pray that such proceeding and petition be dismissed, and that notice be given such creditors as is provided by § 58-a (8) of the bankruptcy law of 1898.

.....,  
.....,  
.....,  
*Petitioners.*

List of Creditors and Addresses.

The following is the list of the creditors and their addresses referred to in the foregoing petition:

Names of creditors.	Addresses.

.....,  
.....,  
.....,  
*Petitioners.*<sup>31</sup>

STATE OF ..... }  
County of ..... } ss.:  
City of ..... }

We, ..... and ..... the petitioners mentioned and described in the foregoing petition, do hereby severally make solemn oath that the statements of fact contained in such petition are true, according to the best of our knowledge, information, and belief; and also that the list annexed thereto and therein referred to comprises all of the creditors of the said ..... and gives their addresses, so far as they are known or can be ascertained.

.....,  
.....,  
.....,

Subscribed and sworn to before me, this ..... day of ....., 19...

.....  
.....

31. This petition cannot be made by the attorney, save when the petition for an adjudication can be so made. See, generally, Section Eighteen, and Form No. 113.

## Form No. 138.

Order to Show Cause on Petition for Dismissal in Involuntary Case.<sup>33</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

Whereas, application has been made by the petitioning creditors herein<sup>33</sup> for the dismissal of their petition for an adjudication in bankruptcy against ..... of the ..... of ....., in said district; now, on motion of ....., Esq., attorney for such alleged bankrupt,

It is ordered:

That all creditors of<sup>34</sup> ..... show cause, before the district court of the United States for the ..... district of ....., at ....., in the ..... of ....., in said district, on the ..... day of ....., 19..., at .. M., or as soon thereafter as such hearing may be had, why such application should not be granted.

That notice of such hearing be given by mailing a copy of this order at least ten days prior to the date set for such hearing to each of the creditors whose names appear in the list of creditors annexed to the petition on which this application is based, and by publishing a copy hereof in the designated newspaper of such alleged bankrupt's residence, not later than one week prior to such date.<sup>35</sup>

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the ..... day of ....., 19...

{ Seal of  
the court. }

.....,

*Clerk.*

<sup>33</sup>. Compare Form No. 137 and the foot-notes thereto.

<sup>34</sup>. See foot-note 29 to Form No. 137.

<sup>34</sup>. See foot-note 57 to Form No. 106.

<sup>35</sup>. § 58-b.

## Form No. 139.

Order of Dismissal on Petition of Petitioning Creditors and After Notice in Involuntary Case.<sup>36</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...  
*Bankrupt .*

Whereas, a petition was, on the ..... day of ....., 19..., filed herein for an adjudication in bankruptcy against ....., and application was subsequently made for a dismissal of such proceeding and petition by the petitioners therein,<sup>37</sup> and an order to show cause having been granted thereon, and notice having been given as provided in said order, such matter having been regularly called and no creditor having appeared to oppose,<sup>38</sup> and the court being satisfied that said petition should be granted;<sup>39</sup> now, on motion of ....., Esq., attorney for .....,

It is ordered:

That the petition herein to have ..... adjudicated bankrupt and the proceedings thereon be, and the same hereby are, dismissed.<sup>40</sup>

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the ..... day of ....., 19...

{ Seal of }  
 { the court }

.....,  
*Clerk.*

36. See Forms Nos. 137 and 138 and the foot-notes thereto.

37. Or, if by the bankrupt, or for want of prosecution, state the facts.

38. Or, if a creditor appeared, note appearance and the facts.

39. Or, if the application is to be refused, "denied."

40. Or, if the application for dismissal is refused, change to conform to the order made.



**Form No. 140.****Order of Adjudication and Reference.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 27.)

In the District Court of the United States, for the ..... District of.....

IN THE MATTER OF

.....	} In Bankruptcy No. ...
<i>Bankrupt .</i>	

At ....., in said district, on the ..... day of  
 ....., A. D. 19..., before the Honorable .....,  
 Judge of the said court in bankruptcy, the petition of .....  
 .....  
 that he be adjudged bankrupt, within the true intent and meaning of the  
 acts of Congress relating to bankruptcy, having been heard and duly con-  
 sidered, the said .....  
 .....  
 hereby declared and adjudged bankrupt accordingly.

And it is further ordered, that the said matter be referred to .....  
 .....  
 .....  
 one of the referees in bankruptcy of this court, to take all such further pro-  
 ceedings therein as are required by said acts of Congress, and all such acts  
 therein as the court might take or perform, except such as by law or the  
 general orders of the Supreme Court are required to be performed by the  
 judge; and that the said bankrupt shall attend before said referee on the  
 ..... day of ..... 19..., at ... o'clock, .. M., and  
 thenceforth shall submit to such orders as may be made by said referee or by  
 the court relating to ..... said bankruptcy.

Witness, the Honorable ....., Judge of the said court,  
 and the seal thereof, at the city of ....., in said district, on the  
 ..... day of ....., A. D. 19...

.....,  
*District Judge.*

.....,  
*Clerk.*

## Form No. 141.

## Order Denying Adjudication.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 30.)

United States District Court, for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Alleged Bankrupt.*

At ....., in said district, on ..... day of .....,  
 A. D. 19..., before the Honorable....., Judge of the .....  
 ..... district of .....

This cause came on to be heard at ....., in said court, upon  
 the petition of ..... and ..... and .....  
 ....., that ..... be adjudged a bankrupt within  
 the true intent and meaning of the acts of Congress relating to bankruptcy,  
 and [here state the proceeding, whether there was no opposition, or if opposed,  
 state what proceedings were had].

And thereupon, and upon consideration of the proofs in said cause (and  
 the arguments of counsel thereon, if any), it was found that the facts set  
 forth in said petition were not proved; and it is therefore adjudged that  
 said ..... is not a bankrupt, and that said petition be dis-  
 missed, with costs.

Witness, the Honorable ....., Judge of said court, and the  
 seal thereof, at ....., in said district, on the .....  
 day of ....., A. D. 19...

{ Seal of  
the court. }

.....,

*District Judge.*

## Form No. 142.

## Petition to Vacate Adjudication.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 43.)

United States District Court, for the ..... District of .....

IN THE MATTER OF

..... In Bankruptcy No. ...

*Bankrupt .*

To the District Court of the United States, for the ..... District of .....

The petition of ..... respectfully shows and alleges:

*First:* That he resides in the city of ....., State of .....*Second:* That your petitioner is a creditor of said alleged bankrupt and his claim is based upon the following facts:

.....

.....

*Third:* That heretofore and on or about the ..... day of .....  
 ....., 19..., your petitioner instituted an action in the .....  
 court of ..... county against the above-named .....,  
 alleged bankrupt, as defendant. That said action was brought to recover the  
 sum of \$....., and on the ..... day of ....., 19..., a  
 judgment was rendered in said action in favor of petitioner.

*Fourth:* That an execution upon the said judgment was duly issued to  
 the sheriff of ..... county, the said judgment having been duly  
 docketed in the office of the clerk of ..... county. That said execution  
 was duly levied upon the real property of the said defendant.

*Fifth:* That on ....., 19..., a petition in involuntary bank-  
 ruptcy was filed in this court against the above-named .....,  
 and a receiver appointed. That thereafter an alleged adjudication was made  
 therein in which the said ..... was declared a bankrupt. The  
 said receiver has made a demand upon the sheriff to deliver over to him all  
 the property of ..... heretofore levied upon under the execution  
 obtained by petitioner upon his said judgment.

*Sixth:* That your petitioner is informed and verily believes that the  
 aforesaid petition in bankruptcy filed herein did not set forth the jurisdic-  
 tional facts required under the bankruptcy act, and is defective and void,  
 and insufficient to confer jurisdiction upon the court to proceed therein. That

the said petition and subpoena required to be served upon the alleged bankrupt by law were never in fact properly served upon the said bankrupt, as required by law to obtain jurisdiction over the said bankrupt, and that the purported service of the same upon the said..... was illegal and void, in that said petition and subpoena were alleged to have been served outside of this district, and not upon the alleged bankrupt personally. That the alleged bankrupt had absconded and left the jurisdiction That this court never in fact, acquired any jurisdiction whatever in the said bankruptcy proceeding, and the alleged adjudication was for that reason without jurisdiction and void.

Your petitioner therefore prays that an order be granted herein, vacating and setting aside the alleged adjudication in bankruptcy herein, vacating the appointment of the receiver herein and all proceedings heretofore had, and dismissing the petition heretofore filed herein.

That no previous application for this order has been made.

Dated ....., 19...

.....,

*Petitioner.*

[*Verification.*]

**Form No. 143.**

**Notice of Motion to Vacate Adjudication.**

(Hagar and Alexander's Bankruptcy Forms, No. 40.)

United States District Court, for the ....., District of .....

<p>IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	<p>In Bankruptcy No. ...</p>
--	---	------------------------------

**SIRS:**

Please take notice that upon the annexed petition of ....., duly verified the ..... day of ....., 19..., and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this court at a term thereof, to be held in the United States Court House at ....., on the ..... day of ....., 19..., at .... o'clock in the .... noon of that day or as soon thereafter as counsel can be heard, for an order vacating and setting aside the alleged adjudication in

bankruptcy herein, and all proceedings thereon, and dismissing the petition heretofore filed herein, and for such other and further relief as to the court may seem just and proper in the premises.

Dated ....., 19...

Yours, etc.,

.....  
*Attorney for Petitioner,*  
 Office and Post Office Address,  
 ..... Street,  
 .....

To

....., Esq.,  
*Attorney for Petitioning Creditors.*

To

....., Esq.,  
*Attorney for Creditors.*

#### Form No. 144.

#### Demand for Jury Trial

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 22.)

United States District Court, for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Alleged Bankrupt.*

I, ....., of ....., in said district, the alleged bankrupt, who has this day filed an answer to the petition filed on the ..... day of ....., 19..., by ....., ..... and ....., praying for an adjudication in involuntary bankruptcy, do hereby apply for and demand a trial by jury in respect to those matters concerning which I am entitled thereto by the provisions of section 19-a of the bankruptcy act.

Dated ....., 19...

.....  
*Alleged Bankrupt .*

## Form No. 145.

Referee's Certificate of Disqualification.<sup>41</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

To the Honorable ....., District Judge:

I, ....., one of the referees in bankruptcy of your court, do hereby certify that I am disqualified to act as such in the above entitled proceeding,<sup>42</sup> for the following reasons:<sup>43</sup> .....

I do, therefore, return the papers transmitted to me by the clerk.

Dated, ....., ....., 19...

.....,

*Referee in Bankruptcy.*

41. For general disqualification, see § 35; for what referees may not do, § 39-b; for reference of case after adjudication, see § 32.

42. Or the disqualification may exist as

to a portion of the proceeding, as in a contest on a certain claim.

43. Here insert reasons, as relationship, relation of attorney and client with bankrupt, or any other reason (see § 32).

## Form No. 146.

Petition to Revise in Matter of Law.<sup>44</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... In Bankruptcy No. ...

*Bankrupt .*

To <sup>45</sup> the Honorable, the Judges of the Circuit Court of Appeals of the  
..... Circuit of the United States:

Your petitioner respectfully shows:

That he resides at ....., and is a creditor <sup>46</sup> of .....  
....., a bankrupt, who was so adjudged by the district court  
of the United States for the ..... district of ....., on the .....  
day of ....., 19...

That, after such adjudication, the following proceedings were had in the  
case of the said bankrupt:<sup>47</sup> .....

That, on the ..... day of ....., 19..., an order was granted and  
entered by said district court of the United States,<sup>48</sup> .....

.....,  
a copy of which order is hereto annexed.

That said order was erroneous in matter of law in that:<sup>49</sup> .....

Wherefore, your petitioner, feeling aggrieved because of such order, asks  
that the same may be revised in matter of law by your honorable court, as  
provided in § 24-b of the bankruptcy law of 1898, and the rules and practice  
in such case provided.<sup>50</sup>

[Add verification as in Form No. 66.]

.....,  
*Petitioner.*

44. Consult, generally, Sections Twenty-four and Twenty-five, and General Order XXXVI, though the latter seems to refer to appeals only.

45. If the petition is to the district court in the first instance, this form should be addressed to the district judge.

46. Or specify how he is interested in the proposed revision.

47. Here recite steps leading up to the ruling or order complained of.

48. Here state specifically the erroneous order or ruling of which revision in law is sought, as, "enjoining and restraining your petitioner from disposing of the following described property, viz: .....;" or, "requiring your petitioner to deliver to the said trustee in bankruptcy certain property, viz: ....., " or as the facts may be.

49. Here give the equivalent of an assignment of error on an appeal in equity.

50. See Section Twenty-five, *ante*, footnote 11.

## Form No. 147.

Order of District Court Allowing Petition for Revision in Matter of Law.<sup>51</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

Whereas, application has been made for revision in matter of law by the circuit court of appeals of the ..... circuit of the United States of the order entered herein on the ..... day of ....., 19..., and the court being satisfied that the question there determined is one of which revision may be asked, as provided in § 24-b of the bankruptcy law of 1898,<sup>52</sup> and that the application should be granted; on motion of ....., Esq., attorney for the petitioner,

It is ordered:

That the order of this court, made and entered herein on the ..... day of ....., 19..., be revised in matter of law by the circuit court of appeals of the ..... circuit of the United States, as provided by § 24-b of the bankruptcy law of 1898, and the rules and practice of that court.

That the clerk, within ..... days from this date, prepare, at the expense of the petitioner, a certified copy of such order and of the record of this case pertinent to such order, and file the same with the clerk of such circuit court of appeals.

Witness, the Honorable ....., Judge of the said court and the seal thereof, at the city of ....., in said district, on the ..... day of ....., 19....

{ Seal of  
the court. }.....,  
Clerk.

51. Use this form only in case application is made to the district court in the first instance. If application is made to the circuit court of appeals, a formal order allowing the review is often not entered, but the case is at once docketed and the

clerk gives notice of the pendency of the petition for revision to the respondent. See Section Twenty-five, foot-note 11.

52. Certain orders cannot be reviewed at all, others only by appeal. Consult, generally, Section Twenty-five, ante.



## Form No. 148.

Notice to Respondent on Revision.<sup>53</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

To ....., of ....., and ....., of  
....., his attorney:

Please take notice <sup>54</sup> that a petition, a copy of which is served on you herewith, is pending in the circuit court of appeals of the ..... circuit of the United States, and that you are required to answer, demur, plead, or move to dismiss the same within <sup>55</sup> ..... days from the date of this notice, or, in case of your default, the same may be granted and a mandate issued accordingly.

Witness, the Honorable, the judges of the circuit court of appeals of the ..... circuit, and the seal of said court, at ....., in said circuit, this ..... day of ....., 19...

{ Seal of  
the court. }

.....,  
*Clerk.*

<sup>53</sup>. See Sections Twenty-four and Twenty-five, *ante*, and the forms just *ante*.

<sup>54</sup>. In the first circuit, this notice takes the form of an order to show cause entered as of course. This form can be easily modified to fit that practice. It is thought to

combine both the features of a mere notice and the more formal elements of an order to show cause. Compare Section Twenty-five, foot-note 11.

<sup>55</sup>. This time is usually fixed by rule.

## Form No. 149.

Order of Circuit Court of Appeals on Revision.<sup>56</sup>

At a session of the Circuit Court of Appeals for the ..... Circuit,  
held at the city of ....., in the ..... District of  
....., on the ..... day of ....., 19...

Present— The Hon. ...., Circuit Judge;  
The Hon. ...., Circuit Judge, and  
The Hon. ...., ..... Judge.

## IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

A petition having been filed herein by ....., of .....,  
....., on the ..... day of ....., 19..., asking for revision in  
matter of law of the order of the district court of the United States for  
the ..... district of ....., in bankruptcy, made and entered in  
the above entitled cause, and due notice of such petition having been given  
the respondent and the same having been regularly heard,<sup>57</sup> .....  
....., Esq., appearing for the petitioner, and ....., Esq.,  
for the respondent, and this court being satisfied that:<sup>58</sup> .....

It is ordered:

That the said petition of ..... for a revision be, and the  
same hereby is, dismissed,<sup>59</sup> with costs.

That the mandate of this court issue to said district court accordingly.

Witness, the Honorable, the judges of the circuit court of appeals of  
the ..... circuit, and the seal of said court, at ....., in said  
circuit, this ..... day of ....., 19...

{ Seal of  
the court }

.....,  
*Clerk.*

<sup>56</sup> See, generally, Sections Twenty-four and Twenty-five.

<sup>57</sup> Here specify how, as "and submitted on briefs without oral argument;" or as the facts may be.

<sup>58</sup> Here recite briefly the decision as to whether or not error in law was committed by the court below.

<sup>59</sup> Or "granted;" or, if in part only, "granted in so far as it refers to ....."

## Form No. 150.

## Citation on Appeal.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 359.)

United States District Court, for the ..... District of.....

IN THE MATTER OF

..... In Bankruptcy No. ...

*Bankrupt .*

United States of America, ss:

The President of the United States to ....., Greeting:

You and each of you are hereby cited and admonished to appear in the United States circuit court of appeals for the ..... circuit, in the city of ....., on the ..... day of ....., 19..., pursuant to the appeal duly obtained and filed in the clerk's office of the district court of the United States for the ..... district of ....., wherein you as objecting creditors are appellees and ....., bankrupt, is the appellant, to show cause, if any there be, why the order and decree in said appeal mentioned, should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf, and to do and receive that may appertain to justice to be done in the premises.

Witness, the Honorable ....., United States Judge for the ..... district of ....., on the ..... day of ....., in the year of our Lord one thousand nine hundred and .....

.....,

J.

**Form No. 151.****Notice of Motion for Stay Pending Review.**

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 379.)

United States District Court, for the ..... District of .....  
In Bankruptcy.

IN THE MATTER OF

.....  
*Bankrupt.*

Sir:

Upon all the proceedings had herein and on the petition to review the order and decree entered herein on the ..... day of ....., 19.., directing that (etc.) ....., filed in the clerk's office of the United States Circuit Court of Appeals for the ..... Circuit, on or about ....., 19..., I shall move this Court at a session thereof to be held on the ..... day of ....., 19.., at ... A. M., or as soon thereafter as counsel can be heard, for a stay of all proceedings herein on said final order and decree, pending said petition to review; also for such other and further relief as to the court may seem proper.

Dated, ....., 19...

.....  
*Attorney for .....,*  
(Address.)

To ....., Esq.,  
*Attorney for .....*

**Form No. 152.****Order Staying Proceedings Pending Petition for Review Under 24-b.**

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 76.)

At a State Term of the District Court of the United States, in and  
for the ..... district of ....., at the Court House,  
in the City of ....., on the ..... day of ....., 19...

Present:

Hon. ....  
*District Judge.*

IN THE MATTER OF

.....  
*Bankrupt.*

Upon reading and filing the petition of ..... duly verified, the petition to review herein, and on motion of ..... attorney for said petitioner, and sufficient reason appearing therefor, it is

Ordered, that further proceedings to enforce the order made and entered herein dated ..... to ....., be stayed, pending the hearing and determination of the petition for review herein, upon the filing in this Court by the petitioner of a supersedeas bond, with good and sufficient sureties to the satisfaction of the Court in the sum of \$.....

.....  
*U. S. D. J.*

## Form No. 153.

Petition for Writ of Error from the Supreme Court to a Circuit Court of Appeals.

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 383.)

United States Circuit Court of Appeals, for the ..... Circuit.

.....  
*Plaintiff in Error,*

vs.

.....  
*Defendant in Error.*

Your petitioner, ....., plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States circuit court of appeals for ..... circuit, and that a judgment has therein been rendered on the .... day of ....., affirming (*or reversing*) a judgment of the district court of the United States for the ..... district of ....., and that the matter in controversy in said suit exceeds ..... thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of the different States, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner would respectfully pray that a writ of error be allowed him in the above entitled cause directing the clerk of the United States circuit court of appeals for the ..... circuit to send the record and proceeding in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

.....,  
*Plaintiff in Error,*

By .....,

*His Attorney.*

The foregoing petition is granted and writ of error allowed as prayed for upon .....s giving bond according to law in the sum of \$.....

.....,  
*Associate Justice of the Supreme Court of  
the United States.*

**Form No. 154.**

**Writ of Error from the Supreme Court of the United States to a Circuit Court of Appeals.**

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 384.)

United States of America, *ss.*:

The President of the United States to the Honorable, the Judges of the  
United States Circuit Court of Appeals for the ..... Circuit,  
Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between ..... , plaintiff in error, and ..... , defendant in error, a manifest error hath hapened, to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hat been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

## Form No. 155.

## Petition for Meeting of Creditors to consider Proposed Compromise.

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 115.)

United States District Court for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt.*

To ....., Esq., Referee in Bankruptcy:

The petition of ..... respectfully shows:

1. That your petitioner is the trustee herein, duly qualified and acting.
2. That among the assets coming into the hands of your petitioner is a certain claim consisting of: .....  
.....  
against ..... of ..... That your petitioner has made efforts to collect said claim, has presented same and demanded payment thereof. That payment was refused by the said ..... on the following grounds, to wit:  
.....  
.....

3. That after considerable negotiation, your petitioner has succeeded in obtaining an offer of \$. .... from said ..... in full settlement of your petitioner's claim against him. That your petitioner has fully investigated the claim, and verily believes that it is to the best interests of this estate to accept the amount offered, and petitioner recommends a compromise of the claim upon the terms offered.

Wherefore, your petitioner prays that a meeting of creditors be called upon ten days' notice, to consider a proposed compromise of the controversy of the claim against .....

[Verification.]

.....,  
Petitioner.

**Form No. 156.****Notice to Creditors of Special Meeting.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 116.)

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

To the creditors of ....., of ....., in the county of ....., and district aforesaid, a bankrupt:

Notice is hereby given that on the ..... day of ....., ..... 19..., at .... o'clock, .. M., there will be a meeting of the creditors of the said bankrupt, at ....., in the ..... of ....., in said district, for the following purposes:

[*Here set forth statement of object of meeting, as for example, "To consider a proposed compromise of a controversy between the trustee herein and ..... concerning ..... on the following terms:"*]

To transact such other business as may properly come before said meeting.

Dated, ....., ....., ..... 19...

.....,  
*Referee in Bankruptcy.*

**Form No. 157.****Order Authorizing Compromise.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 117.)

United States District Court for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

Upon reading and filing the petition of ....., trustee herein, duly verified, praying for authority to compromise a controversy with .....



and all the proceedings heretofore had herein, and a meeting of creditors having been duly held before the referee herein on ten days' notice, to consider the proposed compromise of the controversy with the said . . . . ., and no objections having been filed and no one having appeared in opposition thereto,

Now, on motion of . . . . ., attorney for the said trustee, it is

Ordered, that . . . . ., the trustee herein, be and he hereby is authorized to settle and compromise the controversy with . . . . . of the city of . . . . ., for the sum of \$. . . . ., and the said trustee is authorized to execute the necessary papers to carry out said compromise.

Dated, . . . . ., . . . . ., . . . . ., 19 . . .

. . . . .,

*Referee in Bankruptcy.*

### Form No. 158.

#### Petition for Review of Referee's Order.<sup>60</sup>

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

. . . . .

In Bankruptcy No. . . .

*Bankrupt .*

To . . . . ., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner is a creditor<sup>61</sup> of . . . . ., the above-named bankrupt, and that his claim has been allowed herein.

That, on the . . . . . day of . . . . ., 19 . . ., an order, a copy of which is hereto annexed, was made and entered herein.

That such order was and is erroneous in that<sup>62</sup> . . . . .

. . . . .  
. . . . .

<sup>60</sup> See, generally, Section Thirty-nine, *ante*. Consult also General Order XXVII. Note §§ 2(10) and 38-a. Compare also Form No. 80, and the foot-notes thereto.

<sup>61</sup> Or "the trustee" or otherwise, as the facts may be. See General Order XXVII.

<sup>62</sup> Here give the equivalent of an assignment of error in an appeal in equity, or a concise statement of the error relied on.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the bankruptcy law of 1898 and General Order XXVII.

Dated, ....., ....., ....., 19...

.....,

*Petitioner.*

[Add verification as in Form No. 66.]

### Form No. 159.

#### Referee's Certificate on Review.<sup>63</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

To the Hon. ...., District Judge:

I, ....., the referee in bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, an order,<sup>64</sup> a copy of which is annexed to the petition hereinafter referred to, was made and entered on the ..... day of ....., 19...

That, on the ..... day of ....., 19..., ....., a ..... in such proceeding, feeling aggrieved thereat, filed a petition for a review, which was granted.

That a summary of the evidence on which such order was based is as follows:<sup>65</sup> .....

That the question presented on this review is:<sup>66</sup> .....

<sup>63.</sup> This form is of more general application than Form No. 56, which savors more of the practice under the law of 1867. Consult, generally, Section Thirty-nine. See also General Order XXVII. See Form No. 158 for petition.

<sup>64.</sup> If a question is to be certified without decision, use Form No. 56.

<sup>65.</sup> Here recite the facts leading up to the order, perhaps calling attention to the pages of the record-book and the documents handed up. See General Order XXVII.

<sup>66.</sup> Here phrase the question involved into an interrogation, if possible limiting it to a single sentence. See General Order XXVII.

I hand up herewith, for the information of the judge, the following papers:

- (1) The record-book of this proceeding;
- (2) The petition on which this certificate is granted;
- (3) All other papers filed with me herein which are pertinent to this review.

Dated, ....., 19...

Respectfully submitted,

.....,  
*Referee in Bankruptcy.*

**Form No. 160.**

**Order Approving Appointment of Trustee.<sup>67</sup>**

At a Court of Bankruptcy, held in and for the ..... District  
 of ....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

**IN THE MATTER OF**

..... } In Bankruptcy No. ...  
*Bankrupt .*

This being the day appointed for the first meeting of creditors herein, and due notice thereof having been given as provided by the bankruptcy law of 1898, and ..... having been appointed trustee herein by a majority vote in number and amount of claims of all the creditors of said bankrupt previously allowed and present at such meeting, and they having fixed the amount of his bond at \$.....; now, on motion of ..... Esq., attorney for .....,

It is ordered:

That the appointment of ..... be, and the same is hereby, approved,<sup>68</sup> and that he be and become trustee herein, on filing a bond, with sufficient sureties, in \$....., as provided in section 50-b of the bankruptcy law of 1898, to be approved by this court.

.....,  
*Referee in Bankruptcy.*

<sup>67</sup>. This is a substitute for Forms Nos. 22 and 23. Consult, generally, Section Forty-four, as affected by § 2(17) and General Order XIII. See also §§ 45, 46, 50, 55, and 56.

<sup>68</sup>. In case approval is denied, change the recitals and the order, and where a new meeting is necessary, insert the clause calling such meeting and directing the giving of notice.

## Form No. 161.

Trustee's First Report.<sup>69</sup>

In the District Court of the United States for the ..... District of .....

## IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt* .

To ....., Esq., Referee in Bankruptcy:

I, ....., the trustee in this proceeding, do hereby report as follows:

That, on the .... day of ....., 19.., I was appointed trustee herein, immediately qualified by filing the required bond, and have since acted as such.

That, upon entering on such duties, I prepared a complete inventory of all the property of such bankrupt,<sup>70</sup> which showed such property to consist as follows:<sup>71</sup> .....

That <sup>72</sup> I have caused a certified copy of the order approving such bond and of the adjudication herein to be filed for record in the offices where conveyances are recorded in the county of ....., in said district.<sup>73</sup>

That the following is a brief detailed statement of the steps in such proceeding to this date, not hereinbefore mentioned:<sup>74</sup> .....

That I desire instruction as to the following matters:<sup>75</sup> .....

<sup>69</sup>. Consult, generally, Section Forty-seven. See, for penalty if report not filed, General Order XVII. This report must be filed within one month after the trustee is appointed. See § 47-a(10). The form here is merely a suggestion. Reports of this kind differ greatly in each case.

<sup>70</sup>. If an appraisal has been taken, it should also be referred to here, and a summary of it given.

<sup>71</sup>. State briefly the kind, location, value of, and incumbrances, if any, on the property, or refer to the inventory or the appraisers' report on file.

<sup>72</sup>. Use this paragraph only where there is real estate.

<sup>73</sup>. See §§ 21-e and 47-e.

<sup>74</sup>. Here set out briefly the more important steps of the proceeding to the date of this report.

<sup>75</sup>. Ask such instruction or order as the facts warrant, as to intervening in suits, whether suits to set aside alleged preferences or fraudulent transfers shall be brought, whether there shall be an immediate sale of the property or a part of it, etc., as the facts of each proceeding suggest.

That I have on hand in cash ..... dollars (\$....), which is deposited in the ..... bank, the designated depository of this court,<sup>76</sup> and that said sum is sufficient<sup>77</sup> for a first dividend of .... per cent. (....%), for the declaration and payment of which I do hereby apply.

Dated, ....., ....., 19...

Respectfully submitted,

.....,

*Trustee.*

STATE OF .....,  
County of .....,  
City of ....., } ss.:

I, ....., the trustee herein, do hereby make solemn oath that the statements of fact contained in the above report are true, according to the best of my knowledge, information, and belief.

.....

Subscribed and sworn to before me, this ..... day of ....., 19...

.....,

.....

### Form No. 162.

#### Order Declaring and Ordering First Dividend Paid.<sup>78</sup>

At a Court of Bankruptcy, held in and for the ..... District of  
....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

Application having been heretofore made for the declaration of a first dividend of not less than ..... per cent. (....%) herein, on the report of ....., the trustee herein, and due notice having been given of the proposed declaration and payment of such dividend, and no objections

76. Stop here, if there is not enough on hand for a first dividend.

77. See § 65-b, as amended by act of 1903.

78. Consult, generally, Sections Forty-seven and Sixty-five. See also General Order XXIX, and §§ 39-a(1), 58-a(5).

having been made thereto, and it appearing from said trustee's report that such dividend will not include more than fifty per cent. (. . . %) of the money of the estate in excess of the debts which have priority not yet paid and such claims as will probably be allowed; now, on motion of . . . . .

. . . . ., Esq., attorney for such trustee,

It is ordered:

That a dividend of . . . . . per cent. (. . . %) be, and the same hereby is, declared on all claims, not entitled to priority, allowed herein to this date, in accordance with a dividend sheet hereto annexed.

That the said dividend be paid by the trustee herein forthwith.<sup>79</sup>

. . . . .,

*Referee in Bankruptcy.*

**Dividend Sheet.**

No.	Dr.	Sum allowed.		Cr.	

. . . . .,

*Referee in Bankruptcy.*

**Form No. 163.**

**Trustee's Final Report and Account.<sup>80</sup>**

In the District Court of the United States for the . . . . . District of . . . . .

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	<p>In Bankruptcy No. ...</p>
--	------------------------------

To . . . . ., Esq., Referee in Bankruptcy:

I, . . . . ., the trustee in this proceeding, do hereby make my final report and account as follows:

<sup>79</sup>. If debts entitled to priority have not been paid, add a paragraph directing their payment and specifying the names of the priority claimants and the amounts at which their claims have been allowed.

<sup>80</sup>. This form is merely a suggestion. It is impossible to give more than a skeleton of a report which must vary widely with each case. Consult, generally, Section Forty-seven, also General Order XVII.

That, on the ..... day of ....., 19..., I was appointed trustee herein, immediately qualified by filing the required bond, and have since acted as such.

That I have previously filed reports herein under dates of the ..... day of ....., 19..., and the ..... day of ....., 19...

That the following is a brief detailed statement of the steps in this proceeding since the date of my last report:<sup>81</sup> .....

.....

That the said bankrupt's property is now reduced to money,<sup>82</sup> except<sup>83</sup> ....., which property, for the following reasons<sup>84</sup> .....

..... should be sold at public auction at the time of the final meeting herein.

That more than three months<sup>85</sup> has elapsed since the first dividend to creditors was declared, and said estate is now ready to be closed.

That annexed hereto is my final account, duly verified.<sup>86</sup>

Dated, ....., ....., 19...

Respectfully submitted,

.....,

*Trustee.*

**Final Account.<sup>87</sup>**

[See and use Form No. 49.]

STATE OF ....., }  
County of ....., } ss.:  
City of ....., }

I, ....., the trustee herein, do hereby make solemn oath that the statements of fact contained in the foregoing report are true, according to the best of my knowledge, information, and belief; also that the account thereto annexed is true, and contains entries of every sum of money

This report must be on file fifteen days before a meeting can be held. Compare also Form No. 161, and see Form No. 164. For the account, see Form No. 49. If there are no assets, Form No. 58 should be used.

81. Here set out briefly the more important steps of the proceeding since the last report, among other things, showing the cash on hand at that time and the total of receipts and disbursements since.

82. If all in the form of cash, stop here.

83. If any property remains unsold, specify it here.

84. Give reasons for a sale, specifying whether there are any offers and the probable value, if any, of such assets.

85. See § 65-b, as amended by the act of 1903.

86. See § 47-a(8) and Form No. 49.

87. Arrange with breaks and balances corresponding to the different dividend periods, so as to permit the making of the summary statement at the end of Form No. 160.

received by me as such trustee, and that the payments in such account stated to have been made by me have been so made.<sup>88</sup>

Subscribed and sworn to before me, this ..... day of ....., 19...

**Form No. 164.**

**Final Order of Distribution.<sup>89</sup>**

At a Court of Bankruptcy, held in and for the ..... District of  
....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

**IN THE MATTER OF**

..... } In Bankruptcy No. ...

*Bankrupt .*

A final report and account having been filed by ....., the trustee herein, and due notice having been given of said filing and of a final meeting of creditors to examine and pass on such account<sup>90</sup> and of the declaration and time of payment of a final dividend herein,<sup>91</sup> and no objection having been made to such account or to the declaration and payment of such dividend;<sup>92</sup> now, on motion of ....., Esq., attorney for the trustee herein,

It is ordered:

That the final account of ....., the trustee herein, be, and the same hereby is, approved.

That<sup>93</sup> .....

That the trustee disburse from the money on hand, for expenses of administration, the following:<sup>94</sup> .....

<sup>88</sup>. This oath is an adaptation of Form No. 50.

<sup>89</sup>. Consult, generally, Section Forty-seven, and see §§ 55-f, 58-a(5)(6), 62, 64 and 65, and General Order XXIX.

<sup>90</sup>. If for a sale of remaining assets, recite the fact here, and also any other matter included in the notice for the meeting.

<sup>91</sup>. If the notice included one for a proposed sale of assets recite that fact here.

<sup>92</sup>. In case of sale, add: "or to such proposed sale."

<sup>93</sup>. If a sale was also had, insert a clause approving such sale here.

<sup>94</sup>. Here add the items, something as follows: "To ....., for ....., \$....."



.....  
 .....  
 which sums are hereby allowed, and retain in his hands ..... dollars (\$....) for his necessary expenses in making distribution hereunder.

That said trustee pay to the following creditors<sup>95</sup> entitled to priority of payment the sums severally set opposite their names, viz.:<sup>96</sup>

That the attorney's fee herein be ..... dollars (\$....), which sum is hereby allowed; and that it be paid by said trustee to ....., Esq., attorney for the bankrupt, ..... dollars (\$....), and<sup>97</sup> to ....., Esq., attorney for the petitioning creditors, ..... dollars (\$....).

That<sup>98</sup> said trustee pay to ....., Esq., his attorney herein, ..... dollars (\$....), which sum is hereby allowed to him for the services of such attorney, as a part of the expenses of administration herein.

That<sup>99</sup> said trustee pay the previous dividend of ..... per cent. (...%) to the following creditors, entitled thereto: .....

.....  
 That, from the balance remaining on hand, said trustee retain his commissions, which are hereby fixed at the maximum amount specified in § 48 of the bankruptcy law of 1898, as amended, viz.: ..... dollars (\$....), and pay to the undersigned referee his commissions and claim fees as fixed by § 40 of said law, as amended, viz.: ..... dollars (\$....).

That the balance then remaining, viz.: the sum of ..... dollars (\$....), be disbursed in a final dividend of ..... per cent. (...%), which is hereby declared and ordered paid forthwith, to the creditors whose claims are approved herein and on the amount as appears on the dividend sheet hereto annexed.

That, on the coming in of vouchers for the payments herein ordered, the trustee and the sureties on his bond be, and they are hereby, discharged.

That the annexed summary statement be sent or delivered to each creditor when said dividend is paid to him.<sup>1</sup>

.....,  
*Referee in Bankruptcy.*

The items are usually the expenses of giving notice of the meeting, stenographer's fees, or the filing fees and expenses of petitioning creditors in involuntary cases. See § 62, and compare § 64-b(3).

95. See § 64-b(4)(5).

96. Here set out the names of priority creditors whose claims have been allowed and not previously paid, with the amounts to which they have been found entitled in a schedule in the body of the form, similar to that in Form No. 19.

97. Use only in involuntary cases.

98. Use only where the trustee has found it necessary to employ and has employed an attorney.

99. Use only when claims have been proven since the first dividend, setting out (1) name, (2) amount of claim proven, and (3) amount of dividend in a schedule in the body of the form, similar to the dividend sheet at the end of this form.

1. This is not required, but is suggested as a safe and courteous practice.

## Dividend Sheet.

[See Form No. 162, and copy in same matter.]

## Summary Statement.

Total cash collected by trustee..... \$.....

Disbursed prior to or at time of first dividend:

For ..... \$.....

For priority claims.....

For first dividend of.....\$.....

Total ..... \$.....

Balance on hand after first dividend..... \$.....

Cash collected since, as per final account.....

Total cash for distribution on final report..... \$.....

## Disbursed as follows:

For ..... \$.....

For expenses of administration.....

For priority claims.....

For attorney's fee, under § 64-b (3).....

For legal services to trustee.....

For first dividend of .....\$ to creditors whose  
claims had not then been allowed.....

For trustee's commissions.....

For referee's commissions and fees.....

For final dividend.....

\$.....

Form No. 165.

Trustee's Combined Dividend Check and Receipt.

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... In Bankruptcy No. ...

*Bankrupt .*

\$..... No. ....

....., ....., ....., ....., 19...

The ..... National Bank of .....

Pay to the order of ....., ..... dollars, being a .....  
dividend of ..... per cent. (....%) on ..... claim allowed in the  
proceeding of ....., a bankrupt, by order dated .....,  
....., 19...

Countersigned, ..... *Trustee.*

.....  
*Referee in Bankruptcy.*

.....

RECEIPT.

(Do not detach. If detached, the check will not be honored.)

\$..... No. ....

....., ....., ....., ....., 19...

Received of ....., the trustee of ....., a  
bankrupt, being in full of the ..... dividend of ..... per cent.  
(....%) on ..... claim allowed in the proceeding of such bankrupt, by  
order dated ....., 19...

.....  
(*Creditor's Signature.*)

2. This form is of course merely a sug-  
gestion to trustees who wish to do their  
work thoroughly. Compare, generally, Sec-

tion Forty-seven. See also § 65 and Gen-  
eral Order XXIX.

## FORM No. 166.

Referee's Certificate of Fees Payable.<sup>3</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF FEES IN PROCEEDINGS  
IN BANKRUPTCY REFERRED TO

*Referee in Bankruptcy.*

To ....., Clerk of the United States District Court, for the  
..... District of .....

I, ....., the referee in bankruptcy to whom the proceedings  
in bankruptcy hereinafter mentioned were referred do hereby certify that  
the following cases are closed and the fees now payable as follows:

To trustees:

No. case.	Name of bankrupt.	Name of trustee.

To bankrupts (no trustee having been appointed):

No. case.	Name of bankrupt.

To the referee:

No. case.	Name of bankrupt.

Dated, ....., 19...

*Referee in Bankruptcy.*

<sup>3</sup> Consult, generally, Section Fifty-one. See also §§ 40 and 48, as amended by the act of 1908; also General Orders XXIX and XXXV.

Form No. 167.

Bond of Trustee, with Justification of Sureties.<sup>4</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... In Bankruptcy No. ...

*Bankrupt .*

Know all men by these presents: That we, ....., of the ..... of ....., in said district, as principal, and ....., and ....., both of the ..... of ....., in said district, as sureties, are held and firmly bound unto the United States of America in the sum of<sup>5</sup> ..... dollars (\$....), in lawful money of the United States, to be paid to the United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ..... day of ....., 19...

The condition of this obligation is such that:

Whereas the above-named ..... was, on the ..... day of ....., 19..., duly adjudicated a bankrupt herein, and on the ..... day of ....., 19..., the above-named ..... was appointed trustee in said proceeding in bankruptcy, and he, the said ..... has accepted said trust, with all the duties and obligations pertaining thereunto;

Now, therefore, if the said ....., trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as such trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

..... [L. S.]

..... [L. S.]

..... [L. S.]

Signed, sealed, and delivered, in the presence of

.....

<sup>4</sup> Consult, generally, Section Fifty. See also Form No. 25, for which this is a substitute, the former containing no justification;

note § 50-d-f. This bond can be adapted to that required of a receiver.

<sup>5</sup> See § 50-e.

STATE OF ..... }  
 County of ..... } ss.:  
 City of ..... }

On this ..... day of ....., 19..., the above-named .....  
 ....., and ..... and ..... appeared  
 before me, and severally acknowledged the execution of the foregoing bond.<sup>6</sup>

STATE OF ..... }  
 County of ..... } ss.:  
 City of ..... }

..... and ....., respectively, the sureties in  
 the foregoing bond, being each severally duly sworn, deposes and says that  
 he is a resident of and a ..... holder within the ..... of .....  
 in said district, and is worth in property, at its actual value, ..... dollars<sup>7</sup>  
 (\$.....) over all the debts and liabilities which he owes or has incurred,  
 and exclusive of property exempt by law from levy and sale under an  
 execution.

Subscribed and sworn to before me, this ..... day of ....., 19...

### Form No. 168.

#### Order Approving Trustee's Bond.<sup>8</sup>

At a Court of Bankruptcy, held in and for the ..... District of  
 ....., at ....., this ..... day of ....., 19...

Present: ....., Referee.

#### IN THE MATTER OF

..... } In Bankruptcy No. ...  
*Bankrupt* . }

The petition for the adjudication of the above-named bankrupt, .....  
 ....., having been filed herein on the ..... day of ....., 19...,

6. This is not essential, but is thought good practice.

7. See § 50-f.

8. For reasons for this, consult, gener-

ally, Sections Twenty-one and Fifty. See also § 47-c, added by the amendatory act of 1903, and § 70-a.

and ....., having been appointed trustee herein on the ..... day of ....., 19..., and he having given a bond for the faithful performance of his official duties in the amount of ..... dollars (\$.....), as provided by the order appointing him; now, on motion of ..... Esq., attorney for .....,

It is ordered:

That said bond be, and the same is hereby, approved.

.....,

*Referee in Bankruptcy.*

### Form No. 169.

#### Certificate of Referee as to Falsity of Pauper Affidavit.

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

I, ....., referee in bankruptcy in charge of the above-entitled proceeding, do hereby certify:

That I have reason to believe that the pauper affidavit filed herein by the above-named bankrupt, as provided in § 51 (2) of the bankruptcy law of 1898, is false; and I do, therefore, set the ..... day of ....., 19..., at .. M., as the time and ....., in the ..... of ....., in said district, as the place, when said bankrupt shall be examined as to the truth of such affidavit.

Dated, ....., ....., ....., ....., 19...

.....,

*Referee in Bankruptcy.*

To ....., bankrupt:

You are hereby ordered to appear before the undersigned, for examination, at the time and place specified in the above certificate.

Dated, ....., ....., ....., ....., 19...

.....,

*Referee in Bankruptcy.*

## Form No. 170.

Special Clauses for Proofs of Debt.<sup>10</sup>

[To conform to General Order XXI.]

1. Insert at the end of all proofs of debt, not resting on a note or judgment, the following averment:

“That no note has been received for such debt<sup>11</sup> (except .....)  
nor has any judgment been rendered thereon<sup>12</sup> (except .....).”

2. Insert, after the statement of the “consideration” in all proofs of debt resting on open account, the following averment:

“That the said debt became due (or will become due) on the .....  
day of ....., 19...”

3. Insert also, in the same place, in all proofs of debt resting on open account, where the items of account mature at different dates, the following averment:

“That the average due date of said debt is the ..... day of .....,  
19...”

4. Insert in all proofs of debt by a corporation (Form No. 33) which are not sworn to by the treasurer, after the words “authorized to make this proof,” the following averment:

“That the same is not made by the treasurer of such corporation, for the reason that<sup>13</sup> ....., and that the affiant is an officer of such corporation and his duties most nearly correspond to those of treasurer.”

5. In all proofs of debt where the claim was assigned after the petition in bankruptcy, but before proof, add at the end of the proof, the following averment:

“That, at the time these proceedings in bankruptcy were begun, such debt was owned by ....., of ....., .....; that since then, by an instrument in writing, hereto annexed, such debt has been assigned to the affiant; and that annexed hereto is a deposition by said ....., as provided by General Order XXI (2).”

10. See, generally, Section Fifty-seven, *ante*, and General Order XXI. See also Forms Nos. 31, 32, 33, 34, 35, 36, 37, 38, and 39; also Forms Nos. 171 and 172.

11. If so, prove on the note, or surrender it and prove on the debt, adding an explanation here.

12. If a judgment has been entered, prove

on the judgment, attaching a transcript, and specifying how much of the costs, if any, were earned before the petition in bankruptcy was filed; see § 63-a(2)(3).

13. Here give the reason why the proof is not made by the treasurer, as absence, illness, etc.



## Form No. 171.

Petition for Reconsideration and Rejection of Claim.<sup>14</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy.

*Bankrupt .*

To ....., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is the trustee herein.<sup>15</sup>

That the proof of debt of ....., of ....., claiming to be a creditor of the said ....., was filed herein on the ..... day of ....., 19..., and, on the ..... day of ....., 19..., duly allowed.

That the same should not have been allowed for the following reasons:<sup>16</sup>

.....  
That the attorney of said claimant is ....., Esq., of .....

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore, your petitioner prays that the said proof of debt may be reconsidered and rejected.<sup>17</sup>

.....,

*Petitioner.*

[Add verification as in Form No. 66.]

14. Consult, generally, Section Fifty-seven and General Order XXI(6); and see Forms Nos. 172, 38, and 39.

15. A creditor may make this petition; if so, he should show the allowance of his claim.

16. As, for instance, because technically imperfect, or not in accordance with the general orders, or secured, or the claimant preferred and his preference not surrendered or want of consideration, or many other reasons. The reasons should be set forth as in a pleading, so that the claim-

ant may have proper notice of the issue he must meet.

Neither the bankrupt act nor the general orders require the petitioner to aver facts which, if proved, would defeat the claim. It is only necessary to aver facts which, if true, are a sufficient cause for the re-examination of the claim. In re Watkinson & Co. (D. C., Pa.), 12 Am. B. R. 370, 130 Fed. 218.

17. This form can be adapted to a case where the application is to reduce but not reject *in toto*.

## Form No. 172.

Notice of Petition for Reconsideration and Rejection of Claim.<sup>18</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... In Bankruptcy No. ...

*Bankrupt .*

To ....., a creditor, and ....., Esq., his attorney:

You will please take notice that ....., the trustee herein,<sup>19</sup> has filed a petition asking that your claim against ....., the above-named bankrupt, be reconsidered and rejected,<sup>20</sup> and that a hearing will be had on such petition at ....., in the ..... of ....., in said district, on the ..... day of ....., 19..., at .... o'clock, .. m.

Dated, ....., 19...

.....  
*Referee in Bankruptcy.*

## Form No. 173.

## Proof of Secured Debt.

(Hagar and Alexander's Bankruptcy Forms, No. 130.)

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... In Bankruptcy No. ...

*Bankrupt .*

At ....., in said ..... district of ....., on the ..... day of ....., A. D. 19..., came ..... of ....., in the county of ....., State of ..... in said ..... district of ..... and made oath, and says that the said .....

18. Consult, generally, Section Fifty-seven. See, for practice, General Order XXI(6). If claim is rejected, the proper order is suggested by Form No. 39; if merely reduced, by Form No. 38.

19. If made by a creditor, change to fit the fact.

20. Or "reduced to \$....." It may be suggested that a copy of the petition should be mailed with this notice.

....., the person by (*or against*) whom a petition for adjudication of bankruptcy has been filed, .... at and before the filing of said petition, and still .... justly and truly indebted to said deponent in the sum of ..... dollars:  
that the said debt exists upon.....  
of which a ..... is hereto annexed; that the consideration of said debt is as follows:

.....  
.....  
that the said debt ..... due on .....  
.....  
..... the average due date being ..... 19...;  
and that no note has been received for the said debt nor any judgment rendered thereon except as aforesaid; that no part of said debt has been paid except .....  
.....  
that there are no set-offs or counterclaims to the same except.....  
.....;  
that the only securities held by this deponent for said debt are the following:  
.....  
.....

Subscribed and sworn to before me, this ..... day of ....., A. D. 19...  
.....,  
*Creditor.*

[*Official character.*]

**Form No. 174.**

**Order Expunging or Reducing Proof of Debt.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 164.)

United States District Court for the ..... District of .....

IN THE MATTER OF	} In Bankruptcy No. ...
.....	
<i>Bankrupt .</i>	

The trustee of the estate of the above-named bankrupt having filed in the office of the referee a duly verified petition praying that the proof of debt

heretofore filed herein by ....., an alleged creditor for \$....., be reconsidered, rejected and expunged (*or reduced*), and an order having been made herein that a hearing be had thereon on the ..... day of ....., 19..., and due notice of said hearing having been given to said claimant, and to the said trustee, and the said claimant having appeared by counsel on said day, and the evidence submitted (or testimony having been taken thereon), now on reading and filing the trustee's said petition and after hearing ....., Esq., attorney for the said trustee, in support of said petition and ....., Esq., in opposition thereto, it is

Ordered, that the prayer of said petition be and the same is hereby granted, and it is further

Ordered, that said claim of ..... be and it is hereby rejected, disallowed and expunged from the list of claims upon the record in this case. (*or that said claim of ..... be and it hereby is reduced to \$..... and allowed at said amount upon the list of claims herein.*)

Dated, ....., 19..

.....  
*Referee in Bankruptcy.*

**Form No. 175.**

**Order Allowing Claim.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 165.)

United States District Court for the ..... District of .....

<p>IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	<p>In Bankruptcy No. ...</p>
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..... having filed in the office of the referee a proof of claim against the estate of the above-named bankrupt in the sum of \$....., and the said claim having been objected to by (the trustee or certain creditors) and the objections having come on for a hearing before me, and testimony having been offered in behalf of ..... in support of the said claim, and by (the trustee or certain objecting creditors) in opposition thereto, and due deliberation having been had, and after hearing ..... Esq., attorney for the said claimant, in support of the said claim, and ....., Esq., attorney for (trustee or objecting creditors), in opposition thereto, it is

Ordered, that the said claim be and the same is hereby allowed in the sum of \$..... and the objections thereto dismissed.

Dated, ....., ....., ....., 19...

.....

*Referee in Bankruptcy.*

**Form No. 176.**

**Notice of Final Meeting.<sup>21</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

To the creditors of ....., of ....., in the county of ....., and district aforesaid, a bankrupt:

Notice is hereby given that on the ..... day of ....., A. D. 19..., at ..... o'clock, .. M., there will be a meeting of the creditors of the above-named bankrupt at ....., in the ..... of ....., in said district, to <sup>22</sup> *examine and pass upon the final report and account of ....., the trustee herein, which was filed in the office of the undersigned at ....., in said district, on the ..... day of ....., 19..., and shows \$..... on hand for distribution,<sup>23</sup>* and to transact such other business as may properly come before such meeting.

Dated, ....., ....., ....., 19...

.....

*Referee in Bankruptcy.*

.....,

*Attorney for the Trustee.*

<sup>21</sup>. Consult, generally, Section Fifty-eight. See also §§ 47-a(8), 55-f, and 65. Compare Forms Nos. 18 and 178. See also for notices given by the clerk, Forms Nos. 53, 57, 98, 108, 138.

<sup>22</sup>. The italics are used only for conven-

ience of reference in substituting clauses for other notices. See Form No. 176.

<sup>23</sup>. When the meeting is also for the declaration and payment of a final dividend, see Form No. 179.

**Form No. 177.****Special Clauses for Notices to Creditors.<sup>24</sup>**

1. Where the notice is for a hearing on an application for a discharge or composition (§ 58-a (2)), or the proposed dismissal of the proceedings (§ 58-a (7)), as previously suggested in Forms Nos. 98, 108, and 138, the order to show cause should be used.

2. Where the notice is for the examination of the bankrupt (§ 58-a (1)), at a meeting called for that purpose, substitute for the words in italics in Form No. 172, the words:

“To attend an examination of the bankrupt.”

3. Where the notice is for a proposed sale of property (§ 58-a (4)), substitute in the same place in Form No. 172, the words:

“To consider a proposed sale of the following described property, viz.:<sup>25</sup> .....

....., and if objection to said sale is not made, or, if objected to, it is ordered, forthwith to attend the sale of such property at auction to the highest bidder, on the following terms:<sup>26</sup> .....

....., subject to confirmation by the undersigned, at a continuance of such meeting, which, on the conclusion of such sale, will be taken to ....., in the ..... of ....., in said district, on the ..... day of ....., 19...., at ..... o'clock, .. m.”

4. Where the notice is for the declaration and payment of a dividend (§ 58-a (5)) substitute in the same place in Form No. 172, the words:

“For the purpose of declaring and directing the payment of a dividend of not less than ..... per cent. upon all debts allowed prior to or on that date.”

5. Where the notice is of the proposed compromise of a controversy (§ 58-a (6)), substitute in the same place in Form No. 172, the words:

“To pass upon a proposition to compromise a controversy between the trustee herein and ....., concerning<sup>27</sup> ..... by<sup>28</sup> .....”

6. Where the notice is of a meeting of creditors for any purpose not specifically indicated in § 58-a, substitute in the same place in Form No. 172, the words:

“For the purpose of<sup>29</sup> .....”

<sup>24</sup>. Consult, generally, Section Fifty-eight. See also Form No. 176 and the footnotes thereto.

<sup>25</sup>. Here insert description and give appraised value and the incumbrances, if any.

<sup>26</sup>. Here insert terms as to down payment, etc.

<sup>27</sup>. Here indicate the question at issue.

<sup>28</sup>. Here indicate the proposed compromise.

<sup>29</sup>. Here describe briefly the purpose of the meeting.

Form No. 178.

Combined Notice to Creditors.<sup>30</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... In Bankruptcy No. ...

*Bankrupt .*

To the creditors of ....., of ....., in the county of ....., and district aforesaid, a bankrupt:

Notice is hereby given that on the ..... day of ....., A. D. 19..., at ..... o'clock, .. M., there will be a meeting of the creditors of the said bankrupt, at ....., in the ..... of ....., in said district, for the following purposes:

I. To consider a proposed sale of the following described property, viz.:<sup>31</sup> ..... and, if objection to said sale is not made, or, if objected to, it is ordered, forthwith to attend a sale of such property at auction to the highest bidder, on such terms as may then be fixed;

II. To examine and pass upon the final report and account of the trustee, which was filed in the office of the undersigned at ....., in said district, on the ..... day of ....., 19..., and shows \$..... on hand for distribution;

III. For the purpose of declaring and ordering paid a final dividend herein;

IV. To transact such other business as may properly come before said meeting.

Notice<sup>32</sup> is also given that, unless proofs of debt are filed on or before the day set for such meeting, the same cannot share in such dividend.

Dated, ....., .., ....., 19...

.....,  
*Referee in Bankruptcy.*

....., Esq.,  
*Attorney for Trustee.*

30. See, generally, Section Fifty-eight, and the forms just *ante*, with their foot-notes.

31. Here insert description and give ap-

praised value and the incumbrances, if any.

32. This clause should also be added to the notice of the first dividend.

## Form No. 179.

Affidavit of Publication of Notice.<sup>33</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

STATE OF .....,  
 County of .....,  
 City of .....,

} ss.:

[Attach slip here.]

....., of the ..... of ....., in said district, being duly sworn, deposes and says, that he is the proprietor<sup>34</sup> of ....., the newspaper designated for the publication of notices in bankruptcy in the county of ....., in said district; and that the notice to creditors in the above-entitled proceeding, of which the attached printed slip is a copy, was published in said newspaper on the ..... day of ....., 19...

.....

Subscribed and sworn to before me, this ..... day of ....., 19...

.....,

.....

<sup>33.</sup> See Section Fifty-eight, *ante*, and note Form No. 179.<sup>34.</sup> Or "foreman," or "clerk," as the case may be.



Form No. 180.

Affidavit of Mailing Notice.<sup>25</sup>

In the District Court of the United States for the ..... District of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt</i> .</p>	}	In Bankruptcy No. ...
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STATE OF ..... County of ..... City of .....	}	ss.:                      [Attach notice here.]
--	---	---

....., of the ..... of ....., in said district, being duly sworn, deposes and says that, on the ..... day of ....., 19... deponent mailed notices to creditors, of which the annexed printed notice is a copy, one each to the persons, copartnerships, and corporations mentioned in the schedule of names and addresses hereto annexed, by depositing such notices in sealed, postpaid envelopes,<sup>26</sup> in the general post-office at the ..... of ....., in the district aforesaid.

.....

Subscribed and sworn to before me, this ..... day of ....., 19...

.....,

.....

<sup>25.</sup> See Section Fifty-eight, *ante* and Form No. 180. The original notice, the affidavit of publication, and this affidavit should be bundled together before being filed.

<sup>26.</sup> Or, if the notice is mailed by the referee, add words indicating that an "official business" envelope was used.

## Form No. 181.

Order Appointing Attorney for Trustee.<sup>37</sup>

At a Court of Bankruptcy, held in and for the ..... District  
of ....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

Application having been made for the appointment of an attorney for the trustee herein, and it appearing that the services of an attorney are and will be required, and that the appointment hereinafter made is acceptable to such trustee;<sup>38</sup> now, on motion of ....., Esq.,

It is ordered:

That ....., Esq., of the ..... of ....., in said district, be, and he hereby is, appointed attorney for the trustee herein,<sup>39</sup> his compensation to be fixed and paid as an expense of administration at the final meeting of creditors.

.....,

*Referee in Bankruptcy.*

<sup>37</sup> See, generally, Section Sixty-two.

<sup>38</sup> If the choice has been submitted to creditors, here recite their action.

<sup>39</sup> Or, "that ....., the trustee,

be authorized to employ ....., of the ....., of ....., in said district, as his attorney herein."

## Form No. 182.

Petition for Instruction as to Burdensome Property.<sup>40</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

To ....., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is the trustee herein.

That a portion of such bankrupt's estate consists of the following property:<sup>41</sup> .....That your petitioner has investigated the value of such property and finds the same to be worthless,<sup>42</sup> for the following reasons:<sup>43</sup> .....

That it will be for the benefit of said estate that your petitioner be instructed to disclaim title to such property and to refuse to take the same into his possession.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore, your petitioner prays for an order permitting him to disclaim title to such property and to refuse to take the same into his possession.

.....,

*Trustee.*

[Add verification as in Form No. 66.]

<sup>40</sup> See Section Seventy, and compare the forms immediately ante. See also Forms Nos. 42, 43, 44, 45, and 46.

<sup>41</sup> Here describe the property.

<sup>42</sup> Or, if actually burdensome to the bankrupt's estate, state that fact.

<sup>43</sup> Here give the reasons on which the order is asked, showing condition, incumbrances, etc.

**Form No. 183.**

**Order on Petition as to Burdensome Property.<sup>44</sup>**

At a Court of Bankruptcy, held in and for the ..... District  
of ....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	<p>In Bankruptcy No. ...</p>
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Application having been made for an order permitting the trustee herein to disclaim title to certain worthless <sup>45</sup> property, and to refuse to take the same into his possession, and it appearing that such order should be granted; now, on motion of ..... Esq., attorney for .....,

It is ordered:

That ....., the trustee herein, be, and he hereby is, directed to disclaim title to the following described property, and to refuse to take the same into his possession, viz.:<sup>46</sup> .....

.....,  
*Referee in Bankruptcy.*

**Form No. 184.**

**Order Allowing Trustee to Continue Business.**

(Hagan and Alexander's Bankruptcy Forms, No. 162.)

United States District Court for the ..... District of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	<p>In Bankruptcy No. ...</p>
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On reading and filing the annexed petition of ....., the trustee of the estate of the above-named bankrupt, verified ....., 19..., and on motion of ....., attorney for the said trustee, it is

<sup>44</sup> See Form No. 182, and its foot-notes.

<sup>45</sup> Here describe the property.

<sup>46</sup> Or "burdensome."

Ordered, that . . . . ., the said trustee, be and he is hereby authorized, in his discretion, to continue the business of the said bankrupt, for a period of . . . . . days from the date of this order.

Dated, . . . . ., . . . . ., . . . . ., 19...

.....  
*Referee in Bankruptcy.*

**Form No. 185.**

**Petition for Leave by Trustee to Sue.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 187.)

United States District Court, for the . . . . . District of . . . . .

**IN THE MATTER OF**

..... } In Bankruptcy No. ...

*Bankrupt .*

To the United States District Court, for the . . . . . District of . . . . . :

The petition of . . . . . respectfully shows:

1. That your petitioner is the trustee in bankruptcy herein, duly qualified and acting.

2. That among the assets coming into the hands of your petitioner as trustee was a certain contract dated . . . . ., 19... with . . . . . That, as your petitioner is informed and verily believes, at the time of the adjudication herein, the bankrupt had entered upon the performance of said contract and completed the same.

3. That the said . . . . . has been examined under section 21-a, in this proceeding, but denies that there is any sum of money coming to the bankrupt herein, on account of said contract.

4. That the creditors herein have requested your petitioner, as trustee, to bring an action against . . . . . for the recovery of the moneys claimed to be due this estate by reason of said contract, and your petitioner has been advised by his counsel, . . . . ., that he has a good and valid cause of action against . . . . .

5. That no previous application has been made for the order prayed for.

Wherefore, your petitioner prays for an order authorizing and permitting him to bring an action in the . . . . . court for the county of....  
....., against .....

.....  
*Petitioner.*

[Verification.]

## Form No. 186.

## Order Authorizing Trustee to Sue.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 188.)

At a stated term of the United States District Court for the .....  
 District of ....., held at the United States Court House,  
 City of ..... on the ..... day of ....., 19...

Present: Hon. ...., District Judge.

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

Upon reading and filing the annexed petition of .....,  
 trustee herein, duly verified, and upon motion of .....,  
 attorney for said trustee, it is

Ordered, that ....., as trustee in bankruptcy of the above-  
 named bankrupt, be and he hereby is authorized and permitted to bring an  
 action as such trustee in bankruptcy, in the ..... court of .....,  
 ..... county, against ....., upon the following  
 alleged cause of action: .....  
 .....  
 to recover any moneys which may be due this estate from .....

.....

*D. J.*

**Form No. 187.****Demand in Reclamation.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 311.)

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Alleged Bankrupt.*

SIR:—

Please take notice that the undersigned is the owner of and entitled to the immediate possession of the following chattels which were wrongfully and unlawfully obtained from him by the above-named (alleged) bankrupt, and that the undersigned demands the immediate return of said property, to wit:

.....  
*[Here set forth property claimed in detail].*  
 .....

Dated, .....

Yours, etc.,

.....,

By .....,

*Attorney.***Form No. 188.****Petition to Reclaim.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 312.)

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ...

*Bankrupt .*

To the District Court of the United States, for the ..... District of .....:

The petition of ..... respectfully shows and alleges:

First: (That your petitioner is a corporation duly organized under and

existing under and by virtue of the laws of the State of . . . . ., and having an office for the transaction of its business in the city of . . . . .).

Second: That at all the times hereinafter mentioned, the . . . . . said bankrupt was engaged in business in the city of . . . . . as . . . . .

Third: That your petitioner is the owner and entitled to the immediate possession of the property set forth in schedule "A" hereto annexed, and made a part hereof, and that the value of said property is . . . . . (\$ . . . . .) dollars.

Fourth: That your petitioner further alleges upon information and belief, that heretofore and on or about the . . . . . day of . . . . ., 19 . . . , an involuntary petition in bankruptcy was filed in the office of the clerk of this court, by three creditors of above bankrupt, praying that the said . . . . . be adjudged an involuntary bankrupt, and that thereafter . . . . ., Esq., was duly appointed as temporary receiver in bankruptcy of the said . . . . ., and that pursuant to the order of his appointment, he did take possession of and continues to hold the property mentioned and described in the schedule hereto annexed and made a part hereof, marked exhibit "A," and that the said property is in the original piece in which it was delivered by your petitioner to the said . . . . . (That on the . . . . . day of . . . . ., 19 . . . , the said . . . . . was duly adjudicated a bankrupt).

Fifth: That heretofore and before the commencement of this proceeding, due demand was made by your petitioner upon the said . . . . ., Esq., receiver, that he deliver possession of the said goods, wares and merchandise in said schedule "A" mentioned to your petitioner, but that said demand has been refused.

Sixth: That heretofore and at various times between the . . . . . day of . . . . . and the . . . . . day of . . . . ., both dates inclusive, said . . . . ., upon false and fraudulent representations, induced your petitioner to sell and deliver to him the said goods, wares and merchandise mentioned and described in said schedule "A" hereto annexed, and the said . . . . . wrongfully, fraudulently and with intent to defraud your petitioner and knowing that your petitioner relied upon the truth of the representations so made, procured the said property to be delivered to his custody.

Seventh: That at the time that the said goods were so delivered to the said . . . . . by your petitioner as aforesaid, and at the time that the said false and fraudulent representations were made as aforesaid, the said . . . . . was insolvent and unable to pay his debts in full to his knowledge, and made false and fraudulent representations with intent to cheat and defraud your petitioner, and so knowing his insolvency as afore-



said, induced your petitioner to sell and deliver the said merchandise as aforesaid with the intent and design not to pay therefor when the term of credit upon which the same had been sold should have expired.

Eighth: Your petitioner further alleges that the false and fraudulent representations, the truth of which he relied upon, and which induced him to sell and deliver the said merchandise as aforesaid, are as follows, to wit:

That heretofore and on or about the ..... day of ....., 19..., the said ..... did make, sign and deliver a written statement of his financial condition to ..... in the city of ....., wherein he did state that he had merchandise on hand on the ..... day of ..... to the value of \$.....; outstanding accounts of \$.....; fixtures of the value of \$.....; and cash on hand and in bank of \$....., or a total of assets of \$..... and did further state that his liabilities amounted to the sum of \$..... and that he was worth over and above all his debts and liabilities the sum of \$.....

Ninth: That your petitioner obtained the said statement previous to the sale and delivery of the said merchandise in said schedule "A" mentioned; and as your petitioner is informed and does verily believe, the said ..... did deliver the said signed statement as aforesaid to petitioner for the purpose of obtaining credit, and that your petitioner relied upon the truth of the representations therein contained.

Tenth: Upon information and belief, that the aforesaid representations were false and untrue, in that the said ..... did not have on the ..... day of ....., the assets as heretofore alleged and stated by him in said statement, of the total value of \$....., and owed in liabilities a sum in excess of the liabilities as hereinabove alleged and by him in said statement specified of \$....., and that the said ..... did not have a surplus over and above all of his debts and liabilities of the sum of \$.....

Eleventh: That the said goods had not been taken by virtue of a warrant against your petitioner for the collection of any tax, assessment or fine, issued in pursuance of a statute of the United States, and that they have not been seized by virtue of an execution or warrant of attachment from or through whom your petitioner has derived title to the said chattels.

Wherefore, your petitioner does respectfully pray that the said ....., Esq., as said temporary receiver herein, be directed to deliver to your petitioner the said property in said schedule "A" mentioned and described, upon your petitioner filing in the office of the clerk of this court a bond in double the value of said property to be returned to him conditioned that in the event your petitioner fails to establish his right, title and interest in and to the said property, that then, and in that event, your petitioner will repay to the said receiver, or trustee hereinafter to be elected, the value of the said property so

to be delivered to him and all costs and expenses, and your petitioners have such other and further relief, as to this honorable court may seem just and proper.

Dated, ....., ....., ....., ....., 19...

.....,

*Petitioner.*

.....

*Solicitors for Petitioner,*

Address, .....

[*Verification.*]

(Schedule "A" annexed.)

### Form No. 189.

#### Answer in Reclamation.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 315.)

United States District Court, for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

..... as receiver in bankruptcy of the estate of the above-named bankrupt, answering the petition of the claimant herein, shows and alleges, upon information and belief:

1. Admits the allegations of plaintiff's petition numbered ....., ....., ....., ....., and .....
2. The receiver further answering the said petition denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph numbered ..... and ..... of said petition, and therefore denies same.
3. The receiver further answering the said petition, denies the allegations of paragraph ..... of said petition.
4. The receiver denies the allegations of paragraph ....., but admits that a letter, dated ....., from the attorneys for the petitioner herein and written after the filing of the petition of bankruptcy herein and containing an alleged demand was received by the bankrupt herein.

5. The receiver further answering the said complaint admits that a certain portion of the property claimed by the petitioner has come into the hands of the receiver as a part of the assets belonging to this estate.

The receiver further answering said petition and as a further and separate defense (or counterclaim) thereto alleges:

[*Here set forth specifically defense or counterclaim.*]

Wherefore, the receiver demands judgment dismissing the petition of the claimant herein, with costs.

.....,  
*As Receiver in Bankruptcy of*  
 .....  
 [Address.]

.....,  
*Attorney for Receiver.*

[*Verification.*]

[Trustee after appointment is proper person to answer and defend.]

**Form No. 190.**

**Petition for Sale under General Order XVIII(2).<sup>47</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF  .....  <i>Bankrupt .</i>	}	In Bankruptcy No. ...
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To ....., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is the trustee herein.

That a portion of such bankrupt's estate consists of the following property;<sup>48</sup> .....

47. See Section Seventy and General Order XVIII(2). Though such sales are of doubtful validity, they are common. This form can be adapted to a sale of personal property, or one at public auction under

the same general order. See also Forms 42, 43, 44, 45, 46, 182, 183, 191, and 192.

48. Here insert description of property, giving its location, appraised value, the incumbrances, if any, etc.

That it will be to the advantage of the estate that such property be sold forthwith, for the following reasons:<sup>49</sup> .....

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore, your petitioner prays for an order permitting him to sell said property in the way and on the terms above specified.

[Verification same as in Form No. 66.]

Trustee.

### Form No. 191.

Order for Sale under General Order XVIII(2).<sup>50</sup>

At a Court of Bankruptcy, held in and for the ..... District  
of ....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

#### IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

Application having been made by the trustee herein for an order permitting such trustee to sell the following property<sup>51</sup> .....  
.....  
on the terms hereinafter mentioned, and it appearing that good cause for such sale has been shown; now, on motion of ....., Esq., attorney for the trustee,

It is ordered:

That ....., the trustee herein, be, and he hereby is, authorized to sell the property above specified to ....., on receipt from him of ..... dollars (\$....) in cash.<sup>52</sup>

Referee in Bankruptcy.

<sup>49</sup>. Here give the reasons, as, for instance, a cash offer of 75 per cent. of the appraised value, giving name of person making the offer, etc., or the necessity of vacating the premises in which the property is, or any of the numerous reasons which require prompt action on sales of a bankrupt's assets.

<sup>50</sup>. See foot-note 44 to Form No. 190, and the references therein.

<sup>51</sup>. Here copy the description of the property from the petition.

<sup>52</sup>. Or, as the terms may be, usually adding a clause directing the transfer of title by an instrument transferring only the trustee's right, title, and interest, and in no way amounting to a warranty. See Form No. 193.

## Form No. 192.

## Petition to Confirm Sale.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 251.)

United States District Court, for the ..... District of .....

## IN THE MATTER OF

..... In Bankruptcy No. ...

*Bankrupt .*

To the Hon. ...., District Judge:

The petition of ..... respectfully shows:

That your petitioner is the temporary receiver herein, duly qualified and acting.

That on ....., 19..., by order of this court, the property and effects of the said bankrupt at ....., st., city of ..... , consisting of ....., were offered for sale at public auction.

That the same was offered in bulk at the beginning of such sale and a bid of \$..... was made for the same, and that the goods were then offered for sale in separate lots according to catalogue, and realized the sum of \$..... or more than the bid in bulk.

That the said sum of \$..... realized, is below 75 per cent. of the appraised value of the property, which is \$ ....., and in order to deliver said property to the purchasers, it is necessary for your petitioner to procure an order confirming said sale.

Your petitioner is of the opinion and verily believes that a larger sum than as above stated cannot be obtained, as the sale was largely attended and fairly conducted, and advises that the said goods be delivered to the respective bidders, for the reason that said merchandise will rapidly deteriorate in value, and the expense attendant upon storing the goods for a longer time, or of a resale, would be considerable, and unlikely to produce better results, and petitioner verily believes that the sale should be confirmed.

Wherefore, your petitioner respectfully prays that an order be made confirming the said sale, and authorizing him to deliver the said merchandise as sold in lots to the respective highest bidders therefor and for such other and further relief as to the court may seem just and proper.

.....,  
*Petitioner.*

[Verification.]

## Form No. 193.

Order Confirming Sale, after Notice to Creditors.<sup>53</sup>

At a Court of Bankruptcy, held in and for the ..... District  
of ....., at ....., this ..... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

..... In Bankruptcy No. ...

*Bankrupt .*

Application having been made by the trustee herein for the sale of the following property,<sup>54</sup> ..... and a notice of proposed sale having been given thereon, as provided by § 58-a (4) of the bankruptcy law of 1898, and no objection having been made to said sale, and the same having then taken place and said property having been sold to ....., of the ..... of ....., in said district, for ..... dollars (\$.....), and now coming on for confirmation, as provided in such notice; now, on motion of ....., Esq., attorney for the trustee herein,

It is ordered:

That such sale be, and the same hereby is, confirmed.

That the trustee herein, on receipt of the consideration in cash, complete the same by executing the proper instrument transferring to such purchaser all his right, title, and interest in said property, and delivering the same to such purchaser.

.....,

*Referee in Bankruptcy.*

<sup>53</sup> See Sections Seventy and Fifty-eight. This form can be adapted to any sale, whether public or private, on notice, and should always be entered, for the protection of the purchaser's title. See special

clauses for sale on notice in Form No. 177. See also Forms Nos. 190 and 191, and compare Forms Nos. 42, 43, 44, 45, and 46.

<sup>54</sup> See foot-note 48 to Form No. 190.

Form No. 194.

Petition for Private Sale by Trustee.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 240.)

United States District Court, for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt .*

To ....., Esq., Referee in Bankruptcy: .

Your petitioner respectfully shows:

That he is the trustee herein duly qualified and acting.

That a portion of such bankrupt's estate consists of the following property:

.....  
.....

That it will be to the advantage of the estate that such property be sold forthwith at private sale for the following reasons and upon the following terms: .....

.....

That no previous application has been made to this court for the order hereinafter asked.

Wherefore, your petitioner prays for an order permitting him to sell said property in the way and on the terms above specified.

.....,

*Petitioner.*

[*Verification.*]

## Form No. 195.

## Order for Private Sale by Trustee.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 241.)

United States District Court, for the ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ....

*Bankrupt .*

....., the trustee herein, having filed a duly verified petition praying for an order permitting him to sell at private sale the following property: [*Here specify property.*]

.....  
 .....  
 on the terms set forth in said petition (and a meeting of creditors having been duly held upon ten days' notice) and it appearing that good cause for such sale has been shown; now, on motion of ..... Esq., attorney for the trustee, it is

Ordered: That ....., the trustee herein, be, and he hereby is authorized to sell the property above specified to ..... for the sum of \$.....

And it is further ordered: That the said trustee keep an accurate account thereof and file same with the referee.

Dated, ....., ..... day of ....., 19...

.....,  
*Referee in Bankruptcy.*



## Form No. 196.

## Petition for Sale Free and Clear of Liens.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 248.)

United States District Court, ..... District of .....

IN THE MATTER OF

..... } In Bankruptcy No. ...  
*Bankrupt .*

To the District Court of the United States, for the ..... District of .....:

The petition of ..... respectfully shows and alleges:

First: That your petitioner was heretofore and on the ..... day of ....., 19..., duly appointed the trustee in bankruptcy of all of the property of the above bankrupt and has duly qualified as such by filing his bond in this court in the sum of \$..... conditioned for the faithful performance of his duties, and is now acting as such trustee.

Second: That your petitioner has taken possession of all the property of the said bankrupt which includes the following described real and personal estate located at the town of ....., ..... county, State of .....

All that certain tract or parcel of land, with the buildings thereon erected and all machinery connected with or attached to said building and property, situate in the town of ....., county of ..... and State of ....., bounded as follows:

.....  
 .....  
 .....

Together with all and singular, the tenements, hereditaments and appurtenances belonging to the said property; and the reversion, remainders, tolls, income, rents, issue and profits thereof, including all chattels, fixtures, furnishings, machinery, tools and every other estate, right, title and interest, property and appurtenances of the said .....

Third: That heretofore and on the ..... day of ....., 19..., an involuntary petition in bankruptcy was filed herein against the above-named bankrupt, and theretofore and within four months prior to the date of the filing of the said petition, to wit, on the ..... day of .....,

19..., the said bankrupt, for and in consideration of the alleged sum of \$....., made, executed and delivered a certain bond and mortgage covering all of the above-described property, to ..... [a corporation organized under and existing by virtue of the laws of the State of .....]

Fourth: That the said alleged bond and mortgage were, as your petitioner is informed and does verily believe, executed and delivered under the following circumstances:

That on the said ..... day of ....., 19..., and for a considerable period prior thereto, the said bankrupt above named was insolvent and that his property at a fair valuation was insufficient to pay all of his debts in full, which said debts, as your petitioner is informed and does verily believe, did on said ..... day of ....., 19..., and prior thereto, aggregate the sum of about \$.....; and that all of his assets of whatsoever kind, character, nature or description, did not exceed in value the sum of about \$.....

Fifth: That on said ..... day of ....., 19..., the said bankrupt was indebted to ..... in the sum of \$....., which said indebtedness consisted of two promissory notes in writing, made, executed and delivered by ..... to ....., each for the sum of \$.....

Sixth: That on said ..... day of ....., 19..., the said notes of \$....., due on that day, were not paid by the said bankrupt, and were thereupon duly protested for nonpayment by the said ....., on which said day, as your petitioner is informed and verily believes, the said ..... knew and had reasonable cause to believe that the said ..... was insolvent and unable to pay his debts; and that thereafter and on the ..... day of ....., 19..., well knowing that the said ..... was insolvent and having good and reasonable cause to so believe, and without any present fair consideration, and as security for an antecedent indebtedness, he did accept and take the said bond and mortgage for the said sum of \$..... on said real and personal property hereinbefore mentioned and described.

Seventh: That heretofore and by order of this court, all of the said property hereinbefore mentioned and described was duly appraised at the sum of \$....., and as your petitioner is informed and does verily believe, the said property if sold by your petitioner subject to the said mortgage of \$....., above mentioned, will not realize any equity whatsoever by reason of the fact that the said property is not worth the amount of the said mortgage and that no one interested in property of this character would purchase said property subject to it.

Eighth: That your petitioner proposes to institute legal proceedings in this court to declare void and of no effect the said mortgage and to have the same annulled and canceled as of record, upon the ground that under and by virtue of the terms and conditions of the acts of Congress relating to bankruptcy, the giving of the said mortgage was preferential as security for an antecedent indebtedness and for no present fair consideration passing at the time of the execution and delivery thereof; and upon the further ground that the said mortgage constituted a preference by reason of the fact that at the time that the said bond and mortgage were executed and delivered, the said ..... receiving the same, knew and had reasonable cause to know and believe that the said bankrupt was insolvent.

Ninth: That your petitioner has examined and caused to be examined ....., ....., and other witnesses, to all of which testimony your petitioner upon the hearing of the application herein made begs leave to refer and from which said examination the facts as hereinbefore alleged do more particularly and at length appear.

Tenth: That your petitioner in the performance of his duties as said trustee is desirous of immediately disposing of all of the property of the bankrupt herein, and in order so to do most advantageously to the interest of the creditors of the said bankrupt, does verily believe that the said property should be sold free of and from the lien of the said mortgage of \$..... which said mortgage in detail covers the said property as hereinbefore described, and which was made, executed and delivered on said ..... day of ....., 19..., by the said ....., bankrupt herein, for the said sum of \$....., and which was thereafter and on the ..... day of ....., 19..., duly recorded in Liber .... of Mortgages at page ..... in the office of the clerk of the county of ....., State of .....

Wherefore, your petitioner does respectfully pray this Honorable Court that an order be made herein, requiring ..... mortgagee to show cause before this court at a time and place to be stated, why an order should not be made and entered herein, directing that all of the property mentioned and described in the petition herein and covered by the said mortgage herein referred to, be sold by your petitioner as trustee of the said bankrupt, at public auction and in the manner prescribed by the acts of Congress relating to bankruptcy, and the General Orders of the Supreme Court of the United States, free of and from the lien of the said mortgage and why the proceeds arising of and from the sale of the said property should not be held by your petitioner subject to the lien of the said mortgage, to all intents and purposes as though the said property had not been sold, subject to the final order, judgment and decree of this court, or the final order, judgment and decree of a court of competent jurisdiction, as to the validity of the said mortgage

and why your petitioner should not have such other and further relief as to this Honorable Court may seem just and proper.

And your petitioner will ever pray, etc.

Dated ....., ....., ....., ....., 19...

....., *Petitioner.*  
 .....  
*Attorney for Trustee,*  
 Office and Post-office address,  
 .....Street,  
 City of.....

[*Verification.*]

**Form No. 197.**

**Notice of Motion for Sale Free and Clear of Liens.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 249.)

United States District Court for the ....., District of .....

<p><b>IN THE MATTER OF</b></p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	<p>} In Bankruptcy No. ...</p>
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Please take notice that upon the annexed petition of ....., trustee in bankruptcy of the above-named bankrupt, verified ....., 19..., the annexed affidavit of ....., verified ....., 19..., the ..... (mortgage, etc.) a copy whereof is hereto annexed, from ..... to ....., bearing date ....., 19..., and upon all the proceedings and testimony taken herein, a motion will be made by the undersigned on behalf of the trustee herein before ....., Esq., referee in bankruptcy, in charge of this proceeding, at his office, No. .... street, in the city of ....., on the ..... day of ....., 19..., at .... o'clock in the ..... noon, or as soon thereafter as counsel can be heard, for an order authorizing and directing ....., as trustee in bankruptcy of the estate of the above-named bankrupt, to sell the property mentioned in the annexed petition of the trustee herein, and situated at ....., ....., and that the said trustee be authorized and directed to sell and dispose of the aforesaid property, now in his possession, and claimed to belong to this estate, free and clear of all liens and demands thereon, including an alleged mortgage of ..... to .....,

dated . . . . ., 19 . . . , and that the proceeds arising from the sale of the said property be held by the trustee subject to the claims, liens and demands of the alleged mortgagees, lienors and claimants, and that the said mortgages, liens, claims and demands attach to the proceeds of such sale with the same force and effect as if upon the property itself, subject to the final order, judgment and decree of this court or of a court of competent jurisdiction as to the validity, *bona fides* and extent of such mortgage, lien, claim and demand;

And for such other and further relief as to this court may seem just and proper.

Dated, . . . . ., . . . . ., . . . . ., 19 . . .

.....  
Attorney for Petitioner.

Address, . . . . .

To . . . . .

{ Claimant or  
Alleged Mortgagee. }

### Form No. 198.

#### Order Directing Sale Free and Clear of Liens.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 250.)

United States District Court for the . . . . ., District of . . . . .

IN THE MATTER OF

..... } In Bankruptcy No. ...

*Bankrupt* .

An order having been heretofore made herein requiring . . . . . to show cause before this court, at the office of . . . . ., Esq., referee, why an order should not be made herein, directing that all the property, now in the possession of said trustee and mentioned and described in the petition annexed to the said order and alleged to be covered by the mortgage therein referred to, be sold by the said trustee at public auction, and in the manner prescribed by the acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, free of and from the lien of the said mortgage, and why the proceeds arising of and from the sale of the said property should not be held by the said trustee subject to the lien of the said mortgage, to all intents and purposes as though the said property had not been sold: subject to the final order, judgment and

decree of this court, or of the final order, judgment or decree of a court of competent jurisdiction, as to the validity, *bona fides* and extent of the said mortgage, and for other and further relief,

Now, upon reading and filing the said order to show cause, and the petition of ..... trustee thereto annexed, verified the ..... day of ..... 19....,

And upon the petition in bankruptcy herein, the testimony taken at the first meeting of creditors in support of the said application; and the said ..... having duly appeared upon the return of said order to show cause and duly filed his answer, verified the ..... day of ..... 19...., the affidavits of ..... and ..... duly verified the ..... and ..... days of ..... 19...., in opposition to the said application,

And after hearing respective counsel for the trustee and the ..... and due deliberation having been had; and it appearing to the satisfaction of this court that the best interests of the creditors of the said bankrupt above named will be subserved by the granting of the application, and for divers other reasons that the said application is proper, it is hereby

Ordered, adjudged and decreed, that ..... Esq., as trustee of ..... bankrupt, be, and he hereby is authorized, directed and permitted to sell and dispose at public auction, and in the manner and mode as prescribed by the acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, all of the property of the ..... bankrupt, situated at ..... more particularly mentioned and described in a certain indenture of mortgage heretofore made by ..... to ..... for the sum of \$. .... dated the ..... day of ..... 19...., and recorded on the ..... day of ..... 19...., at .... o'clock, . . . m., in Liber ..... of Mortgages, at page ..... in the office of the clerk of the county of ..... State of .....

And it is further ordered, adjudged and decreed, that the said ..... as said trustee, be, and he hereby is authorized, directed and permitted to sell and dispose of the said property in said mortgage more particularly mentioned and described, free of and from the lien of the said mortgage hereinbefore described, and that the proceeds of and from the sale of the said property be held by the said trustee, subject to the lien of the said mortgage, to all intents and purposes as though the said property had not been sold: subject to the final order, judgment and decree of this court or the final order, judgment and decree of a court of competent jurisdiction, as to the validity, *bona fides* and extent of the said mortgage.

Dated, City of ..... 19....

.....  
Referee in Bankruptcy.



# APPENDIX A

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## RULES OF PRACTICE

FOR THE

### COURTS OF EQUITY OF THE UNITED STATES.\*

*(In effect February 1, 1912.)*

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**RULE I.**—District Court always open for certain purposes.—Orders at chambers.—The district courts, as courts of equity shall be deemed always open for the purpose of filing any pleading, of issuing and returning meane and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

**RULE II.**—Clerk's office always open, except, etc.—The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders and other proceedings which are grantable of course.

**RULE III.**—Books kept by clerk and entries therein.—The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.

**RULE IV.**—Notice of orders.—Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a

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\* "In proceedings in equity instituted for the purpose of carrying into effect the provisions of the [Bankruptcy] Act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be." . . .

See General Order in Bankruptcy, No. XXXVII, November, 1898.



copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

**RULE V.—Motions grantable of course by clerk.**—All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills *pro confesso*; and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

**RULE VI.—Motion day.**—Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

**RULE VII.—Process, mesne and final.**—The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

**RULE VIII.—Enforcement of final decrees.**—Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge 'hereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

**RULE IX.—Writ of assistance.**—When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

**RULE X.—Decree for deficiency in foreclosures, etc.**—In suits for the foreclosure of mortgages, or for the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money.

**RULE XI.—Process in behalf of and against persons not parties.**—Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may to such order by the same process as if he were

a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

**RULE XII.—Issue of subpoena.—Time for answer.**—Whenever a bill is filed, and not before, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena, may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpoena against all the defendants.

**RULE XIII.—Manner of serving subpoena.**—The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.

**RULE XIV.—Alias subpoena.**—Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpoenas against such defendant, until due service is made.

**RULE XV.—Process, by whom served.**—The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

**RULE XVI.—Defendant to answer.—Default.—Decree pro confesso.**—It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*.

**RULE XVII.—Decree pro confesso to be followed by final decree.—Setting aside default.**—When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso*, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

**RULE XVIII.—Pleadings.—Technical forms abrogated.**—Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.

**RULE XIX.—Amendments generally.**—The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

**RULE XX.—Further and particular statement in pleading may be required.**—A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

**RULE XXI.—Scandal and impertinence.**—The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.

**RULE XXII.—Action at law erroneously begun as suit in equity—Transfer.**—If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

**RULE XXIII.—Matters ordinarily determinable at law, when arising in suit in equity to be disposed of therein.**—If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

**Rule XXIV.—Signature of counsel.**—Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

**RULE XXV.—Bill of complaint—Contents.**—Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of any prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.

**RULE XXVI.—Joinder of causes of action.**—The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient ground must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

**RULE XXVII.—Stockholder's bill.**—Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

**RULE XXVIII.—Amendment of bill as of course.**—The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

**RULE XXIX.—Defenses—How presented.**—Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense to each claim asserted by the bill, omitting any mere statement of the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

**RULE XXX.—Answer—Contents—Counter-claim.**—The defendant in his answer shall in short and simple terms set out his defense heretofore presentable by plea in bar or abatement shall be made in evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims.

**RULE XXXI.—Reply—When required—When cause at issue.**—Unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill.

**RULE XXXII.—Answer to amended bill.**—In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in case of an omission to put in an answer.

**RULE XXXIII.—Testing sufficiency of defense.**—Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter.

**RULE XXXIV.—Supplemental pleading.**—Upon application of either party the court or judge, may upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof.

**RULE XXXV.—Bills of revivor and supplemental bills—Forms.**—It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

**RULE XXXVI.—Officers before whom pleadings verified.**—Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States, or of any Territory, or of the District of Columbia, or any notary public.

**RULE XXXVII.—Parties generally—Intervention.**—Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

**RULE XXXVIII.—Representatives of class.**—When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

**RULE XXXIX.—Absence of persons who would be proper parties.**—In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

**RULE XL.—Nominal parties.**—Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

**RULE XLI.—Suit to execute trusts of will—Heir as party.**—In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

**RULE XLII.—Joint and several demands.**—In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the

persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

**RULE XLIII.—Defect of parties—Resisting objection.**—Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.

**RULE XLIV.—Defect of parties—Tardy objection.**—If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.

**RULE XLV.—Death of party—Revivor.**—In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

**RULE XLVI.—Trial—Testimony usually taken in open court—Rulings on objections to evidence.**—In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

**RULE XLVII.—Depositions—To be taken in exceptional instances.**—The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.

**RULE XLVIII.—Testimony of expert witnesses in patent and trademark cases.**—In a case involving the validity or scope of a patent or trade-mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

**RULE XLIX.—Evidence taken before examiners, etc.**—All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.

**RULE L.—Stenographer—Appointment—Fees.**—When deemed necessary by the court or officer taking testimony a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.

**RULE LI.—Evidence taken before examiners, etc.**—Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

**RULE LII.—Attendance of witnesses before commissioner, master or examiner.**—Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

**RULE LIII.—Notice of taking testimony before examiner, etc.**—Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

**RULE LIV.—Depositions under Rev. Stat. §§ 863, 865, 866, 867—Cross-examination.**—After a cause is at issue, depositions may be taken as provided by sections 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.

**RULE LV.—Deposition deemed published when filed.**—Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.

**RULE LVI.—On expiration of time for depositions, case goes on trial calendar.**—After the time has elapsed for taking and filing depositions under these rules, the case shall be

placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.

**RULE LVII.—Continuances.**—After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

**RULE LVIII.—Discovery—Interrogatories—Inspection and production of documents—Admission of execution or genuineness.**—The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

**RULE LIX.—Reference to master—Exceptional, not usual.**—Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. When such a reference is made, the



party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

**RULE LX.—Proceedings before master.**—Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

**RULE LXI.—Master's report—Documents identified but not set forth.**—In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.

**RULE LXII.—Power of master.**—The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

**RULE LXIII.—Form of accounts before master.**—All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, as the master shall direct.

**RULE LXIV.—Former depositions, etc., may be used before master.**—All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

**RULE LXV.—Claimants before master examinable by him.**—The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

**RULE LXVI.—Return of master's report—Exceptions—Hearing.**—The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

**RULE LXVII.—Costs on exceptions to master's report.**—In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.

**RULE LXVIII.—Appointment and compensation of masters.**—The district courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hoc vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

**RULE LXIX.—Petition for rehearing.**—Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

**RULE LXX.—Suits by or against incompetents.**—Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

**RULE LXXI.—Form of decree.**—In drawing up decrees and orders, neither the bill, nor answers, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, consideration thereof, it was ordered, adjudged and decreed as follows, viz.: " (Here insert the decree or order.)

**RULE LXXII.—Correction of clerical mistakes in orders and decrees.**—Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

**RULE LXXIII.—Preliminary injunctions and temporary restraining orders.**—No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move dissolution or modification of the order, and in that event the court or judge shall proceed to hear

and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

**RULE LXXIV.—Injunction pending appeal.**—When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

**RULE LXXV.—Record on appeal—Reduction and preparation.**—In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *præcipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *præcipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same at the clerk's office for the examination of the other parties at or before the time of filing his *præcipe* under paragraph a of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arises between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph b of this rule and shall be covered by the directions which the court or judge may give on the subject.

**RULE LXXVI. Record on appeal—Reduction and preparation—Costs—Correction of omissions.**—In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

**RULE LXXVII.—Record on appeal—Agreed statement.**—When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement when filed in the office of the clerk of the district

court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal.

**RULE LXXVIII.—Affirmation in lieu of oath.**—Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

**RULE LXXIX.—Additional rules by district court.**—With the concurrence of a majority of the circuit judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings and process, *meane* and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

**RULE LXXX.—Computation of time—Sundays and holidays.**—When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

**RULE LXXXI.—These rules effective February 1, 1913—Old rules abrogated.**—These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.



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## APPENDIX B.

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### THE BANKRUPTCY ACTS OF 1898, 1867, 1841 AND 1800.

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#### I. THE BANKRUPTCY ACT OF 1898.

WITH AMENDMENTS OF 1903, 1906, 1910, and 1917

(With Separate Index.)

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#### AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES.

APPROVED JULY 1, 1898; AMENDMENTS APPROVED FEB. 5, 1903, JUNE 15, 1906, JUNE  
25, 1910, AND MARCH 2, 1917.

*Be it enacted by the Senate and House of Representatives of the United States of  
America, in Congress assembled:*

#### CHAPTER I.

##### DEFINITIONS.

**SECTION 1. Meaning of Words and Phrases.**—a The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under the laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings" or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "dis-

charge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except by this act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified; and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

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## CHAPTER II.

### CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

§ 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estate,

to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, *and allow such officers additional compensation for such services, as provided in section forty-eight of this act*; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; (19) transfer cases to other courts of bankruptcy; and (20) exercise auxiliary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated. (*Thus amended by Act of Feb'y 5, 1903, and June 25, 1910.*)

## CHAPTER III.

### BANKRUPTS.

§ 3. Acts of bankruptcy.—*a* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, *or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States*; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

*b* A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the



transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary take notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section take issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond. (*Thus amended by Act of Feb'y 5, 1903.*)

§ 4. Who May Become Bankrupts.—a Any person except a *municipal, railroad, insurance, or banking corporation*, shall be entitled to the benefits of this act as a voluntary bankrupt.

b Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any incorporated company, and any *moneyed, business or commercial corporation, except a municipal, railroad, insurance, or banking corporation*, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States. (*Thus amended by Acts of Feb'y 5, 1903, and June 25, 1910.*)

§ 5. Partners.—a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership

assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

§ 6. Exemptions of Bankrupts.—a This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

§ 7. Duties of Bankrupts.—a The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition of a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

PROVIDED, HOWEVER, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

§ 8. Death or Insanity of Bankrupts.—a The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and conclude in the same manner, so far as possible, as though he had not died or become insane: PROVIDED, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

§ 9. Protection and Detention of Bankrupts.—a A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

§ 10. Extradition of Bankrupts.—a Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

§ 11. Suits by and against Bankrupts.—a A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

§ 12. Compositions, when Confirmed.—a A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts, compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication, shall be delayed until it shall be determined whether such composition shall be confirmed.

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon such application for the confirmation of a composition, and such objections as may be made to its confirmation.

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided. (*Thus amended by Act of June 25, 1910.*)

§ 13. *Compositions, when Set Aside.*—*a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

§ 14. *Discharges, when Granted.*—*a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

*b* The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court; Provided, that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.

*c* The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. (*Thus amended by Acts of Feb'y 5, 1903, and June 25, 1910.*)

§ 15. *Discharges, when Revoked.*—*a* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

§ 16. *Co-Debtors of Bankrupts.*—*a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

§ 17. *Debts not Affected by a Discharge.*—*a* A discharge in bankruptcy shall release a bankrupt from all of his probable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. (*Thus amended by Act of Feb'y 5, 1903, and Act of March 2, 1917.*)

## CHAPTER IV.

## COURTS AND PROCEDURE THEREIN.

**§ 18. Process, Pleadings, and Adjudications.**—*a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, *except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.*

*b* The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court now may allow.

*c* All pleadings setting up matters of fact shall be verified under oath.

*d* If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition.

*e* If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

*f* If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

*g* Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee. *(Thus amended by Act of Feb'y 5, 1903.)*

**§ 19. Jury Trials.**—*a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

*b* If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

*c* The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

**§ 20. Oaths, Affirmations.**—*a* Oaths required by this act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

*b* Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

**§ 21. Evidence.**—*a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and

his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: *Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.*

b The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart. *(Thus amended by Act of July 5, 1903.)*

§ 23. References of Cases after Adjudication.—a After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

§ 23. Jurisdiction of United States and State Courts.—The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b; section sixty-seven e; and section seventy, subdivision e.*

c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act. *(Thus amended by Acts of Feb'y 5, 1903, and June 25, 1910.)*

§ 24. Jurisdiction of Appellate Courts.—a The Supreme Court of the United States,\* the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

\* Appeals in bankruptcy cases from decisions of circuit courts of appeal restricted by Act of Jan. 28, 1915; amended by Act of September 6, 1916. See p. 606, ante.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

§ 25. Appeals and Writs of Error.—a That appeals, as in equity cases may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to-wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

§ 26. Arbitration of Controversies.—a The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in the court and shall have like force and effect as the verdict of a jury.

§ 27. Compromises.—a The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

§ 28. Designation of Newspapers.—a Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

§ 29. Offenses.—a A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount

of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

*c* A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

*d* A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

§ 30. Rules, Forms, and Orders.—*a* All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

§ 31. Computation of Time.—*a* Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

§ 32. Transfer of Cases.—*a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

## CHAPTER V.

### OFFICERS, THEIR DUTIES AND COMPENSATION.

§ 33. Creation of Two Officers.—*a* The offices of referee and trustee are hereby created.

§ 34. Appointment, Removal, and Districts of Referees.—*a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

§ 35. Qualifications of Referees.—*a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

§ 36. Oaths of Office of Referees.—*a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

§ 37. Number of Referees.—*a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.



§ 38. Jurisdiction of Referees.—a Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for composition or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

§ 39. Duties of Referees.—a Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

§ 40. Compensation of Referees.—a Referees shall receive as full compensation for their services, payable after they are rendered, a fee of *fifteen* dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and *twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration*, and from estates which have been administered before them one per centum commissions on *all moneys disbursed to creditors by the trustee*, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

c In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee. (*Thus amended by Act of February 5, 1903.*)

§ 41. Contempts before Referees.—a A person shall not, in proceedings before a referee (1) disobey or resist any lawful order, process or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been

subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: Provided, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

§ 42. Records of Referees.—a The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

§ 43. Referee's Absence or Disability.—a Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

§ 44. Appointment of Trustees.—a The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

§ 45. Qualifications of Trustees.—a Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

§ 46. Death or Removal of Trustees.—a The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

§ 47. Duties of Trustee.—a Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estate; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts

received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings. (Thus amended by Acts of February 5, 1903, and June 25, 1910.)

§ 48. Compensation of Trustees, Receivers and Marshals.—a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, have, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such compensation.

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

d Receivers or marshals appointed pursuant to section two, subdivision three, of this act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: Provided further, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.

e Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned

over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realised by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act. (Thus amended by Acts of June 15, 1903, and June 25, 1910.)

§ 49. Accounts and Papers of Trustees.—a The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

§ 50. Bonds of Referees and Trustees.—a Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d The court shall require evidence as to the actual value of the property of sureties.

e There shall be at least two sureties upon each bond.

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorised by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.

j Joint trustees may give joint or several bonds.

k If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

§ 51. Duties of Clerks.—a Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with

which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

§ 53. Compensation of Clerks and Marshals.—*a* Clerks shall respectively receive as full compensation for their services to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

*b* Marshals shall respectively receive from the state where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their service in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

§ 53. Duties of Attorney-General.—*a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

§ 54. Statistics of Bankruptcy Proceedings.—*a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

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## CHAPTER VI.

### CREDITORS.

§ 55. Meetings of Creditors.—*a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

*b* At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

*c* The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act.

*d* A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

*e* The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

*f* Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

**§ 56. Voters at Meetings of Creditors.**—*a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

*b* Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

**§ 57. Proof and Allowance of Claims.**—*a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

*b* Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

*c* Claims after being proved may, for the purpose of allowance, be filed by the claimant in the court where the proceedings are pending, or before the referee if the case has been referred.

*d* Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

*e* Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

*f* Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

*g* The claims of creditors who have received preferences, *voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision c, have been made or given*, shall not be allowed unless such creditors shall surrender such preferences, *conveyances, transfers, assignments, or incumbrances*.

*h* The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

*i* Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

*j* Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

*k* Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

*l* Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole or the proportional part thereof if rejected only in part.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: PROVIDED, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer: *(Thus amended by Act of February 5, 1903.)*

§ 58. Notice to Creditors.—a Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, (3) the proposed dismissal of the proceedings, and (9) there shall be thirty days notice of all applications for the discharge of bankrupts. *(Thus amended by the Act of June 25, 1910.)*

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c All notices shall be given by the referee, unless otherwise ordered by the judge.

§ 59. Who may file and dismiss petitions.—a Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b Three or more creditors who have provable claims against any person which amount in the aggregate in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of filing the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard. *(Thus amended by Act of June 25, 1910.)*

§ 60. Preferred Creditors.—*a* A person shall be deemed to have given a preference if, being insolvent, he has, *within four months before the filing of the petition, or after the filing of the petition and before the adjudication*, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Where the reference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.*

*b* If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment and transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

*c* If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

*d* If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate. *(Thus amended by Act of February 5, 1903, and June 25, 1910.)*

## CHAPTER VII.

### ESTATES.

§ 61. Depositories for money.—*a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

§ 62. Expenses of Administering Estates.—*a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid and allowed out of the estates in which they were incurred.

§ 63. Debts which may be Proved.—*a* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of



action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

§ 64. Debts which have Priority.—a The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, *where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery*; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, *traveling or city salesmen*,\* or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication. (*Thus amended by Act of February 5, 1903, and June 15, 1906.*)

§ 65. Declaration and Payment of Dividends.—a Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.*

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

\* Amended by Act of 1906, approved June 15.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act. (*Thus amended by Act of February 5, 1903.*)

§ 66. Unclaimed Dividends.—a Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: PROVIDED, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

§ 67. Liens.—a Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall to the extent of such present consideration only, not be affected by this act.

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court*

*which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: PROVIDED, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry. (Thus amended by Act of February 5, 1903, and June 15, 1910.)

§ 68. Set-offs and Counterclaims.—a In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

§ 69. Possession of Property.—a A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

§ 70. Title to Property.—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interest in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: PROVIDED, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the

court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*

f Upon a confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him. (*Amended by Act of February 5, 1903.*)

§ 71. *That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, That said bankruptcy indexes and dockets, shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor. (Added by Act of February 5, 1903.)*

§ 72. *That neither the referee, receiver, marshal, nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act. (Added by Act of February 5, 1903, and amended by Act of June 25, 1910.)*

#### THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

The original act of 1898 provided as follows:

a This act shall go into full force and effect upon its passage: PROVIDED, HOWEVER, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.

The amendatory act of 1903 provides as follows:

§ 12. *That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.*

The amendatory act of 1910 provides as follows:

§ 14. *That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said Act approved July first, eighteen hundred and ninety-eight, as amended by said Act approved February fifth; nineteen hundred and three, and as further amended by said Act approved June fifteenth, nineteen hundred and six.*



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## II. THE BANKRUPTCY ACT OF 1867.

(With Amendments.)

### COURTS OF BANKRUPTCY.

§ 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the several District Courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this Act.

The said courts shall be always open for the transaction of business under this Act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting in chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

And the jurisdiction hereby conferred shall extend —

To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy;

To the collection of all the assets of the bankrupt;

To the ascertainment and liquidation of the liens and other specific claims thereon;

To the adjustment of the various priorities and conflicting interests of all parties;

And to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors;

And to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

(*Provided*, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contra-distinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the state where such bankrupt resides, having jurisdiction of claims of such nature and amount.)\*

The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the Circuit Courts now have in any suit pending therein in equity.

Said courts may sit for the transaction of business in bankruptcy at any place in the district, of which place, and the time of holding court, they shall have given notice, as well as at the places designated by law for holding such courts.

§ 2. *And be it further enacted*, That the several Circuit Courts of the United States within and for the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under this Act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity.

The powers and jurisdiction hereby granted may be exercised either by said court, or by any justice thereof, in term time or vacation.

† Said Circuit Courts shall also have *concurrent jurisdiction* with the District Courts of the same district, of all suits at law, or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in such assignee;

\* So amended by act of 22 June, 1874, ch. 390, § 2, 18 Stat. 178.

† As amended by act of June 22, 1874, this paragraph appears in R. S., § 4972.



(R. S., § 4979.—The several Circuit Courts shall have, within each district, concurrent jurisdiction with the district court of any district, whether the powers and jurisdiction of a Circuit Court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt, transferable to or vested in such assignee.)

But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: *Provided*, That nothing herein contained shall revive a right of action barred at the time such assignee is appointed.

#### OF THE ADMINISTRATION OF THE LAW IN COURTS OF BANKRUPTCY.

§ 3. *And be it further enacted*, That it shall be the duty of the judges of the District Courts of the United States within and for the several districts to appoint in each Congressional District in said districts, upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the District Court in the performance of his duties under this Act.

No person shall be eligible to such appointment unless he be a counsellor of said court, or of some one of the courts of record of the State in which he resides.

Before entering upon the duties of his office, every person so appointed a register in bankruptcy shall give a bond to the United States, with condition that he will faithfully discharge the duties of his office, in a sum not less than one thousand dollars, to be fixed by said court, with sureties satisfactory to said court, or to either of the said justices thereof.

And he shall, in open court, take and subscribe the oath prescribed in the act entitled "An Act to prescribe an oath of office, and for other purposes," approved July second, eighteen hundred and sixty-two, and also, that he will not during his continuance in office be, directly or indirectly, interested in, or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy in either the District or Circuit Court in his district.

§ 4. *And be it further enacted*, That every register in bankruptcy, so appointed and qualified, shall have power, and it shall be his duty—

- To make adjudication of bankruptcy;
- To receive the surrender of any bankrupt;
- To administer oaths in all proceedings before him;
- To hold and preside at meetings of creditors;
- To take proof of debts;

To make all computations of dividends, and all orders of distribution, and to furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case;

- To audit and pass accounts of assignees;

To grant protection;

To pass the last examination of any bankrupt in cases whenever the assignee or a creditor does not oppose;

And to sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct;

And he shall also make short memoranda of his proceedings in each case in which he shall act, in a docket to be kept by him for that purpose, and he shall forthwith, as the proceedings are taken, forward to the clerk of the District Court a certified copy of said memoranda, which shall be entered by said clerk in the proper minute book, to be kept in his office;

And any register of the court may act for any other register thereof.

*Provided, however*, That nothing in this section contained shall empower a register to commit for contempt, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge;

But in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before him, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

\* No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy, in either the Circuit or District Court of his district, nor in an appeal therefrom, nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts.

(R. S., Sec. 4996.\* No register or clerk of court, or any partner or clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts.)

The fees of said registers, as established by this Act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by this Act.

§ 5. *And be it further enacted*, That the judge of the District Court may direct a register to attend at any place within the district, for the purpose of hearing such voluntary applications under this Act as may not be opposed; of attending any meeting of creditors, or receiving any proof of debts, and, generally, for the prosecution of any bankruptcy or other proceedings under this Act; and the travelling and incidental expenses of such register, and of any clerk or other officer attending him, incurred in so acting, shall be settled by said court in accordance with the rules prescribed under the tenth section of this Act, and paid out of the assets of the estate in respect of which such register has so acted; or, if there be no such assets, or if the assets shall be insufficient, then such expenses shall form a part of the costs in the case or cases in which the register shall have acted in such journey, to be apportioned by the judge; and such register, so acting, shall have and exercise all powers, except the power of commitment, vested in the District Court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents:

*Provided always*, That all depositions of persons and witnesses taken before said register, and all acts done by him, shall be reduced to writing and be signed by him, and shall be filed in the clerk's office as part of the proceedings.

Such register shall be subject to removal by the judge of the District Court;

And all vacancies occurring by such removal, or by resignation, change of residence, death, or disability, shall be promptly filled by other fit persons, unless said court shall deem the continuance of the particular office unnecessary.

§ 6. *And be it further enacted*, That any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court.

In any bankruptcy, or in any other proceedings within the jurisdiction of the court under this Act, the parties concerned, or submitting to such jurisdiction, may, at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court; and the judgment of the court shall be final, unless it be agreed and stated in such special case that either party may appeal, if, in such case, an appeal is allowed by this Act.

The parties may also, if they think fit, agree, that upon the question or questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be

\* So amended by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184.

ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

§ 7. *And be it further enacted*, That parties and witnesses summoned before a register shall be bound to attend, in pursuance of such summons, at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpoena;

And all persons wilfully and corruptly swearing or affirming falsely before a register shall be liable to all the penalties, punishments, and consequences of perjury.

If any person examined before a register shall refuse or decline to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such question or to sign such examination; and such person shall also be liable to be punished for contempt.

§ 8. *And be it further enacted*, That appeals may be taken from the District to the Circuit Courts in all cases in equity, and writs of error may be allowed to said Circuit Courts from said District Courts in cases at law under the jurisdiction created by this act when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the District Court to the Circuit Court for the same district; but no appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed, and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from.

The appeal shall be entered at the term of the Circuit Court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same.

But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the District Court as if no appeal had been taken.

And no appeal shall be allowed unless the appellant, at the time of claiming the same, shall give bond in manner now required by law in cases of such appeals.

No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs.

§ 9. *And be it further enacted*, That in cases arising under this Act, no appeal or writ of error shall be allowed in any case from the Circuit Courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed\* (two thousand dollars).

§ 10. *And be it further enacted*, That the Justices of the Supreme Court of the United States, subject to the provisions of this Act, shall frame general orders for the following purposes:

For regulating the practice and procedure of the District Courts in bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in said courts in all matters under this Act;

For regulating the duties of the various officers of said courts;

(† For regulating the fees payable, and the charges and costs to be allowed, except such as are established by this Act or by law, with respect to all proceedings in bankruptcy before said courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.)

For regulating the fees payable and the charges and costs to be allowed, with respect to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.

For regulating the practice and procedure upon appeals;

For regulating the filing, custody, and inspection of records;

And generally for carrying the provisions of this Act into effect.

\* Amended by act of Feb. 6th, 1875, ch. 77, sec. 3, to \$5,000.00.

† Amended by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184, to read as in the following paragraph.

(\* And said justices shall have power under said sections, by general regulations, to simplify, and so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided.)

After such general orders shall have been so framed, they, or any of them, may be rescinded or varied, and other general orders may be framed in manner aforesaid;

And all such general orders so framed shall, from time to time, by the Justices of the Supreme Court, be reported to Congress, with such suggestions as said Justices may think proper.

#### VOLUNTARY BANKRUPTCY—COMMENCEMENT OF PROCEEDINGS.

§ 11. *And be it further enacted*, That if any person residing within the jurisdiction of the United States, owing debts provable under this Act exceeding the amount of three hundred dollars, shall apply by petition, addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain the benefit of this Act;

And shall annex to his petition a schedule (words "and inventory and valuation" added by act of June 22, 1874), verified by oath before the court, or before a register in bankruptcy, or before one of the commissioners of the Circuit Court of the United States, containing a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and, if not known, the fact to be so stated, and the sum due to each creditor; also the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same;

And shall also annex to his petition an accurate inventory,† verified in like manner, of all his estate, both real and personal, assignable under this Act, describing the same, and stating where it is situated, and whether there are any, and, if so, what encumbrances thereon;

The filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt;

*Provided*, That all citizens of the United States petitioning to be declared bankrupt shall, in filing such petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath shall be filed and recorded with the proceedings in bankruptcy.

And the judge of the District Courts, or, if there be no opposing party, any register of said court, to be designated by the judge, shall forthwith, if he be satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor, and to give such personal or other notice to any persons concerned as the warrant specifies, which notice shall state:

*First*. That a warrant in bankruptcy has been issued against the estate of the debtor.

*Second*. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

*Third*. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

(‡) But whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense

\* So added by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184.

† "And valuation," so amended Act of June 22, 1874.

‡ So amended by act of 22 June, 1874, ch. 390, sec. 5, 18 Stat. 179.

to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper, or newspapers, to all such creditors, whose claims, as reported, do not exceed the sums, respectively, of fifty dollars.)

#### OF ASSIGNMENTS AND ASSIGNEES.

§ 12. *And be it further enacted*, That at the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

§ 13. *And be it further enacted*, That the creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts.

If no choice is made by the creditors at said meeting, the judge, or, if there be no opposing interest, the register, shall appoint one or more assignees.

If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy.

All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

The judge at any time may, and upon the request in writing of any creditor who has proved his claim shall require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties;

The bond shall be approved by the judge or register by his endorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party.

If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

§ 14. *And be it further enacted*, That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on *mesne* process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings:

*Provided, however*, That there shall be excepted from the operation of the provisions of this section—

The necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars;

And also the wearing apparel of such bankrupt, and that of his wife and children;

And the uniform, arms, and equipments of any person who is or has been a soldier in the militia or in the service of the United States;

And such other property as now is, or hereafter shall be exempted from attachment, or seizure, or levy on execution by the laws of the United States;

And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process, or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four:

*Provided*, That the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees;

And in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Act;

And the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court:

*And provided further,* That no mortgage of any vessel or of any other goods or chattels, made as security for any debt or debts, in good faith and for present considerations, and otherwise valid, and duly recorded, pursuant to any statute of the United States or of any State, shall be invalidated or affected hereby.

And all the property conveyed by the bankrupt in fraud of his creditors;

All rights in equity, choses in action, patents and patent rights and copyrights;

All debts due him, or any person for his use, and all liens and securities therefor;

And all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention or of injury to the property of the bankrupt; and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee;

And he may sue for and recover the said estate, debts, and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been presented or defended by such bankrupt.

And a copy, duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for, and recover the property of the bankrupt, as hereinbefore mentioned; but no property held by the bankrupt in trust shall pass by such assignment.

No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

No person shall be entitled, as against the assignee, to withhold from him possession of any books or account of the bankrupt, or claim any lien thereon;

And no suit in which the assignee is a party shall be abated by his death or removal from office, but the same may be prosecuted and defended by his successors, or by the surviving or remaining assignee, as the case may be.

The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other encumbrances.

The debtor shall also, at the request of the assignee, and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper, to enable the assignee to possess himself fully of all the assets of the bankrupt.

The assignee shall immediately give notice of his appointment by publication, at least once a week for three successive weeks, in such newspaper as shall, for that purpose, be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside;

And shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded;

And the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.

§ 15. *And be it further enacted,* That the assignee shall demand and receive from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of this Act;

And he shall sell all such unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors;

(R. S., sec. 5062a (22 June, 1874, ch. 390, sec. 1, 18 Stat. 178.) — That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the re-

ceiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt. *Provided*, That such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors.)

But upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale, as will, in its opinion, prove to the interest of the creditors;

And the assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

(R. S., sec. 5062b (22 June, 1874, ch. 390, sec. 4, 18 Stat. 178.) — That, unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels, and at such times and places, as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court shall be published once a week for three consecutive weeks in the newspaper or newspapers to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court on application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a resale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months, in such installments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. If any assignee shall fail or neglect to well and faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell, or dispose of, or in any manner, fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell, or dispose of the property committed to his charge, he shall, upon proof thereof, be removed, and forfeit all fees or other compensation for any and all services, in connection with such bankrupt's estate, and upon conviction thereof, before any court of competent jurisdiction, shall be liable to a fine of not more than ten thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment, at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid, shall, upon conviction, be liable to a like punishment. That the assignee shall report under oath, to the court, at least as often as once in three months, the condition of the estate in his charge and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the account of any assignee, he shall be required to account for all interest, benefit or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit, or advantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall wilfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and on conviction thereof, be punished by imprisonment in the penitentiary not less than one and not more than five years.)

§ 16. *And be it further enacted*, That the assignee shall have the like remedy to recover all said estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered, and no assignment had been made.

If, at the time of the commencement of the proceedings in bankruptcy an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it,

be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him.

No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving, or remaining, or new assignee, as the case may be, he shall be admitted to prosecute the suit, in like manner and with like effect as if it had been originally commenced by him.

In suits prosecuted by the assignee a certified copy of the assignment made to him by the judge or register shall be conclusive evidence of his authority to sue.

§ 17. *And be it further enacted*, That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate and apart from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property or for the payment of his debts.

When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or a register of said court, or may authorize the same to be deposited in any convenient bank, upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon.

He shall give written notice to all known creditors, by mail or otherwise, of all dividends, and such notice of meetings, after the first, as may be ordered by the court.

He shall be allowed, and may retain, out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

He may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him and the other party to the controversy, and may, under such direction, compound and settle any such controversy by agreement with the other party, as he thinks proper and most for the interest of the creditors.

§ 18. *And be it further enacted*, That the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient.

At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is hereinbefore provided for the choice of assignee.

An assignee may, with the consent of the judge, resign his trust, and be discharged therefrom.

Vacancies caused by death, or otherwise, in the office of assignee may be filled by appointment of the court, or, at its discretion, by an election by the creditors, in the manner hereinbefore provided, at a regular meeting, or at a meeting called for the purpose, with such notice thereof, in writing, to all known creditors, and by such person as the court shall direct.

The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

When, by death, or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate.

And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

No person who has received any preference contrary to the provisions of this Act shall vote for or be eligible as assignee.



But no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

#### OF DEBTS AND PROOF OF CLAIMS.

§ 19. *And be it further enacted*, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of contract, may be proved against the estate of the bankrupt.

All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest.

If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced.

And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules.

Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the Court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

No debts other than those above specified shall be proved or allowed against the estate.

§ 20. *And be it further enacted*, That in all cases of mutual debts or mutual credits between the parties the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition.

(\* Or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off.)

When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct;

Or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt.

\* So added by act of 22 June, 1874, ch. 390, sec. 6, 18 Stat. 179.

If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor for bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

§ 21. *And be it further enacted*, That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby.

(\* But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge.)

And no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined.

And any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge: *Provided*, There be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge: *And provided, also*, That if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid.

If any bankrupt shall, at the time of adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

§ 22. *And be it further enacted*, That all proofs of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident debtors before any register in bankruptcy in the judicial districts where such creditors, or either of them, reside, or before any commissioner of the Circuit Court authorized to administer oaths in any district.

(Sec. 5076 a (22 June 1874, ch. 390, sec. 20, 18 Stat. 186).—That in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof, in the manner and under the regulations provided by law; such proof to be certified by the notary and attested by his signature and official seal.)

(Sec. 5076 b (Act of August 15, 1876, ch. 304, 19 Stat. 206).—*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do.)

To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath, or solemn affirmation, before the proper register or commissioner, setting forth—

The demand;

The consideration thereof;

Whether any and what securities are held therefor

And whether any and what payments have been made thereon;

That the sum claimed is justly due from the bankrupt to the claimant;

\* So added by act of 22 June, 1874, ch. 390, sec. 7, 18 Stat. 179.

That the claimant has not, nor has any other person for his use, received any security or satisfaction whatever other than that by him set forth;

That the claim was not procured for the purpose of influencing the proceedings under this act;

And that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the said claim, or any part thereof, against such bankrupt, or take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor or any other person in the proceedings under this act, is or shall be in any way affected, influenced, or controlled;

And no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

Such oath, or solemn affirmation shall be made by the claimant testifying of his own knowledge, unless he is absent from the United States, or prevented by some other good cause from testifying, in which cases the demand may be verified in like manner by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge, or, if in a foreign country, the oath of the creditor may be taken before any minister, consul, or vice-consul of the United States; and the court may, if it shall see fit, require or receive further pertinent evidence, either for or against the admission of the claim.

Corporations may verify their claims by the oath or solemn affirmation of their president, cashier, or treasurer.

If the proof is satisfactory to the register or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time and receipt of such proof, and the amount and nature of the debts, which books shall be open to the inspection of all the creditors.

The court may, on the application of the assignee, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

§ 23. *And be it further enacted*, That when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity, or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

Any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.

The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers;

And any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

§ 24. *And be it further enacted*, That a supposed creditor who takes an appeal to the Circuit Court from the decision of the District Court rejecting his claim, in whole or in part, shall, upon entering his appeal in the Circuit Court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in an action at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs

against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate.

A bill of exchange, promissory note, or other instrument used in evidence upon the proof of a claim, and left in court, or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall endorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

§ 25. *And be it further enacted*, That when it appears to the satisfaction of the court that the estate of the debtor or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of;

And whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent, or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of;

And the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts.

But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

§ 26. *And be it further enacted*, That the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating—

To the disposal or condition of his property;

To his trade and dealings with others, and his accounts concerning the same;

To all debts due to or claimed from him;

And to all other matters concerning his property and estate, and the due settlement thereof according to law;

Which examination shall be in writing, and shall be signed by the bankrupt, and be filed with the other proceedings.

And the court may, in like manner, require the attendance of any other person as a witness; and if such person shall fail to attend on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person, and bring him forthwith before the court, or before a register in bankruptcy for examination as such witness.

If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailor, or any officer in whose custody he may be; or may direct the examination to be had, taken, and certified, at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been in court.

The bankrupt shall, at all times until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court.

If the bankrupt is without the district, and unable to return and personally attend at any of the times, or do any of the acts which may be specified or required pursuant to this section, and if it appears that such absence was not caused by wilful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do with like effect as if he had not been in default.

He shall also be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property so that the same shall conform to the facts.

For good cause shown, the wife of any bankrupt may be required to attend before the

court, to the end that she may be examined as a witness; and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he shall prove to the satisfaction of the court that he was unable to procure the attendance of his wife.

No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action unless the same is founded on some debt or claim from which his discharge or bankruptcy would not release him.

§ 27. *And be it further enacted*, That all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate *pro rata*, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labors performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full;

*Provided*, That any debt proved by any person liable as bail, surety, guarantor, or otherwise for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given;

And the assignee shall then report and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath;

And he shall also produce and file vouchers for all payments for which vouchers shall be required by any rule of the court;

He shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt, as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands.

At such meeting the majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

In case a dividend is ordered the register shall, within ten days after such meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim, the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward by mail to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

§ 28. *And be it further enacted*, That the like proceedings shall be had at the expiration of the next three months, or earlier if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted the same shall be divided in manner aforesaid.

Further dividends shall be made in like manner as often as occasion requires;

And after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

If at any time there shall be in the hands of the assignee any outstanding debts or other property, due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under the direction of the court, sell and assign such debts or other property in such manner as the court shall order.

No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter.

Preparatory to the final dividend, the assignee shall submit his account to the court, and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and such assignee shall, if required by the court, be examined as to the truth of such account, and, if found correct, he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt.

The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their said debts.

In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case, on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars; and if, at any time, there shall not be in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

If, by accident, mistake, or other cause, without fault of the assignee, either or both of the said second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held.

In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order: —

*First.* The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.

*Second.* All debts due to the United States, and all taxes and assessments under the laws thereof.

*Third.* All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State.

*Fourth.* Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

*Fifth.* All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed: *Always provided,* That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

#### OF THE BANKRUPT'S DISCHARGE AND ITS EFFECT.

§ 29. *And be it further enacted,* That at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proven against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days,\* and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

No discharge shall be granted, or, if granted, be valid —

If the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact;

Or if he has concealed any part of his estate or effects, or any books or writings relating thereto;

\* Amended so as to read "and before the final disposition of the cause." (Act of July 26, 1876, ch. 234, sec. 1.)

Or if he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act;

Or if he has caused, permitted, or suffered any loss, waste, or destruction thereof;

Or if, within four months before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized, on execution;

Or if, since the passage of this act, he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities;

Or has admitted or been privy to the making of any false or fraudulent entry in any book of account or other document with intent to defraud his creditors;

Or has removed, or caused to be removed, any part of his property from the district with intent to defraud his creditors;

Or if he has given any fraudulent preference contrary to the provisions of this act;

Or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property;

Or has lost any part thereof in gaming;

Or has admitted a false or fictitious debt against his estate;

Or if, having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge;

Or if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account;

Or if he, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation;

Or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts;

Or if he has been convicted of any misdemeanor under this act, or has been guilty of any fraud whatever contrary to the true intent of this act;

And before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, suffered or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted.

§ 30. *And be it further enacted*, That no person who shall have been discharged under this act, and shall afterwards become bankrupt, on his own application, shall be again entitled to a discharge, whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims, is filed at or before the time of application for discharge.

But a bankrupt, who shall prove to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

§ 31. *And be it further enacted*, That any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the District Court.

§ 32. *And be it further enacted*, That if it shall appear to the court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court, in substance as follows:

District Court of the United States, District of —.

Whereas —, has been duly adjudged a bankrupt under the Act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears

to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said — be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the — day of —, on which day the petition for adjudication was filed by or [or against] him excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court at —, in the said district, this — day of —, A. D. —.

[Seal.]

— —, Judge.

§ 33. *And be it further enacted*, That no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt;

And no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint-contractor, indorser, surety, or otherwise.

And in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, ("upon which he is liable as the principal debtor." So amended, Act of July 27, 1868, ch. 258, sec. 1), unless the assent in writing of a majority in number and value of his creditors who have proved their claims, is filed in the case at or before the time of application for discharge.

(R. S., sec. 5112 a (22 June, 1874, ch. 390, sec. 9, 18 Stat. 180).—That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor without the assent of at least one-fourth of his creditors in number, and one-third in value. And the provision in section five thousand one hundred and twelve (thirty-three of said act of March second, eighteen hundred and sixty-seven) requiring fifty per centum of such assets is hereby repealed.)

§ 34. *And be it further enacted*, That a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in *hæc verba*, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge;

*Always provided*, That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same.

Said application shall be in writing; shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other of the said acts; but said application shall be subject to amendment at the discretion of the court.

The court shall cause reasonable notice of said application to be given to said bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper.

If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after



the granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if said court shall find that said fraudulent acts, and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings.

#### PREFERENCES AND FRAUDULENT CONVEYANCES DECLARED VOID.

§ 35. And be it further enacted, That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally—the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent\* (and that such attachment, payment, pledge, assignment, or conveyance, is made in fraud of the provisions of this act—the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited).

And if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and † that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud.

Any contract, covenant, or security made or given by the bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for, or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void;

And if any creditor shall obtain any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, every creditor so offending shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

(R. S., sec. 5130 a (22 June, 1874, ch. 390, sec. 10, 18 Stat. 180).—That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section five thousand one hundred and twenty-eight (thirty-five) of the act to which this is an amendment, is hereby changed to two months, but this provision shall not take effect until two months after the passage of this act, and in the cases aforesaid, the period of six months mentioned in said section five thousand one hundred and twenty-nine (thirty-five) is hereby changed to three months, but this provision shall not take effect until three months after the passage of this act.)

\* Amended so as to read: "Knowing that such attachment, sequestration, seizure, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited. And nothing in said section five thousand one hundred and twenty-eight (thirty-five) shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan."—Act of June 22, 1874. R. S. § 5128.

† (The word "knowing" inserted by act of June 22, 1874, ch. 390, sec. 11.)

**BANKRUPTCY OF PARTNERSHIPS AND OF CORPORATIONS.**

§ 36. *And be it further enacted*, That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted;

And all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts;

And the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof;

And after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors;

And if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors;

And if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy;

And the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts;

And the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this act;

And in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

§ 37. *And be it further enacted*, That the provisions of this act shall apply to all moneyed, business, or commercial corporations and joint-stock companies, and that upon the petition of any officer of any such corporation or company duly authorized by a vote of a majority of the corporators present, at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors;

And all the provisions of this Act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company in relation to the same matters concerning the corporation or company, and the money and property thereof.

All payments, conveyances, and assignments declared fraudulent and void by this Act, when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. No allowance or discharge shall be granted to any corporation or joint-stock company, or to any person, or officer, or member thereof;

*Provided*, That whenever any corporation by proceedings under this Act shall be declared bankrupt, all its property and assets shall be distributed to the creditors of such corporation in the manner provided in this Act in respect to natural persons.

**OF DATES AND DEPOSITIONS.**

§ 38. *And be it further enacted*, That the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court, or by a register, in the manner provided in

section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act;

The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection.

Copies of such records, duly certified under the seal of the court, shall in all cases be *prima facie* evidence of the facts therein stated.

Evidence of examination in any of the proceedings under this Act may be taken before the court, or a register in bankruptcy, *visa voce* or in writing, before a commissioner of the Circuit Court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony, in the same manner as in suits in equity in the Circuit Court.

### INVOLUNTARY BANKRUPTCY.

§ 39. *And be it further enacted*, That any person residing and owing debts as aforesaid, who, after the passage of this Act,

Shall depart from the State, district, or territory of which he is an inhabitant, with intent to defraud his creditors;

Or, being absent, shall, with such intent, remain absent;

Or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this Act;

Or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process.

Or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property rights, or credits, either within the United States or elsewhere, with intent to delay defraud, or hinder his creditors;

Or who has been arrested and held in custody under or by virtue of means process or execution issued out of any court of any State, district or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this Act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such State, district, or Territory applicable thereto. for a period of seven days;

Or has been actually imprisoned for more than\* (seven) days in a civil action, founded on contract, for the sum of one hundred dollars or upwards.

Or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency shall make any payment, gift, grant, sale, conveyance,† (or transfer of money, or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process), with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this Act;

‡ (Or who, being a banker, merchant, or trader, has stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days);

Shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors,\* (the aggregate of whose debts provable under this Act amount to at least

\* (Amended to "twenty." R. S., sec 5021; Act of June 22, 1874.)

† Amended so as to read, "Or transfer of money or other property, estate rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process."

‡ Words in parentheses amended so as to read, "or who, being a bank, banker, broker, merchant, trader, (j) manufacturer, or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped, or suspended and not resumed payment, within a period of forty days of his commercial paper, (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days, to pay any depositor upon demand of payment lawfully made. R. S., sec. 5021, Act of June 22, 1874.)

§ Words in parentheses amended so as to read, "who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts (1) provable under this act amounts to at least one-third of the debts so provable. R. S. sec. 5021, Act of June 22, 1874.

two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.)

\* And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this Act: *Provided*, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this Act was intended, or that the debtor was insolvent;

And such creditor shall not be allowed to prove his debt in bankruptcy.

§ 40. *And be it further enacted*, That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted;

And may also, by its injunction, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any of the debtor's property not excepted by this Act from the operation thereof, and from any interference therewith;

And if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance, or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged bankrupt and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition or the further order of the court, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

\* In the Revised Statutes, section 5021, the following was inserted before and instead of this paragraph: *Provided*, also, That no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratable and without creating any preference, and valid, according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors. And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this Act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith), shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding in cases heretofore commenced, twenty days, and in cases hereafter commenced ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money (m) or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid. So amended by act of July 26, 1876, ch. 234, sec. 1, 19 Stat. 102.

A copy of the petition and of such order to show cause shall be served on such debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode;

Or, if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication, in such manner as the judge may direct.

No further proceedings, unless the debtor appear and consent thereto, shall be had until proof shall have been given, to the satisfaction of the court, of such service or publication;

\* And if such proof be not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.

§ 41. *And be it further enacted*, That on such return day, or adjourned day, if the notice has been duly served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy;

† (Or, at the election of the debtor, the court may, in its discretion, award a *venue facias* to the marshal of the district returnable within ten days before him, for the trial of the facts set forth in the petition, at which time the trial shall be had, unless adjourned for cause.)

And if, upon such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover his costs.

§ 42. *And be it further enacted*, That if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt, and, as such, subject to the provisions of this act, and shall forthwith issue a warrant to take possession of the estate of the debtor.

The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore (See amendment, Act June 22, 1874), providing for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five after the date of the order, or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule† of the creditors and an inventory of his estate in the form, and verified in the manner required of a petitioning debtor by section thirteen.

If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner hereinbefore provided for the service of the order to show cause;

And if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

If the petitioning creditor shall not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

\* Amended by act of 22 June, 1874, ch. 390, sec. 13, 18 Stat. 182, to read:

"And if, on return day of the order to show cause as aforesaid the court shall be satisfied that the requirement of section five thousand and twenty-one (thirty-nine) of said act, as to the number and amount of petitioning creditors, has been complied with, or if within the time provided for in section five thousand and twenty-one (thirty-nine) of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors, and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

† So amended by act of 22 June, 1874, ch. 390, sec. 14, 18 Stat. 182.

‡ Words "and valuation" added, Act of June 22, 1874.

§ 43. *And be it further enacted*, That if, at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take, and hold, and distribute the estate, under the direction of such committee.

If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed and that the interests of the creditors will be promoted thereby, it shall confirm the same;

And upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled by said trustees, according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed;

And such consent and the proceedings thereunder shall be as binding in all respects on any creditor, whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it;

And the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors; and the said trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors;

And the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this Act; and the said trustees shall have all the rights and powers of assignees in bankruptcy.

The court, on the application of such trustees, shall have power to summon and examine, on oath or otherwise, the bankrupt and any creditor, and any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers, in the same manner as in other proceedings in bankruptcy under this act;

And the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Act.

If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no resolution had been passed, and the court may make all necessary orders for resuming the proceedings;

And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Act.

(R. S., sec. 5103 a (22 June, 1874, ch. 390, sec. 17, 18 Stat. 182).—That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor, of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors

of the debtor. And in calculating a majority for the purpose of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or assign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole value of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and, if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by a resolution passed in the matter and under the circumstances aforesaid, add to or vary the provisions of, any composition previously accepted by them, without prejudice to any person taking interest under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case be computed in calculating periods of time prescribed by said act.)

#### PENALTIES AGAINST BANKRUPTS.

§ 44. *And be it further enacted*, That from and after the passage of this act, if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy,—  
Secrete or conceal any property belonging to his estate;

Or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same, or any part thereof, out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same;

Or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent;

Or spend any part thereof in gaming;

Or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee, or omit from his schedule, any property or effects whatsoever;

Or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignees within one month after coming to the knowledge or belief thereof;

Or shall attempt to account for any of his property by fictitious losses or expenses;

Or shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud;

Or shall with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by bona fide transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for;

He shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years.

§ 45. *And be it further enacted*, That if any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this Act, or under color of doing anything thereunder, wilfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by this act, or which shall be allowed under the authority thereof, such person, when convicted thereof, shall forfeit and pay the sum of not less than three hundred dollars, and not exceeding five hundred dollars, and be imprisoned not exceeding three years.

§ 46. *And be it further enacted*, That if any person shall forge the signature of a judge, register, or other officer of the court, or knowingly concur in using any such forged or counterfeit signature or seal for the purpose of authenticating any proceeding or document,

Or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, any such person shall be guilty of felony, and upon conviction thereof shall be liable to a fine of not less than five hundred dollars, and not more than five thousand dollars, and to be imprisoned not exceeding five years, at the discretion of the court.

#### FEEES AND COSTS.

§ 47. *And be it further enacted*, That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this Act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the registers:

For issuing every warrant, two dollars.

For each day in which a meeting is held, three dollars.

For each order for a dividend, three dollars.

For every order substituting an arrangement by trust deed for bankruptcy, two dollars.

For every bond with sureties, two dollars.

For every application for any meeting in any matter under this Act, one dollar.



For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

For taking depositions, the fees now allowed by law.

For every discharge where there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and before a warrant issues, the petitioner shall deposit with the senior register of the court, or with the clerk, to be delivered to the register, fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel payment to the register.

Before any dividend is ordered the assignee shall pay out of the estate to the messenger the following fees, and no more:

First.—For service of warrant, two dollars.

Second.—For all necessary travel, at the rate of five cents a mile, each way.

Third.—For each written note to creditor named in the schedule, ten cents.

Fourth.—For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they had been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of said expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

The enumeration of the foregoing fees shall not prevent the judges, who shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders.

(R. S., sec. 5127 a (22 June, 1874, ch. 390, sec. 18, 18 Stat. 184).—That from and after the passage of this act, the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: *Provided*, That the preceding provision shall be and remain in force until the justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections four thousand nine hundred and ninety (ten) and five thousand one hundred and twenty-seven (forty-seven) of said act, and no longer, which duties they shall perform as soon as may be.

§ 5127 b (22 June, 1874, ch. 390, sec. 19, 18 Stat. 184).—That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the Supreme Court of the United States, as well as such other or further information as may be required by said justices.

First, the number of cases in bankruptcy in which the warrant prescribed in section five thousand and nineteen (eleven) of said act has come to his hands during the year ending June thirtieth, preceding;

Secondly, how many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately;

Thirdly, the total amount of all other fees, costs, expenses, and emoluments, respectively and separately, earned or received by him during such year, from or in respect of any matter in bankruptcy;

Fourthly, a summarized statement of such fees, costs, and emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year;

Fifthly, a summarized statement of all actual disbursements in such cases for such year.

And in like manner every register shall, in the same month, and for the same year, make a report to such clerk; of

First, the number of voluntary cases in bankruptcy coming before him during said year;

Secondly, the amount of assets and liabilities, as nearly as may be, of the bankrupt;

Thirdly, the amount and rate per centum of all dividends declared;

Fourthly, the disposition of all such cases;

Fifthly, the number of compulsory cases in bankruptcy coming before him, in the same way;

Sixthly, the amount of assets and liabilities, as nearly as may be, of such bankrupts;

Seventhly, the disposition of all such cases;

Eighthly, the amounts and rate per centum of all dividends declared in such cases;

Ninthly, the total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year, in each class of cases above stated.

And in like manner every assignee shall, during said month make like return to such clerk; of,

First, the number of voluntary and compulsory cases, respectively and separately, in his charge during said year;

Secondly, the amount of assets and liabilities therein, respectively and separately;

Thirdly, the total receipts and disbursements therein, respectively and separately;

Fourthly, the amount of dividends paid or declared, and the rate per centum thereof, in each class respectively and separately;

Fifthly, the total amount of all his fees, charges and emoluments of every kind therein, earned or received.

Sixthly, the total amount of expenses incurred by him for legal proceedings and counsel fees;

Seventhly, the disposition of the cases respectively;

Eighthly, a summarized statement of both classes as aforesaid;

And in like manner, the clerk of said court, in the month of August in each year, shall make up a statement for such year, ending June thirtieth, of,

First, all classes in bankruptcy pending at the beginning of the said year;

Secondly, all of such cases disposed of;

Thirdly, all dividends declared therein;

Fourthly, the number of reports made from each assignee therein;

Fifthly, the disposition of all such cases;

Sixthly, the number of assignees' accounts filed and settled;

Seventhly, whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and if any have failed to make such report, their respective names and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees, charges, costs, and emoluments, respectively, earned or accrued during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall in said month of August, transmit every such statement and report so filed with him, together with his own statement and report as aforesaid, to the attorney-general of the United States.

Any person who shall violate the provisions of this section shall on motion made, under the direction of the attorney-general, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding one year.)

#### OF MEANING OF TERMS AND COMPUTATION OF TIME.

§ 48. *And be it further enacted*, That the word "assignee" and the word "creditor" shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation;" and the word "oath" shall include "affirmation."

And in all cases in which any particular number of days is prescribed by this Act, or shall be mentioned in any rule or order of court, or general order which shall at any time be made under this Act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

§ 49. *And be it further enacted*, That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia.

And in and upon the Supreme Courts of the several Territories of the United States, when the bankrupt resides in the said District of Columbia or in either of the said Territories.

And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a Circuit Court in bankruptcy may be exercised by the district judge.

§ 50. *And be it further enacted*, That this act shall commence and take effect, as to the appointment of the officers created hereby and the promulgation of rules and general orders, from and after the date of its approval: *Provided*, That no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, Anno Domini eighteen hundred and sixty-seven.

### III. THE BANKRUPTCY ACT OF 1841.

*An Act to establish a uniform System of Bankruptcy throughout the United States.*

(Passed August 19th, 1841, repealed March 3rd, 1843.)

**SECTION 1.** Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, established throughout the United States a uniform system of bankruptcy, as follows: All persons whatsoever, residing in any State, District or Territory of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, who shall, by petition, setting forth to the best of his knowledge and belief a list of his or their creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of his or their property, rights and credits, of every name, kind and description, and the location and situation of each and every parcel and portion thereof, verified by oath, or, if conscientiously scrupulous of taking an oath, by solemn affirmation, apply to the proper court, as hereinafter mentioned, for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court. All persons, being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters or marine insurers, owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts within the true intent and meaning of this act, and may, upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, to wit: whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter, or marine insurer, shall depart from the State, District or Territory, of which he is an inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested, or shall willingly and fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution; or shall remove his goods, chattels and effects, or conceal them to prevent their being levied upon or taken in execution, or by other process; or make any fraudulent conveyance, assignment, sale, gift or other transfer of his lands, tenements, goods or chattels, credits or evidence of debt: Provided, however, That any person so declared a bankrupt, at the instance of a creditor, may, at his election, by petition to such court within ten days after its decree, be entitled to a trial by jury before such court, to ascertain the fact of such bankruptcy; or if such person shall reside at a great distance from the place of holding such court, the said judge, in his discretion, may direct such trial by jury to be had in the county of such person's residence, in such manner and under such directions as the court may prescribe and give; and all such decrees passed by such court, and not so re-examined, shall be deemed final and conclusive as to the subject-matter thereof.

**SEC. 2.** And be it further enacted, that all future payments, securities, conveyances, or transfers of property, or agreement made or given by any bankrupt in contemplation of bankruptcy, to any person or persons whatever, not creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupts; and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt in contemplation of bankruptcy, to any person or persons whatever, not being a bona-fide creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive, the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act: Provided, That all dealings and transactions by and with any bankrupt, bona-fide made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act: Provided, That the other party to any such dealings or

transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignments or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred: And provided also, That nothing in this act contained shall be construed to annul, destroy or impair, any lawful rights of married women, or minors, or any liens, mortgages, or other securities, on property, real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.

SEC. 3. And be it further enacted, That all the property, and rights of property, of every name and nature, and whether real, personal or mixed, of every bankrupt, except as is hereinafter provided, who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose, which power of appointment and removal such court may exercise at its discretion, toties quoties; and the assignee so appointed shall be vested with all the rights, titles, powers and authorities to sell, manage and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully, to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy declared as aforesaid; and all suits in law or in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect as they might have been by such bankrupt; and no suit commenced by or against any assignee shall be abated by his death or removal from office, but the same may be prosecuted or defended by his successor in the same office: Provided, however, That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of three hundred dollars; and, also, the wearing apparel of such bankrupt, and that of his wife and children; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of said court.

SEC. 4. And be it further enacted, That every bankrupt who shall bona-fide surrender all his property, and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court, and shall otherwise conform to all the requisitions of this act, shall (unless a majority in number and value of his creditors who have proved their debts shall file their written dissent thereto) be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted him by such court accordingly, upon his petition filed for such purpose; such discharge and certificate not, however, to be granted until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place, to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors, or other persons in interest, may appear and contest the right of the bankrupt thereto: Provided, That in all cases where the residence of the creditor is known, a service on him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, as in their discretion shall seem proper, having regard to the distance at which the creditor resides from such court. And if any such bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors contrary to the provisions of this act, or shall wilfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisites of this act, or shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate; nor shall any person, being a merchant, banker, factor,

underwriter, broker, or marine insurer, be entitled to any such discharge or certificate, who shall become bankrupt, and who shall not have kept proper books of account, after the passing of this act; nor any person who, after the passing of this act, shall apply trust funds to his own use: Provided, That no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, indorser, surety, or otherwise, for or with the bankrupt. And such bankrupt shall at all times be subject to examination, orally, or upon written interrogatories, in and before such court, or any commission appointed by the court therefor, on oath, or, if conscientiously scrupulous of taking an oath, upon his solemn affirmation, in all matters relating to such bankruptcy, and his acts and doings, and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice; and if, in any such examination, he shall wilfully and corruptly answer, or swear, or affirm, falsely, he shall be deemed guilty of perjury, and shall be punishable therefor in like manner as the crime of perjury is now punishable by the laws of the United States; and such discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property, as aforesaid, contrary to the provisions of this act, on prior reasonable notice specifying in writing such fraud or concealment; and if, in any case of bankruptcy, a majority in number and value of the creditors who shall have proved their debts at the time of hearing of the petition of the bankrupt for a discharge, as hereinbefore provided, shall at such hearing file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court, at such time and place and in such manner as the court may order; or he may appeal from that decision at any time within ten days thereafter to the circuit court next to be held for the same district, by simply entering in the district court, or with the clerk thereof, upon record, his prayer for an appeal. The appeal shall be tried at the first term of the circuit court after it be taken, unless, for sufficient reason, a continuance be granted; and it may be heard and determined by said court summarily, or by a jury, at the option of the bankrupt; and the creditors may appear and object against a decree of discharge and the allowance of the certificate, as hereinbefore provided. And if, upon a full hearing of the parties, it shall appear to the satisfaction of the court, or the jury shall find, that the bankrupt has made a full disclosure and surrender of all his estate, as by this act required, and has in all things conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate, as provided in this act.

SEC. 5. And be it further enacted, That all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid monies as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars: Provided, That such labor shall have been performed within six months next before the bankruptcy of his employer; and all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuities and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in present; and no creditor or other person coming in and proving his debt or other claim shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby; and in all cases where there are mutual debts or mutual credits between the

parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off; all such proof of debts shall be made before the court decreeing the bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to disallow and set aside any debt, upon proof that such debt is founded in fraud, imposition, illegality, or mistake; and corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officer, who may be specially appointed for that purpose; and in appointing commissioners to receive proof of debts, and perform other duties under the provisions of this act, the said court shall appoint such persons as have their residence in the county in which such bankrupt lives.

SEC. 6. And be it further enacted, That the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed upon the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity; and for this purpose the said district court shall be deemed always open. And the district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined; and for this purpose the circuit court of such district shall also be deemed always open. And the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent the circuit courts may now do in any suit pending therein in equity. And it shall be the duty of the district court in each district, from time to time to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; which rules, regulations and forms, shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other rules and regulations and forms substituted therefor; and in all such rules, regulations and forms it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by the public at large. And the said courts shall, from time to time, prescribe a tariff or table of fees and charges to be taxed by the officers of the court or other persons for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable, with reference to the nature and character of such services.

SEC. 7. And be it further enacted, That all petitions by any bankrupt for the benefit of this act, and all petitions by a creditor against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district in which the person supposed to be a bankrupt shall reside, or have his place of business, at the time when such petition is filed, except where otherwise provided in this act. And upon every such petition, notice thereof shall be published in one or more public newspapers printed in such district, to be designated by such court, at least twenty days before the hearing thereof; and all persons interested may appear at the time and place where such hearing is thus to be had, and show cause, if any they have, why the prayer of the said petitioner should not be granted; all evidence by witnesses to be used in all hearings before such court shall be under oath, or solemn affirmation, when the party is conscientiously scrupulous of taking an oath, and may be oral or by deposition, taken before such court, or before any commissioner appointed by the court, or before any disinterested State judge of the State in which the deposition is taken; and all proof of debts or other claims, by creditors entitled to prove the same under this act shall be under oath or solemn affirmations, as aforesaid, before such court or commissioner appointed thereby, or before some disinterested State judge of the State where the creditors live, in such form as may be prescribed by the rules and regulations hereinbefore authorized to be made and established by the courts having jurisdiction in bankruptcy. But all such proofs of debts and other claims shall be open to contestation in the proper court having jurisdiction over the proceedings in the particular case in bankruptcy; and as well the assignee as

the creditor shall have a right to a trial by jury upon an issue to be directed by such court, to ascertain the validity and amount of such debts or other claims; and the result therein, unless a new trial shall be granted, if in favor of the claims, shall be evidence of the validity and amount of such debts or other claims. And if any person or persons shall falsely and corruptly answer, swear or affirm, in any hearing or on trial of any matter, or in any proceeding in such court in bankruptcy, or before any commissioner, he and they shall be deemed guilty of perjury, and punishable therefor in the manner and to the extent provided by law for other cases.

SEC. 8. And be it further enacted, That the circuit court within and for the district where the decree of bankruptcy is passed shall have concurrent jurisdiction with the district court of the same district of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee or by or against any person or persons claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

SEC. 9. And be it further enacted, That all sales, transfers and other conveyances of the assignee of the bankrupt's property and rights of property shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy; and all assets received by the assignee in money shall, within sixty days afterwards, be paid into the court, subject to its order respecting its future safe-keeping and disposition; and the court may require of such assignee a bond, with at least two sureties, in such sum as it may deem proper, conditioned for the due and faithful discharge of all his duties, and his compliance with the orders and directions of the court; which bond shall be taken in the name of the United States, and shall, if there be any breach thereof, be sued and suable, under the order of such court, for the benefit of the creditors and other persons in interest.

SEC. 10. And be it further enacted, That in order to insure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors; and a dividend and distribution of such assets as shall be collected and reduced to money, or so much thereof as can be safely disposed of, consistently with the rights and interests of third persons having adverse claims thereto, shall be made among the creditors who have proved their debts, as often as once in six months from the time of the decree declaring the bankruptcy; notice of such dividends and distribution to be given in some newspaper or newspapers in the district, designated by the court, ten days at least before the order therefor is passed; and the pendency of any suit at law or in equity, by or against such third persons, shall not postpone such division and distribution, except so far as the assets may be necessary to satisfy the same; and in all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled and brought to a close by the court, within two years after the decree declaring the bankruptcy. And where any creditor shall not have proved his debt until a dividend or distribution shall have been made and declared, he shall be entitled to be paid the same amount, pro rata, out of the remaining dividends or distributions thereafter made, as the other creditors have already received, before the latter shall be entitled to any portion thereof.

SEC. 11. And be it further enacted, that the assignee shall have full authority, by or under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposit, or lien upon any property, real or personal, whether payable in present or at a future day, and to tender a due performance of the conditions thereof. And such assignee shall also have authority, by and under the order and direction of the proper court in bankruptcy, to compound any debts or other claims, or securities due or belonging to the estate of the bankrupt; but no such order or direction shall be made until notice of the application is given in some public newspaper in the district, to be designated by the court, ten days at least before the hearing, so that all creditors and other persons in interest may appear and show cause, if any they have, at the hearing, why the order or direction should not be passed.



SEC. 12. And be it further enacted, That if any person who shall have been discharged under this act, shall afterward become bankrupt, he shall not again be entitled to a discharge under this act, unless his estate shall produce (after all charges) sufficient to pay every creditor seventy-five per cent. on the amount of the debt which shall have been allowed to each creditor.

SEC. 13. And be it further enacted, That the proceedings in all cases in bankruptcy shall be deemed matters of record; but the same shall not be required to be recorded at large, but shall be carefully filed, kept and numbered in the office of the said court, and a docket only, or short memorandum thereof, with the numbers, kept in a book by the clerk of the court; and the clerk of the court, for affixing his name and the seal of the court to any form, or certifying a copy thereof, when required thereto, shall be entitled to receive, as compensation, the sum of twenty-five cents, and no more. And no officer of the court, or commissioner, shall be allowed by the court more than one dollar for taking the proof of any debt or other claim of any creditor or other person against the estate of the bankrupt; but he may be allowed, in addition, his actual travel expenses for that purposes.

SEC. 14. And be it further enacted, That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are herein exempted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignees the whole of the expenses and disbursements paid by them, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective rights and interests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

SEC. 15. And be it further enacted, That a copy of any decree of bankruptcy, and the appointment of assignees, as directed by the third section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignees under and by virtue of this act; and that such recital, together with certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt, of, in and to, the lands therein mentioned and described, to the purchaser, as fully to all intents and purposes, as if made by such bankrupt himself immediately before such order.

SEC. 16. And be it further enacted, That all jurisdiction, power and authority, conferred upon and vested in the district court of the United States by this act, in cases in bankruptcy, are hereby conferred upon and vested in the circuit court of the United States for the District of Columbia, and in and upon the supreme or superior courts of any of the Territories of the United States, in cases in bankruptcy, where the bankrupt resides in the said District of Columbia, or in either of the said Territories.

SEC. 17. And be it further enacted, That this act shall take effect from and after the first day of February next.

## IV. THE BANKRUPTCY ACT OF 1800.

*An Act to establish a uniform System of Bankruptcy throughout the United States.*

(Passed April 4th, 1800; repealed December 19th, 1803.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of June next, if any merchant or other person residing within the United States, actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter or marine insurer, shall, with intent unlawfully to delay or defraud his or her creditors, depart from the State in which such person usually resides, or remain absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she cannot be taken, or served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered or taken in execution, or make or cause to be made any fraudulent conveyance of his or her lands, or chattels, or make or admit any false or fraudulent security or evidence of debt, or being arrested for debt, or having surrendered him or herself in discharge of bail, shall remain in prison two months or more, or escape therefrom, or whose lands or effects being attached by process issuing out of, or returnable to, any court of common law, shall not, within two months after written notice thereof, enter special bail and dissolve the same, or in districts in which attachments are not dissolved by the entry of special bail, being arrested for debt after his or her lands and effects, or any part thereof, have been attached for a debt or debts amounting to one thousand dollars or upwards, shall not, upon notice of such attachment, give sufficient security for the payment of what may be recovered in the suit in which he or she shall be arrested, at or before the return-day of the same, to be approved by the judge of the district, or some judge of the court out of which the process issued upon which he is arrested, or to which the same shall be returnable, every such person shall be deemed and adjudged a bankrupt: Provided, that no person shall be liable to a commission of bankruptcy if the petition be not preferred, in manner hereinafter directed, within six months after the act of bankruptcy committed.

SEC. 2. And be it further enacted, That the judge of the district court of the United States, for the district where the debtor resides, or usually resided at the time of committing the act of bankruptcy, upon petition in writing against such person or persons being bankrupt, to him to be exhibited by any one creditor; or by a greater number, being partners, whose single debt shall amount to one thousand dollars, or by two creditors whose debts shall amount to one thousand, five hundred dollars, or by more than two creditors whose debts shall amount to two thousand dollars, shall have power, by commission under his hand and seal, to appoint such good and substantial persons, being citizens of the United States, and resident in such district, as such judge shall deem proper, not exceeding three, to be commissioners of the said bankrupt, and in case of vacancy or refusal to act, to appoint others from time to time as occasion may require: Provided always, that before any commission shall issue, the creditor or creditors petitioning shall make affidavit or solemn affirmation before the said judge of the truth of his, her or their debts, and give bond, to be taken by the said judge, in the name and for the benefit of the said party so charged as a bankrupt, and in such penalty, and with such surety, as he shall require, to be conditioned for the proving of his, her or their debts, as well before the commissioners as upon a trial at law, in case the due issuing forth of the said commission shall be contested, and also for proving the party a bankrupt, and to proceed on such commission in the manner herein prescribed. And if such debt shall not be really due, or after such commission taken out it cannot be proved that the party was a bankrupt, then the said judge shall upon the petition of the party aggrieved, in case there be occasion, deliver such bond to the said party, who may sue thereon, and recover such damages under the penalty of the same, as, upon trial at law, he shall make appear he has sustained, by reason of any breach of the condition thereof.

SEC. 3. And be it further enacted, That before the commissioners shall be capable of

acting, they shall respectively take and subscribe the following oath or affirmation, which shall be administered by the judge issuing the commission, or by any of the judges of the Supreme Court of the United States, or any judge, justice or chancellor of any State court, and filed in the office of the clerk of the district court: "I, A. B., do swear, or affirm, that I will faithfully, impartially and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me, as a commissioner, in a commission of bankruptcy against \_\_\_\_\_, and that without favor or affection, prejudice or malice." And the commissioners, who shall be sworn, as aforesaid, shall proceed, as soon as may be, to execute the same; and upon due examination, and sufficient cause appearing against the party charged, shall and may declare him or her to be a bankrupt: Provided, that before such examination be had, reasonable notice thereof, in writing, shall be delivered to the person charged as a bankrupt; or if he or she be not found at his or her usual place of abode, to some person of the family above the age of twelve years, or if no such person appear, shall be fixed at the front or other public door of the house in which he or she usually resides, and thereupon it shall be in the power of such person, so charged as aforesaid, to demand before, or at the time appointed for such examination, that a jury be empanelled to inquire into the fact or facts alleged as the causes for issuing the commission, and on such demand being made the inquiry shall be had before the judge granting the commission, at such time as he may direct, and in that case such person shall not be declared bankrupt, unless, by the verdict of the jury, he or she shall be found to be within the description of this act, and shall be convicted of some one of the acts described in the first section of this act: Provided also, that any commission which shall be taken out as aforesaid, and which shall not be proceeded in as aforesaid, within thirty days thereafter, may be superseded by the said judge who shall have granted the same, upon the application of the party thereby charged as a bankrupt, or of any creditor of such person, unless the delay shall have been unavoidable or upon a just occasion.

SEC. 4. And be it further enacted, That the commissioners so to be appointed shall have power forthwith, after they have declared such person a bankrupt, to cause to be apprehended, by warrant under their hands and seals, the body of such bankrupt, where-soever to be found within the United States: Provided, they shall think that there is reason to apprehend that the said bankrupt intends to abscond or conceal him or herself, and in case it be necessary in order to take the body of said bankrupt, shall have power to cause the doors of the dwelling-house of such bankrupt to be broken, or the doors of any other house in which he or she shall be found.

SEC. 5. And be it further enacted, That it shall be the duty of the commissioners so to be appointed, forthwith, after they have declared such person a bankrupt, and they shall have power to take into their possession all the estate, real and personal, of every nature and description, to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value, (his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted) and also to take into their possession, and secure, all deeds and books of account, papers and writings belonging to such bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed, in manner hereafter provided.

SEC. 6. And be it further enacted, That the said commissioners shall forthwith, after they have declared such person a bankrupt, cause due and sufficient public notice thereof to be given, and in such notice shall appoint some convenient time and place for the creditors to meet, in order to choose an assignee or assignees of the said bankrupt's estate and effects; at which meeting the said commissioners shall admit the creditors of such bankrupt to prove their debts; and where any creditor shall reside at a distance from the place of such meeting, shall allow the debt of such creditor to be proved by oath or affirmation, made before some competent authority, and duly certified, and shall permit any person duly authorized by letter of attorney from such creditor, due proof of the execution of such letter of attorney being first made, to vote in the choice of an assignee or assignees of the bankrupt's estate and effects in the place and stead of such creditor: and the said commissioners shall assign, transfer or deliver over, all and singular, the said bankrupt's estate and effects, aforesaid, with all muniments and evidences thereof, to such person or persons as the major part in value of such creditors, according to the

several debts then proved, shall choose as aforesaid: Provided always, That in such choice, no vote shall be given by, or in behalf of, any creditor whose debt shall not amount to two hundred dollars.

SEC. 7. Provided always, and be it further enacted, That it shall be lawful for the said commissioners, as often as they shall see cause, for the better preserving and securing of the bankrupt's estate, before assignees shall be chosen as aforesaid, immediately to appoint one or more assignee or assignees of the estate and effects aforesaid, or any part thereof; which assignee or assignees aforesaid, or any of them, may be removed at the meeting of the creditors, so to be appointed as aforesaid for the choice of assignees, is such creditors, entitled to vote as aforesaid, or the major part in value of them, shall think fit; and such assignee or assignees as shall be so removed, shall deliver up all the estate and effects of such bankrupt which shall have come to his or their hands or possession, unto such other assignee or assignees as shall be chosen by the creditors as aforesaid; and all such estate and effects shall be, to all intents and purposes, as effectually and legally voted in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners; and if such first assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing, from such new assignee or assignees of their appointment, as aforesaid, to deliver over as aforesaid, all the estate and effects as aforesaid, every such assignee or assignees shall, respectively, forfeit a sum not exceeding five thousand dollars, for the use of the creditors, and shall moreover be liable for the property so detained.

SEC. 8. And be it further enacted, That at any time previous to the closing of the accounts of the said assignee or assignees so chosen as aforesaid, it shall be lawful for such creditors of the bankrupt as are hereby authorized to vote in the choice of assignees, or the major part of them in value, at a regular meeting of the said creditors, to be called for that purpose by the said commissioners, or by one-fourth in value of such creditors, to remove all or any of the assignees chosen as aforesaid, and to choose one or more in his or their place and stead; and such assignee or assignees as shall be so removed shall deliver up all the estate and effects of such bankrupt which shall have come into his or their hands or possession, unto such new assignee or assignees as shall be chosen by the creditors at such meeting; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners: and if such former assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing from such new assignee or assignees of their appointment, as aforesaid, to deliver over, as aforesaid, all the estate and effects aforesaid, every such former assignee or assignees shall respectively forfeit a sum not exceeding five thousand dollars for the use of the creditors, and moreover shall be liable for the property so detained.

SEC. 9. And be it further enacted, That whenever a new assignee or assignees shall be chosen as aforesaid, no suit at law or in equity shall be thereby abated; but it shall and may be lawful for the court in which any suit may depend, upon the suggestion of the removal of a former assignee or assignees, and of the appointment of a new assignee or assignees, to allow the name of such new assignee or assignees, to be substituted in place of the name or names of the former assignee or assignees, and thereupon the suit shall be prosecuted in the name or names of the new assignee or assignees, in the same manner as if he or they had originally commenced the suit in his or their own names.

SEC. 10. And be it further enacted, That the assignment or assignments of the commissioners of the bankrupt's estate and effects as aforesaid, made as aforesaid, shall be good at law or in equity against the bankrupt, and all persons claiming by, from or under such bankrupt, by any act done at the time, or after, he shall have committed the act of bankruptcy upon which the commission issued: Provided always, that in case of a bona-fide purchase made before the issuing of the commission from or under such bankrupt, for a valuable consideration, by any person having no knowledge, information or notice of any act of bankruptcy committed, such purchase shall not be invalidated or impeached.

SEC. 11. And be it further enacted, That the said commissioners shall have power, by deed or deeds, under their hands and seals, to assign and convey to the assignee or

assignees to be appointed or chosen as aforesaid, any lands, tenements or hereditaments which such bankrupt shall be seized of or entitled to, in fee tail, at law, or in equity, in possession, remainder or reversion, for the benefit of the creditors; and all such deeds being duly executed and recorded, according to the laws of the State within which such lands, tenements or hereditaments may be situated, shall be good and effectual against all persons whom the said bankrupt, by common recovery, or other means, might or could bar of any estate, right, title of or in the said lands, tenements or hereditaments.

SEC. 12. And be it further enacted, That if any bankrupt shall have conveyed or assured any lands, goods or estate, unto any person, upon condition or power of redemption, by payment of money or otherwise, it shall be lawful for the commissioners, or for any person by them duly authorized for that purpose, by writing, under their hands and seals, to make tender of money or other performance according to the nature of such condition, as fully as the bankrupt might have done; and the commissioners, after such performance or tender, shall have power to assign such lands, goods and estate for the benefit of the creditors, as fully and effectually as any other part of the estate of such bankrupt.

SEC. 13. And be it further enacted, That the commissioners aforesaid shall have power to assign, for the use aforesaid, all the debts due to such bankrupt, or to any other person for his or her use or benefit; which assignment shall vest the property and right thereof in the assignee or assignees of such bankrupt, as fully as if the bond, judgment, contract or claim had originally belonged or been made to the said assignees; and after the said assignment, neither the said bankrupt nor any person acting as trustee for him or her, shall have power to recover or discharge the same, nor shall the same be attached as the debt of the said bankrupt; but the assignee or assignees aforesaid shall have such remedy to recover the same, in his or their own name or names, as such bankrupt might or could have had if no commission of bankruptcy had issued. And when any action in the name of such bankrupt shall have been commenced, and shall be pending for the recovery of any debt or effects of such bankrupt, which shall be assigned, or shall or might become vested in the assignee or assignees of such bankrupt as aforesaid, then such assignee or assignees may claim to be, and shall be thereupon, admitted to prosecute such action in his or their name, for the use and benefit of the creditors of such bankrupt; and the same judgment shall be rendered in such action, and all attachments and other security taken therein shall be in like manner holden and liable, as if the said action had been originally commenced in the name of said assignee or assignees, after the original plaintiff therein had become a bankrupt as aforesaid: Provided, that where a debtor shall have, bona-fide, paid his debt to any bankrupt, without notice that such person was bankrupt, he or she shall not be liable to pay the same to the assignee or assignees.

SEC. 14. And be it further enacted, That if complaint shall be made or information given to the commissioners, or if they shall have good reason to believe or suspect, that any of the property, goods, chattels, or debts, of the bankrupt are in the possession of any other person, or that any person is indebted to or for the use of the bankrupt, then the said commissioners shall have power to summon, or to cause to be summoned, by their attorney or other person duly authorized by them, all such persons before them, or the judge of the district where such person shall reside, by such process, or other means, as they shall think convenient, and upon their appearance to examine them by parole or by interrogatories, in writing, on oath or affirmation, which oath or affirmation they are hereby empowered to administer, respecting the knowledge of all such property, goods, chattels and debts; and if such person shall refuse to be sworn or affirmed, and to make answer to such questions or interrogatories as shall be administered, and to subscribe the said answers, or upon examination shall not declare the whole truth, touching the subject-matter of such examination, then it shall be lawful for the commissioners or judge to commit such person to prison, there to be detained until they shall submit themselves to be examined in manner aforesaid, and they shall, moreover, forfeit double the value of all the property, goods, chattels and debts by them concealed.

SEC. 15. And be it further enacted, That if any of the aforesaid persons shall, after legal summons to appear before the commissioners or judge, to be examined, refuse to attend, or shall not attend at the time appointed, having no such impediment as shall be allowed of by the commissioners or judge it shall be lawful for the said commissioners

or judge to direct their warrants to such person or persons as by them shall be thought proper, to apprehend such person as shall refuse to appear, and to bring them before the commissioners or judge to be examined, and upon their refusal to come, to commit them to prison, until they shall submit themselves to be examined according to the directions of this act: Provided, that such witnesses as shall be so sent for shall be allowed such compensation as the commissioners or judge shall think fit, to be ratably borne by the creditors; and if any person, other than the bankrupt, either by subornation of others, or by his or her own act, shall wilfully or corruptly commit perjury, shall on conviction thereof be fined not exceeding four thousand dollars and imprisoned not exceeding two years, and moreover shall, in either case, be rendered incapable of being a witness in any court of record.

SEC. 16. And be it further enacted, That if any person or persons shall fraudulently or collusively claim any debts, or claim or detain any real or personal estate of the bankrupt, every such person shall forfeit double the value thereof, to and for the use of the creditors.

SEC. 17. And be it further enacted, That if any person, prior to his or her becoming a bankrupt, shall convey to any of his or her children, or other persons, any lands or goods, or transfer his or her debts or demands into other persons' names, with intent to defraud his or her creditors, the commissioners shall have power to assign the same in as effectual a manner as if the bankrupt had been actually seized or possessed thereof.

SEC. 18. And be it further enacted, That if any person or persons who shall become bankrupt within the intent and meaning of this act, and against whom a commission of bankruptcy shall be duly issued, upon which commission such person or persons shall be declared bankrupt, shall not, within forty-two days after notice thereof, in writing, to be left at the usual place of abode of such person or persons, or personal notice in case such person or persons be then in prison, and notice given in some gazette, that such commission hath been issued, and of the time and place of meeting of the commissioners, surrender him or herself to the said commissioners, and sign or subscribe such surrender, and submit to be examined, from time to time, upon oath or solemn affirmation, by and before such commissioners, and in all things conform to the provisions of this act, and also upon such his or her examination fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times, he or she hath disposed of, assigned or transferred, any of his or her goods, wares or merchandise, monies or other effects and estate, and of all books, papers and writings relating thereunto of which he or she was possessed, or in or to which he or she was in any way interested or entitled, or which any person or persons shall then have, or shall have had in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission, or whereby such bankrupt, or his or her family then hath or may have or expect any profit, possibility of profit, benefit or advantage whatsoever, except only such part of his or her estate and effects as shall have been really and bona-fide before sold and disposed of in the way of his or her trade and dealings, and except such sums of money as shall have been laid out in the ordinary expenses of his or her family, and also upon such examination, execute in due form of law such conveyance, assurance and assignment of his or her estate, whatsoever and wheresoever, as shall be devised and directed by the commissioners, to vest the same in the assignees, their heirs, executors, administrators and assigns forever, in trust, for the use of all and every the creditors of such bankrupt, who shall come in and prove their debts under the commission; and deliver up unto the commissioners all such part of his or her, the said bankrupt's goods, wares, merchandise, money, effects and estate, and all books, papers and writing thereunto relating, as at the time of such examination shall be in his or her possession, custody or power, his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted, then he or she the said bankrupt, upon the conviction of any wilful default or omission in any of the matters or things aforesaid, shall be adjudged a fraudulent bankrupt, and shall suffer imprisonment for a term not less than twelve months, nor exceeding ten years, and shall not at any time after be entitled to the benefits of this act: Provided always, that in case any bankrupt shall be in prison or custody at the time of issuing such commission, and is willing to surrender and submit to be examined according to the directions of this act, and can be brought

before the said commissioners and creditors for that purpose, the expense thereof shall be paid out of the said bankrupt's effects, and in case such bankrupt is in execution, or cannot be brought before the commissioners, that then the said commissioners, or some one of them, shall from time to time attend the said bankrupt in prison or custody, and take his or her discovery as in other cases, and the assignees or one of them, or some person appointed by them, shall attend such bankrupt in prison or custody, and produce his or her books, papers and writings, in order to enable him or her to prepare his or her discovery; a copy whereof the said assignees shall apply for, and the said bankrupt shall deliver to them or their order within a reasonable time after the same shall have been required.

SEC. 19. And be it further enacted, That the said commissioners shall appoint, within the said forty-two days, so limited as aforesaid, for the bankrupt to surrender and conform as aforesaid, not less than three several meetings for the purposes aforesaid, the third of which meetings shall be on the last of the said forty-two days: Provided always, that the judge of the district within which such commission issues shall have power to enlarge the time so limited as aforesaid, for the purposes aforesaid, as he shall think fit, not exceeding fifty days, to be computed from the end of the said forty-two days, so as such order for enlarging the time be made at least six days before the expiration of said term.

SEC. 20. And be it further enacted, That it shall be lawful for the commissioners, or any other person or officers by them to be appointed, by their warrant, under their hands and seals, to break open in the day time the houses, chambers, shops, warehouses, doors, trunks or chests, of the bankrupt, where any of his or her goods or estate, deeds, books of account or writings, shall be, and to take possession of the goods, money and other estate, deeds, books of account or writings of such bankrupt.

SEC. 21. And be it further enacted, That if the bankrupt shall refuse to be examined, or to answer fully, or to subscribe his or her examination as aforesaid, it shall be lawful for the commissioners to commit the offender to close imprisonment until he or she shall conform him or herself; and if the said bankrupt shall submit to be examined, and upon his or her examination it shall appear that he or she hath committed wilful or corrupt perjury, he or she may be indicted therefor, and being thereof convicted shall suffer imprisonment for a term not less than two years, nor exceeding ten years.

SEC. 22. And be it further enacted, That every bankrupt having surrendered, shall, at all seasonable times before the expiration of the said forty-two days, as aforesaid, or of such further time as shall be allowed to finish his or her examination, be at liberty to inspect his or her books and writings, in the presence of some person to be appointed by the commissioners, and to bring with him or her, for his or her assistance, such persons as he or she shall think fit, not exceeding two at one time, and to make extracts and copies to enable him or her to make a full discovery of his or her effects; and the said bankrupt shall be free from arrest, in coming to surrender, and after having surrendered to the said commissioners for the said forty-two days, or such farther time as shall be allowed for the finishing his or her examination; and in case such bankrupt shall be arrested for debt, or taken on any escape warrant or execution, coming to surrender, or after his or her surrender within the time before mentioned, then on producing such summons or notice under the hands of the commissioners, and giving the officer a copy thereof, he or she shall be discharged; and in case any officer shall afterwards detain such bankrupt, such officer shall forfeit to such bankrupt, for his or her own use, ten dollars for every day he shall detain the bankrupt.

SEC. 23. And be it further enacted, That every person who shall knowingly or wilfully receive or keep concealed any bankrupt so as aforesaid summoned to appear, or who shall assist such bankrupt in concealing him or herself, or in absconding, shall suffer such imprisonment, not exceeding twelve months, or pay such fine to the United States, not exceeding one thousand dollars, as upon conviction thereof shall be adjudged.

SEC. 24. And be it further enacted, That the said commissioners shall have power to examine, upon oath or affirmation, the wife of any person lawfully declared a bankrupt, for the discovery of such part of his estate as may be concealed or disposed of by such wife, or by any other person; and the wife shall incur such penalties for not appearing

before the said commissioners, or refusing to be sworn or affirmed or examined, and to subscribe her examination, or for not disclosing the truth, as by this act is provided against any other person in like cases.

SEC. 25. And be it further enacted, That in case any person shall be committed by the commissioners for refusing to answer, or for not fully answering any question, or for any other cause, the commissioners shall in their warrant specify such question or other cause of commitment.

SEC. 26. And be it further enacted, That if after the bankrupt shall have finished his or her final examination, any other person or persons shall voluntarily make discovery of any part of such bankrupt's estate, before unknown to the commissioners, such person or persons shall be entitled to five per cent. out of the effects so discovered, and such further reward as the commissioners shall think proper; and any trustee having notice of the bankruptcy, wilfully concealing the estate of any bankrupt for the space of ten days after the bankrupt shall have finished his final examination, as aforesaid, shall forfeit double the value of the estate so concealed, for the benefit of the creditors.

SEC. 27. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof such commission may and shall be superseded, and it shall and may be lawful for either of the judges having authority to grant the commission as aforesaid, to award any creditor petitioning another commission, and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission, in manner aforesaid, in trust for, and to be divided among, the other creditors of the said bankrupt, in proportion to their respective debts.

SEC. 28. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security, for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof, such commission shall and may be superseded, and it shall and may be lawful for either of the judges, having authority to grant the commission as aforesaid, to award any creditor petitioning another commission; and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back, or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission in manner aforesaid, in trust for, and to be divided amongst the other creditors of the said bankrupt, in proportion to their respective debts.

SEC. 29. And be it further enacted, That every person who shall be chosen assignee of the estate and effects of a bankrupt shall, at some time after the expiration of four months, and within twelve months from the time of issuing the commission, cause at least thirty days public notice to be given of the time and place the commissioners and assignees intend to meet, to make a dividend or distribution of the bankrupt's estate and effects; at which time the creditors who have not before proved their debts shall be at liberty to prove the same; and upon every such meeting the assignee or assignees shall produce to the commissioners and creditors then present fair and just accounts of all his or their receipts and payments, touching the bankrupt's estate and effects, and of what shall remain outstanding, and the particulars thereof, and shall, if the creditors then present, or a major part of them, require the same, be examined upon oath or solemn affirmation before the same commissioners, touching the truth of such accounts; and in such accounts the said assignee or assignees shall be allowed and retain all such sum and sums of money as they shall have paid or expended in suing out and prosecuting the commission, and all other just allowances on account of or by reason or means of their being assignee or assignees; and the said commissioners shall order such part of the



net produce of the said bankrupt's estate as by such accounts or otherwise shall appear to be in the hands of the said assignees, as they shall think fit, to be forthwith divided among such of the bankrupt's creditors as have duly proved their debts under such commission, in proportion to their several and respective debts; and the commissioners shall make such their order for a dividend in writing, under their hands, and shall cause one part of such order to be filed amongst the proceedings under the said commission, and shall deliver to each of the assignees under such commission a duplicate of such their order, which order of distribution shall contain an account of the time and place of making such order, and the sum total or quantum of all the debts proved under the commission, and the sum total of the money remaining in the hands of the assignee or assignees to be divided, and how many per cent. in particular is there ordered to be paid to every creditor of his debt; and the said assignee or assignees, in pursuance of such order, and without any deed or deeds of distribution to be made for the purpose, shall forthwith make such dividend and distribution accordingly, and shall take receipts in a book to be kept for the purpose, from each creditor, for the part or share of such dividend or distribution which he or they shall make and pay to each creditor respectively: and such order and receipt shall be a full and effectual discharge to such assignee for so much as he shall fairly pay, pursuant to such order as aforesaid.

SEC. 30. And be it further enacted, That within eighteen months next after the issuing of the commission the assignee or assignees shall make a second dividend of the bankrupt's estate and effects, in case the same were not wholly divided upon the first dividend, and shall cause due public notice to be given of the time and place the said commissioners intend to meet to make a second distribution of the bankrupt's estate and effects, and for the creditors who shall not before have proved their debts to come in and prove the same; and at said meeting the said assignees shall produce, on oath or solemn affirmation as aforesaid, their account of the bankrupt's estate and effects, and what upon the balance thereof shall appear to be in their hands shall, by like order of the commissioners, be forthwith divided amongst such of the bankrupt's creditors as shall have made due proof of their debts, in proportion to their several and respective debts, which second dividend shall be final, unless any suit at law or in equity be pending, or any part of the estate standing out that could not have been disposed of, or that the major part of the creditors shall not have agreed to be sold or disposed of, or unless some other or future estate or effects of the bankrupt shall afterwards come to or vest in the said assignees, in which cases the said assignees shall, as soon as may be, convert such future or other estate and effects into money, and shall within two months after the same be converted into money, by like order of the commissioners, divide the same among such bankrupt's creditors as shall have made due proof of their debt under such commission.

SEC. 31. And be it further enacted, That in the distribution of the bankrupt's effects there shall be paid to every one of the creditors a portion-rate according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or specialty, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bankrupt, (Provided, there be no execution executed upon any of the real or personal estate of such bankrupt before the time he or she became bankrupt) shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt.

SEC. 32. And be it further enacted, That the assignees shall keep one or more distinct book or books of account, wherein he or they shall duly enter all sums of money or effects which he or they shall have received or got into his or their possession, of the said bankrupt's estate, to which books of account every creditor who shall have proved his or her debt shall, at all reasonable times, have free resort and inspect the same as often as he or she shall think fit.

SEC. 33. And be it further enacted, That every bankrupt, not being in prison or custody, shall at all times after his surrender be bound to attend the assignees upon every reasonable notice, in writing, for that purpose, given or left at the usual place of his or her abode, in order to assist in making out the accounts of the said bankrupt's estate and effects, and to attend any court of record, to be examined touching the same, or such other business as the said assignee shall judge necessary, for which he shall receive three dollars per day.

SEC. 34. And be it further enacted, That all and every person and persons who shall become bankrupt as aforesaid, and who shall within the time limited by this act surrender him or herself to the commissioners, and in all things conform as in and by this act is directed, shall be allowed five per cent. upon the net produce of all the estate that shall be recovered in and received, which shall be paid unto him or her by the assignee or assignees, in case the net produce, to be paid as aforesaid so as such ten per cent. shall not, in the whole, creditors of said bankrupt who shall have proved their debts under such commission the amount of fifty per cent. on their said debts, respectively, and so as the said five per cent. shall not exceed, in the whole, the sum of five hundred dollars; and in case the net produce of the said estate shall, over and above the allowance hereafter mentioned, be sufficient to pay the said creditors seventy-five per cent. on the amount of their said debts, respectively, that then the said bankrupt shall be allowed ten per cent. on the amount of such net produce, to be paid as aforesaid so as such ten per cent. shall not, in the whole, exceed the sum of eight hundred dollars; and every such bankrupt shall be discharged from all debts by him or her due or owing at the time he or she became bankrupt, and all which were or might have been proved under the said commission; and in case any such bankrupt shall afterwards be arrested or prosecuted or impleaded, for or on account of any of the said debts, such bankrupt may appear without bail, and may plead the general issue, and give this act and the special matter in evidence. And the certificate of such bankrupt's conforming, and the allowance thereof, according to the directions of this act, shall be, and shall be allowed to be, sufficient evidence, prima facie of the party's being a bankrupt within the meaning of this act, and of the commission and other proceedings precedent to the obtaining such certificate, and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action can prove the said certificate was obtained unfairly and by fraud, or unless he can make appear any concealment of estate or effects by such bankrupt to the value of one hundred dollars. Provided, That no such discharge of a bankrupt shall release or discharge any person who was a partner with such bankrupt at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts from which such bankrupt was discharged as aforesaid.

SEC. 35. Provided always, and be it further enacted, That if the net proceeds of the bankrupt's estate, so to be discovered, recovered and received, shall not amount to so much as will pay all and every of the creditors of the said bankrupt who shall have proved their debts under the said commission, the amount of fifty per cent. on their debts respectively, after all charges first deducted, that then and in such case the bankrupt shall not be allowed five per centum on such estate as shall be recovered in, but shall have and be paid by the assignees so much money as the commissioners shall think fit to allow, not more than three hundred dollars, nor exceeding three per centum on the net proceeds of the said bankrupt's estate.

SEC. 36. Provided also, and be it further enacted, That no person becoming a bankrupt according to the intent and provisions of this act shall be entitled to a certificate of discharge, or to any of the benefits of the act, unless the commissioners shall certify under their hands to the judge of the district within which such commission issues that such bankrupt hath made a full discovery of his or her estate and effects, and in all things conformed him or herself to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of the said bankrupt's estate and effects, or unless the said judge should be of opinion that the said certificate was unreasonably denied by the commissioners; and unless two-thirds, in number and in value, of the creditors of the bankrupt, who shall be creditors for not less than fifty dollars respectively, and who shall have duly proved their debts under the said commission, shall sign such certificate to the judge, and testify their consent to the allowance of a certificate of discharge in pursuance of this act; which signing and consent shall be also certified by the commissioners; but the said commissioners shall not certify the same till they have proof by affidavit or affirmation, in writing, of such creditors, or of the persons respectively authorized for that purpose signing the said certificate; which affidavit or affirmation, together with the letter or power of attorney to sign, shall be laid before the judge of the district within which such commission issues, in order for the allowing the certificate of discharge, and the said certificate shall not be allowed unless the bankrupt make oath or affirmation in writing that the certificate of the commissioners and consent of the creditors thereunto were obtained fairly and without fraud; and any of

the creditors of the said bankrupt are allowed to be heard, if they shall think fit before the respective persons aforesaid, against the making or allowing of such certificates by the commissioners or judge.

SEC. 37. And be it further enacted, That if any creditor, or pretended creditor, of any bankrupt shall exhibit to the commissioners any fictitious or false debt or demand, with intent to defraud the real creditors of such bankrupt, and the bankrupt shall refuse to make discovery thereof and suffer the fair creditors to be imposed upon, he shall lose all title to the allowance upon the amount of his effects and to a certificate of discharge as aforesaid, nor shall he be entitled to the said allowance or certificate if he has lost at any one time fifty dollars, or in the whole three hundred dollars, after the passing of this act and within twelve months before he became a bankrupt, by any manner of gaming or wagering whatever.

SEC. 38. And be it further enacted, That if any bankrupt who shall have obtained his certificate shall be taken in execution or detained in prison on account of any debts owing before he became a bankrupt, by reason that judgment was obtained before such certificate was allowed, it shall be lawful for any of the judges of the court wherein judgment was so obtained, or for any court, judge or justice, within the district in which such bankrupt shall be detained, having powers to award or allow the writ of habeas corpus, on such bankrupt producing his certificate so as aforesaid allowed, to order any sheriff or gaoler who shall have such bankrupt in custody to discharge such bankrupt without fee or charge, first giving reasonable notice to the plaintiff, or his attorney, of the motion for such discharge.

SEC. 39. And be it further enacted, That every person who shall have bona-fide given credit to or taken securities, payable at future days, from persons who are or shall become bankrupts, not due at the time of such persons becoming bankrupt, shall be admitted to prove their debts and contracts as if they were payable presently, and shall have a dividend in proportion to the other creditors, discounting, where no interest is payable, at the rate of so much per centum per annum, as is equal to the lawful interest of the State where the debt was payable, and the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities as if such money had been due and payable before the time of his or her becoming bankrupt; and such creditors may petition for a commission, or join in petitioning.

SEC. 40. And be it further enacted, That in case any person committed by the commissioners' warrant shall obtain a habeas corpus, in order to be discharged and there shall appear any insufficiency in the form of the warrant, it shall be lawful for the court or judge before whom such party shall be brought by habeas corpus, by rule or warrant, to commit such persons to the same prison, there to remain until he shall conform as aforesaid, unless it shall be made to appear that he had fully answered all lawful questions put to him by the commissioners; or in case such person was committed for not signing his examination, unless it shall appear that the party had good reason for refusing to sign the same or that the commissioners had exceeded their authority in making such commitment; and in case the gaoler to whom such person shall be committed shall wilfully or negligently suffer such person to escape, or go without the doors or walls of the prison, such gaoler shall for such offense, being convicted thereof, forfeit a sum not exceeding three thousand dollars, for the use of the creditors.

SEC. 41. And be it further enacted, That the gaoler shall, upon the request of any creditor having proved his debt and showing a certificate thereof under the hands of the commissioners, which the commissioners shall give without fee or reward, produce the person so committed; and in case such gaoler shall refuse to show such person to such creditor requesting the same, such person shall be considered as having escaped, and the gaoler or sheriff so refusing shall be liable as for a wilful escape.

SEC. 42. And be it further enacted, That where it shall appear to the said commissioners that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or

assignees of the estate shall state the account between them, and one debt may be set off against the other, and what shall appear to be due on either side on the balance of such account after such set off, and no more, shall be claimed or paid on either side respectively.

SEC. 43. And be it further enacted, That it shall and may be lawful to and for the assignee or assignees of any bankrupt's estate and effects, under the direction of the commissioners, and by and with the consent of the major part in value of such of the said bankrupt's creditors as shall have duly proved their debts under the commission, and shall be present at any meeting of the said creditors, to be held in pursuance of due and public notice for that purpose given, to submit any difference or dispute for, on account of, or by reason or means of, any matter, cause, or thing whatsoever, relating to such bankrupt, or to his or her estate or effects, to the final end and determination of arbitrators to be chosen by the said commissioners, and the major part in value of such creditors as shall be present at such meeting as aforesaid, in such manner as the said assignee or assignees, under the direction and with the consent aforesaid, shall think fit and can agree; and the same shall be binding on the several creditors of the said bankrupt, and the said assignee or assignees are hereby indemnified for what they shall fairly do, according to the directions aforesaid.

SEC. 44. And be it further enacted, That the assignees shall be, and hereby are, vested with full power to dispose of all the bankrupt's estate, real and personal, at public auction or vendue, without being subject to any tax, duty, imposition, or restriction, any law to the contrary notwithstanding.

SEC. 45. And be it further enacted, That if after any commission of bankruptcy sued forth, the bankrupt happen to die before the commissioners shall have distributed the effects, or any part thereof, the commissioners shall nevertheless proceed to execute the commission as fully as they might have done if the party were living.

SEC. 46. And be it further enacted, That where any commission of bankruptcy shall be delivered to the commissioners therein named, to be executed, it shall and may be lawful for them before they take the oath or affirmation of qualification, to demand and take from the creditor or creditors prosecuting such commission a bond with one good security, if required, in the penalty of one thousand dollars, conditioned for the payment of the costs, charges and expenses which shall arise and accrue upon the prosecution of the said commission: Provided always, that the expenses so as aforesaid to be secured and paid by the petitioning creditor or creditors shall be repaid to him or them by the commissioner or assignees out of the first monies arising from the bankrupt's estate or effects, if so much be received therefrom.

SEC. 47. And be it further enacted, That the district judges in each district respectively shall fix a rate of allowance to be made to the commissioners of bankruptcy, as compensation of services to be rendered under the commission, and it shall be lawful for any creditor, by petition to the district judge, to except to any charge contained in the account of the commissioners: and the said judge, after hearing the commissioners, may in a summary way decide upon the validity of such exception.

SEC. 48. And be it further enacted, That all penalties given by this act for the benefit of the creditors shall be recovered by the assignee or assignees by action of debt, and the money so recovered, the charges of suit being deducted, shall be distributed towards payment of the creditors.

SEC. 49. And be it further enacted, That if any action shall be brought against any commissioner, or assignee or other person, having authority under the commission, for anything done and performed by force of this act, the defendant may plead the general issue, and give this act and the special matter in evidence; and in case of a non-suit, discontinuance, or verdict or judgment for him, he shall recover double costs.

SEC. 50. And be it further enacted, That if any estate, real or personal, shall descend, revert to, or become vested in any person after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate signed by the judge as aforesaid, all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them

assigned and conveyed to the assignee or assignees in fee simple or otherwise, in like manner as above directed, with the estate of the said bankrupt, at the time of the bankruptcy, and the proceeds thereof shall be divided among the creditors.

SEC. 51. And be it further enacted, That the said commissioners shall, once in every year, carefully file in the clerk's office of the district court all the proceedings had in every case before them, and which shall have been finished, including the commissions, examinations, dividends, entries and other determinations of the said commissioners, in which office the final certificate of the said bankrupt may also be recorded; all which proceedings shall remain of record in the said office, and certified copies thereof shall be admitted as evidence in all courts, in like manner as the copies of the proceedings of the said district court are admitted in other cases.

SEC. 52. And be it further enacted, That it shall and may be lawful for any creditor of such bankrupt to attend all or any of the examinations of said bankrupt, and the allowance of the final certificate, if he shall think proper, and then and there to propose interrogatories to be put by the judge or commissioners to the said bankrupt and others, and also to produce and examine witnesses and documents before such judge or commissioners, relative to the subject-matter before them. And in case either the bankrupt or creditor shall think him or herself aggrieved by the determination of the said judge or commissioners, relative to any material fact in the commencement or progress of the said proceedings, or in the allowance of the certificate aforesaid, it shall and may be lawful for either party to petition the said judge, setting forth such facts and the determination thereon, with the complaint of the party, and a prayer for trial by jury to determine the same, and the said judge shall, in his discretion, make order thereon, and reward a venire facias to the marshal of the district, returnable within fifteen days before him, for the trial of the facts mentioned in the said petition, notice whereof shall be given to the commissioners and creditors concerned in the same; at which time the trial shall be had, unless, on good cause shown, the judge shall give farther time, and judgment being entered on the verdict of the jury shall be final on the said facts, and the judge or commissioners shall proceed agreeably thereto.

SEC. 53. And be it further enacted, That the commissioners before the appointment of assignees, and the assignees after such appointment, may from time to time make such allowance out of the bankrupt's estate until he shall have obtained his final discharge, as in their opinion may be requisite for the necessary support of the said bankrupt and his family.

SEC. 54. And be it further enacted, That it shall be lawful for the major part in value of the creditors, before they proceed to the choice of assignees, to direct in what manner, with whom and where the monies arising by and to be received from time to time out of the bankrupt's estate shall be lodged, until the same shall be divided among the creditors, as herein provided; to which direction every such assignee and assignees shall conform as often as three hundred dollars shall be received.

SEC. 55. And be it further enacted, That every matter and thing by this act required to be done by the commissioners of any bankrupt shall be valid to all intents and purposes, if performed by a majority of them.

SEC. 56. And be it further enacted, That in all cases where the assignee shall prosecute any debtor of the bankrupt for any debt, duty or demand, the commission, or a certified copy thereof, and the assignment of the commissioners of the bankrupt's estate, shall be conclusive evidence of the issuing the commission and of the person named therein being a trader and bankrupt at the time mentioned therein.

SEC. 57. And be it further enacted, That every person obtaining a discharge from his debts, by certificate as aforesaid, granted under a commission of bankruptcy, shall not on any future commission be entitled to any other certificate than a discharge of his person only; unless the net proceeds of the estate and effects of such person so becoming bankrupt a second time shall be sufficient to pay seventy-five per cent. to his or her creditors on the amount of their debts respectively.

SEC. 58. And be it further enacted, That any creditor of a person against whom a commission of bankruptcy shall have been sued forth, and who shall lay his claim before the commissioners appointed in pursuance of this act, may at the same time declare his unwillingness to submit the same to the judgment of the said commissioners, and his wish that a jury may be impanelled to decide thereon: And in like manner the assignee or assignees of such bankrupt may object to the consideration of any particular claim by the commissioners, and require that the same should be referred to a jury. In either case such objection and request shall be entered on the books of the commissioners, and thereupon an issue shall be made up between the parties, and a jury shall be impanelled, as in other cases, to try the same in the circuit court for the district in which such bankrupt has usually resided. The verdict of such jury shall be subject to the control of the court, as in suits originally instituted in the said court, and when rendered, if not set aside by the said court, shall be certified to the commissioners, and shall ascertain the amount of any such claim, and such creditor or creditors shall be considered in all respects as having proved their debts under the commission.

SEC. 59. And be it further enacted, That the lands and effects of any person becoming bankrupt may be sold on such credit, and on such security, as a major part in value of the creditors may direct: Provided, nothing herein contained shall be allowed so to operate as to retard the granting the bankrupt's certificate.

SEC. 60. And be it further enacted, That if any person becoming bankrupt shall be in prison, it shall be lawful for any creditor or creditors, at whose suit he or she shall be in execution, to discharge him or her from custody, or if such creditor or creditors shall refuse to do so, the prisoner may petition the commissioners to liberate him or her, and thereupon, if in the opinion of the commissioners the conduct of such bankrupt shall have been fair, so as to entitle him or her in their opinion to a certificate, when by law such certificate might be given, it shall be lawful for them to direct the discharge of such prisoner, and to enter the same in their books, which being notified to the keeper of the gaol in which such prisoner may be confined shall be a sufficient authority for his or her discharge: Provided, that in either case, such discharge shall be no bar to another execution, if a certificate shall be refused to such bankrupt: And provided also, that it shall be no bar to a subsequent imprisonment of such bankrupt by order of the commissioners, in conformity with the provisions of this act.

SEC. 61. And be it further enacted, That this act shall not repeal or annul, or be construed to repeal or annul, the laws of any State now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may respect persons who are or may be clearly within the purview of this act, and whose debts shall amount in the cases specified in the second section thereof to the sums herein mentioned. And if any person within the purview of this act shall be imprisoned for the space of three months, for any debt or upon any contract, unless the creditors of such prisoner shall proceed to prosecute a commission of bankruptcy against him or her, agreeably to the provisions of this act, such debtor may and shall be entitled to relief, under any such laws for the relief of insolvent debtors, this act notwithstanding.

SEC. 62. And be it further enacted, That nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them.

SEC. 63. And be it further enacted, That nothing contained in this act shall be taken or construed to invalidate or impair any lien existing at the date of this act upon the lands or chattels of any person who may have become a bankrupt.

SEC. 64. And be it further enacted, That this act shall continue in force during the term of five years, and from thence to the end of the next session of congress thereafter, and no longer: Provided, that the expiration of this act shall not prevent the complete execution of any commission which may have been previously thereto issued.

*An Act to provide for the more convenient organization of the Courts of the United States.*

(February 13, 1801.)

Sec. 12. The said circuit courts respectively shall have cognizance, concurrently with the district courts, of all cases which shall arise, within their respective circuits, under the act to establish an uniform system of bankruptcy throughout the United States; and each circuit judge, within his respective circuit, shall and may perform, all and singular, the duties enjoined by the said act upon a judge of a district court: and the proceedings under a commission of bankruptcy which shall issue from a circuit judge shall, in all respects, be conformable to the proceedings under a commission of bankruptcy which shall issue from a district judge, mutatis mutandis.

*An Act to amend the judicial system of the United States.*

(April 29, 1802.)

Sec. 11. In all cases in which proceedings shall, on the said first day of July next, be pending under a commission of bankruptcy issued in pursuance of the aforesaid act, entitled "An act to provide for the more convenient organization of the courts of the United States," the cognizance of the same shall be, and hereby is, transferred to, and vested in, the district judge of the district within which such commission shall have issued, who is hereby empowered to proceed therein in the same manner and to the same effect as if such commission of bankruptcy had been issued by his order.

# APPENDIX C

## THE CANADIAN BANKRUPTCY ACT

### TOGETHER WITH RULES THEREUNDER

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#### A PROCLAMATION.

E. L. Newcombe, Deputy Minister of Justice, Canada.

Whereas in and by section 98 of an Act of the Parliament of Canada passed in the session thereof held in the 9th and 10th years of Our Reign, chaptered 36, and intituled "An Act respecting Bankruptcy," it is enacted that the said Act shall come into operation at a day to be named by Proclamation of Our Governor General in Council;

And whereas it is expedient and Our Privy Council has advised that a proclamation do issue bringing the said Act into force,—

Now know ye that by and with the advice of Our Privy Council for Canada we do hereby proclaim and direct that the said Act shall come into force and effect upon, from and after the first day of July in the year of Our Lord one thousand nine hundred and twenty.

Of all which our loving subjects and all others whom these presents may concern, are hereby required to take notice and to govern themselves accordingly.

In Testimony Whereof, We have caused these Our Letters to be made Patent, and the Great Seal of Canada to be hereunto affixed. Witness: Our Right Trusty and Right Entirely Beloved Cousin and Counsellor, Victor Christian William, Duke of Devonshire, Marquess of Hartington, Earl of Devonshire, Earl of Burlington, Baron Cavendish of Hardwicke, Baron Cavendish of Keighley, Knight of Our Most Noble Order of the Garter; One of Our Most Honourable Privy Council; Knight Grand Cross of Our Most Distinguished Order of St. Michael and Saint George; Knight Grand Cross of Our Royal Victorian Order; Governor General and Commander-in-Chief of Our Dominion of Canada.

At our Government House, in our city of Ottawa, this Thirty-first day of December, in the year of Our Lord one thousand nine hundred and nineteen, and in the tenth year of Our Reign.

By Command,

THOMAS MULVEY,  
Under Secretary of State.



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# THE CANADIAN BANKRUPTCY ACT OF 1919\*

## with General Rules thereunder

(Stat. of Can., 9-10 Geo. V, 1919, chap. 36, as amended by 10-11 Geo. V, 1920, chap. 34)

### AN ACT RESPECTING BANKRUPTCY.

[Assented to 7th July, 1919; amendments assented to 1st July, 1920.]

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

#### SHORT TITLE.

1. This Act may be cited as *The Bankruptcy Act*.

#### INTERPRETATION.

2. In this Act, unless the context otherwise requires or implies, the expressions,—
  - (a) "affidavit" includes statutory declaration and affirmation;
  - (b) "alimentary debt" means a debt incurred for necessities or maintenance;
  - (c) "appeal court" means the court having jurisdiction in bankruptcy, under this Act, on appeal;
  - (d) "assignment" includes conveyance;
  - (e) "assignor" means the maker of an assignment, whether under this Act such maker may lawfully make such assignment or such assignment may lawfully be made, or not;
  - (f) "authorized assignment" means an assignment made as provided in this Act to an authorized trustee by an authorized assignor of all his property for the general benefit of his creditors;
  - (g) "authorized assignor" means an insolvent assignor whose debts provable under this Act exceed five hundred dollars;
  - (h) "available act of bankruptcy" means an act of bankruptcy available for a bankruptcy petition at the date of the presentation of a petition on which a receiving order is made;
  - (i) "banker" includes any person owning, conducting or in charge of any bank or place where money or securities for money are received upon deposit or held subject to withdrawal by depositors;
  - (j) "bank" or "chartered bank" means an incorporated bank carrying on the business of banking under *The Bank Act*;
  - (k) "corporation" includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the provinces of Canada, and any incorporated company, wheresoever incorporated, which has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies;
  - (l) "court" or "the court" means the court which is invested with original jurisdiction in bankruptcy under this Act;
  - (m) "creditor" with relation to any meeting held under authority of this Act, shall, in the case of a corporation, include bond-holder, debenture holder, shareholder and member of the corporation, and each class thereof shall in meeting express its views or wishes in manner prescribed by General Rules.
  - (n) "debt provable in bankruptcy" or "probable debt" or "debt provable" includes any debt or liability by this Act made provable in bankruptcy or in proceedings under an authorized assignment;
  - (o) "debtor" includes any person, whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him, or any authorized assignment was made by him, (a) was personally present in Canada, or (b) ordinarily resided or had a place of residence in Canada, or (c) was carrying on business in Canada personally or by means of an agent or manager, or (d) was a corporation or a member of a firm or partnership which carried on business in Canada; and where the debtor is a corporation, as defined by this section, the *Winding-up Act*, chapter one hundred and forty-four of the Revised Statutes of Canada, 1906, shall not, except by leave of the Court, extend or apply to it notwithstanding anything in that Act contained, but all proceedings instituted under that Act before this Act comes into force or afterwards, by leave of the Court, may and shall

\* This Act took effect July 1, 1920. See proclamation on page 1565, *ante*.

be as lawfully and effectually continued under that Act as if the provisions of this paragraph had not been made;

(p) "discharge" means the release of a bankrupt or authorized assignor from all his debts provable in bankruptcy or under an authorized assignment save such as are excepted by this Act;

(q) "gazetted" means published in the *Canada Gazette*;

(r) "general rules" includes forms;

(s) "goods" includes all chattels personal and movable property;

(t) "insolvent person" and "insolvent" include a person, whether or not he has done or suffered an act of bankruptcy, (i) who is for any reason unable to meet his obligations as they respectively become due, or (ii) who has ceased paying his current obligations in the ordinary course of business, or (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process would not be sufficient, to enable payment of all his obligations, due and accruing due, thereout;

(u) "judge" means a judge of the court which is by this Act invested with original jurisdiction in bankruptcy;

(v) "judgment" or "execution" or "attachment" shall have operation as if by law the liability of married women thereon and thereunder were personal as well as proprietary;

(w) "local newspaper" means a newspaper published in and having a circulation throughout the bankruptcy district or division wherein the debtor has resided or carried on business for the longest period during the six months immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment;

(x) "locality" of a debtor (whether a bankrupt, assignor or person who has proposed a composition, extension or arrangement to or with his creditors) means either the place within a bankruptcy division or district whereat the debtor has carried on business at any time during the six months immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment, or where the greater portion of the property of such debtor is situate, or where the debtor resides;

(y) "oath" includes affirmation and statutory declaration;

(z) "ordinary resolution" means a resolution carried in manner provided by subsection fourteen of section forty-two of this Act;

(aa) "person" includes corporation and partnership;

(bb) "petition" means petition in bankruptcy;

(cc) "prescribed" means prescribed by General Rules within the meaning of this Act;

(dd) "property" includes money, goods, things in action, land, and every description of property, whether real or personal, movable or immovable, legal or equitable, and whether situate in Canada or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of, or incident to property as above defined;

(ee) "registrar" includes any other officer who performs duties like to those of a registrar;

(ff) "resolution" means ordinary resolution;

(gg) "secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor, or any part thereof, as security for a debt due or accruing due to him from the debtor;

(hh) "sheriff" includes bailiff and any officer charged with the execution of a writ or other process;

(ii) "special resolution" means a resolution decided by a majority in number of the creditors present, personally or by proxy, at a meeting of creditors and voting three-fourths in value of the proved debts on the resolution;

(jj) "trustee" or "authorized trustee" means, dependent upon the context, (a) one of the persons appointed by the Governor in Council, under authority of this Act as proper persons to be trustees in bankruptcy or otherwise hereunder, or (b) one of such persons named in a receiving order or in an authorized assignment to act, or who is otherwise hereunder authorized to act, as a trustee in bankruptcy, or under an authorized assignment or in connection with a proposal by a debtor for a composition, extension or arrangement to or with his creditors;

(kk) "wage-earner" means one who works for wages, salary, commission or hire at a rate of compensation not exceeding fifteen hundred dollars per year, and who does not on his own account carry on business.

#### PART I.

#### BANKRUPTCY AND RECEIVING ORDERS.

##### ACTS OF BANKRUPTCY.

3. A debtor commits an act of bankruptcy in each of the following cases:—

(a) If in Canada or elsewhere he makes an assignment of his property to a trustee or trustees for the benefit of his creditors generally, whether it is an assignment authorized by this Act or not;

(b) If in Canada or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof;

(c) If in Canada or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this Act be void as a fraudulent preference if he were adjudged bankrupt;

(d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of Canada, or, being out of Canada, remains out of Canada, or departs from his dwelling house or otherwise absents himself, or begins to keep house;

(e) If he permits any execution or other process issued against him under which any of his goods are seized, levied upon or taken in execution to remain unsatisfied until within four days from the time fixed by the sheriff for the sale thereof, or for fourteen days after such seizure, levy or taking in execution, or if the goods have been sold by the sheriff or the execution or other process has been held by him after written demand for payment without seizure, levy or taking in execution or satisfaction by payment for fourteen days, or if it is returned endorsed to the effect that the sheriff can find no goods whereon to levy or to seize or take; provided that where interpleader proceedings have been instituted in regard to the goods seized, the time elapsing between the date at which such proceedings were instituted and the date at which such proceedings are finally disposed of, settled or abandoned, shall not be taken into account in calculating any such period of fourteen days;

(f) If he exhibits to any meeting of his creditors any statement of his assets and liabilities which shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;

(g) If he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his goods with intent to defraud, defeat or delay his creditors or any of them;

(h) If he makes any bulk sale of his goods without complying with the provisions of any Bulk Sales Act applicable to such goods in force in the province within which he carries on business or within which such goods are at the time of such bulk sale.

#### PETITION AND RECEIVING ORDER.

4. (1) Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy a creditor may present to the court a bankruptcy petition.

(2) The petition shall be verified by affidavit and served on the debtor in the prescribed manner.

(3) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless,—

(a) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors amounts to five hundred dollars; and,

(b) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition.

(4) The petition shall be presented to the court having jurisdiction in the locality of the debtor.

(5) At the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may adjudge the debtor a bankrupt and in pursuance of the petition, make an order, in this Act called a receiving order, for the protection of the estate.

(6) If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or, in case an authorized assignment has been made, that the estate can be best administered under the assignment, or that for other sufficient cause no order ought to be made, it may dismiss the petition.

(7) Where the debtor appears on the petition, and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security (if any) being given as the court may require for payment to the petitioner of any debt which may be established against him in due course of law and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

(8) Where proceedings are stayed, the court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid.

(9) A creditor's petition shall not, after presentment, be withdrawn without the leave of the court.

(10) The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the service of the petition on which a receiving order is made against him.

(11) Provided, however, that nothing herein contained shall invalidate any proceedings by reason of the same having been commenced, taken or carried on in the wrong court, but the court may at any time transfer to the proper court the petition, application or proceedings, as the case may be.

#### INTERIM RECEIVER.

5. The court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint an authorized trustee as interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or of any part thereof.

#### TRUSTEE UNDER RECEIVING ORDER.

6. (1) On the making of a receiving order the trustee shall be thereby constituted receiver of the property of the debtor and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court and on such terms as the court may impose. But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

(2) The court may constitute as such receiver the trustee named in the petition or some other authorized trustee acting for or within the same bankruptcy district as such named trustee, having regard as far as the court deems just to the wishes of the creditors as proved by any sufficient evidence.

(3) On a receiving order being made against a debtor the property of the debtor shall forthwith pass to and vest in the trustee named therein and in any case of change of trustee, shall pass from trustee to trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever.

(4) The court, upon the application of the trustee or of a creditor proceeding under authority of an ordinary resolution carried by the votes of a majority in number of the known creditors, and upon satisfactory proof that the affairs of the debtor can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may at any time by order, transfer any proceedings under this Act, which are pending before it to another bankruptcy district or division wherein thereafter they may be carried on as effectually as if therein commenced, or the court in which any such proceedings were commenced may of itself, for like cause upon satisfactory proof that such proceedings were commenced in good faith and not for the purpose of attempting to vest authority over the estate involved in any particular authorized trustee or in the authorized trustee acting for or within any bankruptcy district, and provided that such proceedings were commenced within the province of the debtor's locality, order that such proceedings be retained in the bankruptcy district or division in which they were commenced, although the court so ordering may not be the court in which the proceedings ought to have been commenced.

#### STAY OF PROCEEDINGS.

7. (1) The court may, at any time after the presentation of a bankruptcy petition against a debtor, order that any action, execution or other proceeding against the person or property of the debtor pending in any court other than the court having jurisdiction in bankruptcy shall stand stayed until the last mentioned court shall otherwise order, whereupon such action, execution or other proceeding shall stand stayed accordingly; and the court in which any such proceedings are pending may likewise, on proof that a bankruptcy petition has been presented against the debtor, stay such proceedings until the first mentioned court shall otherwise order.

(2) On the making of a receiving order every such action, execution or other proceeding for the recovery of a debt provable in bankruptcy shall, subject to the provisions of the next preceding section as to the rights of secured creditors, stand stayed unless and until the court shall, on such terms as it may think just, otherwise order.

8. (1) The provisions of this Part of this Act shall not apply to wage-earners or to persons engaged solely in farming or the tillage of the soil.

(2) Notwithstanding anything in this Part appearing, no act or omission of a debtor in respect of any debt which,—

(a) was contracted or existed before the coming into operation of this Act; or

(b) is or is evidenced by any judgment or negotiable or renewable instrument the cause or consideration whereof (whether or not such judgment or instrument is a renewal or one of several renewals, had or made, before or after the coming into force of this Act, proceeding from the same cause or consideration) existed before the coming into operation of this Act; shall be deemed an available act of bankruptcy, nor shall any such debt be deemed sufficient to found the presentation of a bankruptcy petition, but it shall be provable in any proceedings otherwise founded under this Part, and otherwise.

## PART II.

## ASSIGNMENTS AND COMPOSITIONS.

## ASSIGNMENTS.

9. Any insolvent debtor whose liability to creditors, provable as debts under this Act, exceed five hundred dollars, may, at any time prior to the making of a receiving order against him, make to an authorized trustee appointed pursuant to section fourteen with authority in the locality of the debtor, an assignment of all his property for the general benefit of his creditors. An assignment so made is in this Act referred to as an "authorized assignment," and every assignment of his property other than an authorized assignment made by an insolvent debtor for the general benefit of his creditors shall be null and void.

10. Every authorized assignment shall be valid and sufficient if it is in the form provided by General Rules or in words to the like effect; and an assignment so expressed shall, subject to the rights of secured creditors, vest in the trustee all the property of the assignor at the time of the assignment excepting such thereof as is held by the assignor in trust for any other person and such thereof as is, against the assignor, exempt from execution or seizure under legal process in accordance with the laws of the province within which the property is situate and within which the debtor resides.

## GENERAL PROVISIONS RELATING TO RECEIVING ORDERS AND ASSIGNMENTS.

11. (1) Every receiving order and every authorized assignment made in pursuance of this Act shall take precedence over,—

(a) all attachments of debts by way of garnishment, unless the debt involved has been actually paid over to the garnishing creditor or his agent; and

(b) all other attachments, executions or other process against property, except such thereof as have been completely executed by payment to the execution or other creditor; but shall be subject to a lien for one only bill of costs, including sheriff's fees, which shall be payable to the garnishing, attaching or execution creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against property.

(2) An execution levied by seizure and sale on and of the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall, in all cases, acquire a good title to them against the authorized trustee.

(3) If an authorized assignment or a receiving order has been made, the sheriff or other officer of any court having seized property of the debtor under execution or attachment or any other process, shall, upon receiving a copy of the assignment certified by the trustee named therein or of the receiving order certified by the registrar or other clerical officer of the court which made it, forthwith deliver to the trustee all the property of the execution debtor in his hands, upon payment by the trustee of his fees and charges and the costs of the execution creditor who has a lien as in this section provided. If the sheriff has sold the debtor's estate or any part thereof, he shall deliver to the trustee the moneys so realized by him less his fees and the said costs.

(4) No receiving order or authorized assignment or other document made or executed under authority of this Act shall be within the operation of any legislative enactment now or at any time in force in any province of Canada relating to deeds, mortgages, judgments, bills of sale, chattel mortgages, property or registration of documents affecting title to or liens or charges upon property real or personal, immovable or movable; but a notice in the prescribed form of such receiving order or assignment and of the first meeting of creditors required to be called pursuant to this Act shall, as soon as possible after the making or executing of such receiving order or assignment, be gazetted, and not less than six days prior to said meeting be published in a local newspaper.

(5) The registrars of the courts of bankruptcy, the registrars of all land title and land registration offices and the recorders or clerks of all courts and offices wherein any documents of title relating to property are, according to the provisions of this Act or of the law of a province, registered, recorded or filed, shall keep on file for public reference a copy of each issue of the *Canada Gazette* which contains any notice or notices, of, incident to or resulting from receiving orders or authorized assignments referring to bankrupts or assignors who resided or carried on business in the province wherein the said courts or offices are situated; and they shall also keep an index book wherein they shall enter alphabetically the name of each bankrupt and authorized assignor who resided or carried on business in such province prior to the date of the receiving order or assignment and in respect of whose estate a notice may at any time hereafter appear in the said *Canada Gazette*.

(6) A fee not exceeding twenty-five cents for each search and fifty cents for each certificate may be charged by such registrar, recorder or clerk.

(7) The King's Printer, upon request of any person who is by this Act required to keep on file for public reference a copy of the *Canada Gazette*, shall regularly supply to such person, *gratis*, two copies of every issue of such *Gazette*.

(8) Every receiving order and every authorized assignment (or a true copy certified as to such order by the registrar or other clerical officer of the court which has made it, and as to such assignment certified by the trustee therein named) shall be registered or filed by or on behalf of the trustee in the proper office in every district, county or territory in which the whole or any part of any real or immovable property which the bankrupt or assignor owns or in which he has any interest or estate is situate.

(9) The proper office in this section referred to shall be the land titles office, land registration office, registry office or other office wherein, according to the law of the province, deeds or other documents of title to real or immovable property may or ought to be deposited, registered or filed.

(10) From and after such registration or filing or tender thereof within the proper office to the registrar or other proper officer, such order or assignment shall have precedence of all certificates of judgment, judgments operating as hypothecs, executions and attachments against land (except such thereof as have been completely executed by payment) within such office or within the district, county or territory which is served by such office, but subject to a lien for the costs of registration and sheriff's fees, of such judgment, execution or attaching creditors as have registered or filed within such proper office their judgments, executions or attachments.

(11) Every registrar or other officer for the time being in charge of such proper office to whom any trustee shall tender or cause to be tendered for registration or filing any such receiving order or authorized assignment shall register or file the same according to the ordinary procedure for registering or filing within such office documents which evidence liens or charges against real or immovable property (and subject to payment of the like fees) if at the time of the tender of such document for such purpose there be tendered annexed thereto as part thereof an affidavit substantially in the following form:—

"In the matter of *The Bankruptcy Act*."

"Canada

"Province of

"I

of

in the province of

, make oath and say—

"That the hereunto annexed document is tendered for registration (or filing) under the

"authority and direction of

of

"in the Province of

a duly appointed trustee under

"*The Bankruptcy Act*."

"Sworn before me at.....

"in the province of.....

"this day of.....19.."

(12) Such affidavit may be sworn before such registrar or other officer, or before a notary public or a commissioner authorized to administer oaths for use in any of the courts of the province.

(13) Any such registrar or other officer, who upon tender of any such receiving order or assignment or a copy thereof, certified as aforesaid, with the proper fees, and with the request that such document be registered or filed as aforesaid, shall refuse or omit to forthwith register or file the same in manner hereinbefore indicated or who shall omit or refuse to comply with provisions of subsection five of this section in so far as they are applicable to him, shall be guilty of an indictable offence punishable upon indictment or summary conviction by a fine not exceeding one thousand dollars or by imprisonment for a term not exceeding one year or to both such fine and such imprisonment.

(14) If the receiving order or assignment is not registered or filed, or if notice of said receiving order or assignment is not published within the time and in the manner prescribed by this section, an application may be made by any creditor or by the debtor to compel the registration or filing of the receiving order or assignment, or publication of such notice, and the judge shall make his order in that behalf and with or without costs, or upon the payment of costs by such person as he may, in his discretion, direct to pay the same; and such judge may, in his discretion, impose a penalty on the trustee for any omission, neglect or refusal to so register, file, or publish as aforesaid, in an amount not exceeding the sum of five hundred dollars, and such penalty when imposed shall forthwith be paid by the trustee personally into and for the benefit of the estate of the debtor.

(15) Saving and preserving the rights of innocent purchasers for value, neither the omission to publish or register as aforesaid, nor any irregularity in the publication or registration, shall invalidate the assignment or affect or prejudice the receiving order.

(16) The provisions of paragraphs one and ten of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in either of the provinces of Nova Scotia and New Brunswick prior to the coming into force of this Act, which became, under the laws of the province wherein it was registered, a charge, lien or hypothec upon such real or immovable property.

12. No advantage shall be taken of or gained by any creditor through any mistake, defect

or imperfection in any authorized assignment or in any receiving order or proceedings connected therewith, if the same can be amended or corrected; and any mistake, defect or imperfection may be amended by the court. Such amendment may be made on application of the trustee or of any creditor on such notice being given to other parties concerned as the judge shall think reasonable; and the amendment when made shall have relation back to the date of the assignment or petition in bankruptcy, but not so as to prejudice the rights of innocent purchasers for value.

#### COMPOSITION, EXTENSION OR SCHEME OF ARRANGEMENT.

13. (1) Where an insolvent debtor intends to make a proposal for,—

- (a) a composition in satisfaction of his debts; or,
- (b) an extension of time for payment thereof; or,
- (c) a scheme of arrangement of his affairs;

he may, either before or after the making of a receiving order against him or the making of an authorized assignment by him, require in writing an authorized trustee to convene at the office of such trustee a meeting of such debtor's creditors, for the consideration of such proposal. In case the convening of such meeting is required after a receiving order or assignment has been made only the trustee named in such order or assignment, or his successor, shall be authorized to convene it.

(2) The debtor shall at the time when he requires the convening of such meeting, or within such time as the trustee may then fix, lodge with the trustee,—

(a) a true statement of the debtor's affairs, including a list of his creditors, which list shall show the post office address of and the amount payable to each creditor, the whole statement being verified by the debtor by way of statutory declaration; and,

(b) a proposal in writing signed by the debtor, embodying the terms of the proposed composition, extension or scheme and setting out the particulars of any sureties or securities proposed.

(3) The trustee shall, when so required, convene a meeting of creditors, and shall, at least ten days before the meeting, send to each creditor a notice of the time and place of such meeting and a copy of the debtor's statement of affairs and of his proposal; if at such meeting a majority in number of creditors who hold two-thirds in amount of the proved debts resolve to accept the proposal, either as made or as altered or modified at the request of the meeting, it shall be deemed to be duly accepted by the creditors, and if approved by the court shall be binding on all the creditors.

(4) Any creditor who has proved his debt may assent to or dissent from the proposal by a letter to that effect addressed postage prepaid and registered to the trustee, prior to the meeting, and any such assent or dissent if received by the trustee at or prior to the meeting shall have effect as if the creditor had been present and had voted at the meeting.

(5) The trustee shall forthwith, if the proposal is accepted by the creditors, apply to the court to approve it.

(6) If creditors who hold ten per cent or more in amount of proved debts request the examination of the debtor, the trustee shall cause him to be examined under oath before the registrar or other officer appointed for that purpose by General Rules and his testimony to be taken down in writing. The testimony, so taken, may be read upon the hearing of the application for the approval of the composition or scheme of arrangement. The court if not satisfied with such testimony as so taken, may direct that the debtor attend before the court for the purpose of further examination.

(7) The court shall, before approving the proposal, hear a report of the trustee as to the terms thereof, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.

(8) If the court is of opinion that the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the court is required, where the debtor is adjudged bankrupt, to refuse his discharge, the court shall refuse to approve the proposal.

(9) If any facts are proved on proof of which the court would be required either to refuse, suspend or attach conditions to the debtor's discharge were he adjudged bankrupt, the court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than fifty cents on the dollar on all the unsecured debts provable against the debtor's estate.

(10) In any other case the court (subject to the provisions of subsection sixteen of this section) may either approve or refuse to approve the proposal.

(11) If the court approves the proposal, the approval may be testified by the seal of the court being attached to the instrument containing the terms of the proposed composition, extension or scheme, or by the terms being embodied in an order of the court.

(12) A composition, extension or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable under this Act, but shall not release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order or for



alimony, or under a judgment against him as co-respondent in a matrimonial case or for necessities of life or alimentary debts, except to such an extent and under such conditions as the court expressly orders in respect of such liability.

(13) The provisions of a composition, extension or scheme under this Act may be enforced by the court on application by any person interested, and any disobedience of an order of the court made on the application shall be deemed a contempt of court.

(14) If default is made in payment of any instalment due in pursuance of the composition, extension or scheme, or if it appears to the court, on satisfactory evidence, that the composition, extension or scheme cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the court was obtained by fraud, the court may, if it thinks fit, on application by the trustee or by any creditor, adjudge the debtor bankrupt, make a receiving order against him and annul the composition, extension or scheme, but without prejudice to the validity of any sale, disposition or payment duly made, or thing duly done, under or in pursuance of the composition, extension or scheme. Where a debtor is adjudged bankrupt under this subsection, any debt provable in other respects, which has been contracted before the adjudication, shall be provable in the bankruptcy.

(15) All parts of this Act shall, so far as the nature of the case and the terms of the composition, extension or scheme admit, apply thereto as if the terms "trustee," "bankruptcy," "bankrupt," "assignment," "authorized assignment," "assignor," "authorized assignor," "order" and "order of adjudication" included respectively a composition, extension or scheme of arrangement, a compounding, extending or arranging debtor and an order approving the composition, extension or scheme.

(16) No composition, extension or scheme shall be approved by the court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt or authorized assignor.

(17) The acceptance by a creditor of a composition, extension or scheme shall not release any person who under this Act would not be released by an order of discharge if the debtor had been adjudged bankrupt.

(18) Where a debtor has been adjudged bankrupt or has made an authorized assignment, and the court subsequently approves the composition, extension or scheme, it may make an order annulling the bankruptcy or authorized assignment and vesting the property of the debtor in him or in such other person as the court may appoint on such terms and subject to such conditions, if any, as the court may declare.

(19) Notwithstanding the acceptance and approval of a composition, extension or scheme, it shall not be binding on any creditor so far as regards a debt or liability from which, under the provisions of this Act, the debtor would not be discharged by an order of discharge in bankruptcy, unless the creditor assents, (as, for the purposes solely of proceedings relating to a composition, extension or scheme he may, notwithstanding any thing in this Act, so assent) to such composition, extension or scheme.

### PART III.

#### TRUSTEES AND ADMINISTRATION OF PROPERTY.

##### APPOINTMENT OF TRUSTEES.

14. (1) The Governor in Council may, upon application made to the Secretary of State of Canada, appoint sufficient fit and qualified persons to be trustees in bankruptcy and under authorized assignments and in proceedings by insolvent debtors to secure compositions, extensions and arrangements under this Act.

(2) Every such trustee shall be appointed with authority limited territorially to the whole or part of some one or more bankruptcy districts or divisions but he shall, for the purpose of obtaining possession of, and realizing upon, the assets of a bankrupt or authorized assignor of whom he is trustee, have power to act as such anywhere. Trustees appointed pursuant to this section are in this Act referred to as "authorized trustees."

(3) Every person who applies to be appointed an authorized trustee shall state in his application full particulars of his qualifications, ability and previous business experience.

(4) No authorized trustee shall accept any assignment or trust or execute any duties under this Act unless and until he has given security to the satisfaction of the Governor in Council, by bond or otherwise, executed to His Majesty as represented by such departmental officer as may be designated by the Governor in Council, for due accounting and for payment over and transfer of all moneys and property received by him as such trustee. If the security required is provided in cash the trustee shall be entitled to be paid thereon such interest as may be prescribed by General Rules.

(5) Such departmental officer shall be a special trustee for the creditors and for the estate.

(6) The amount of such security shall not, at any time, be less than ten thousand dollars.

(7) The said bond shall be kept in force by the trustee until such time as the appointment of the trustee is revoked or until he resign such appointment, and until the Governor in Council is satisfied that all moneys and properties received by the trustee have been duly accounted for and paid over to the parties entitled thereto, whereupon such bond shall be released and discharged.

(8) Unless the creditors, either at the first meeting, or at a meeting convened by notice to all the known creditors, resolve to dispense with further security, the trustee shall give security by bond or otherwise to the registrar of the court in the bankruptcy district or division of the debtor's locality, in an amount satisfactory to the registrar, for the due accounting and payment over and transfer of all moneys and properties received or to be received by him as such trustee in respect of the estate of such debtor, and such security shall be given within thirty days of the date of the receiving order or the making of the assignment. The expense incident to the furnishing of such security may be charged by the trustee to the estate of the debtor.

(9) Should the trustee be unable or fail to give the security required, in the manner and within the time hereinbefore provided, he shall within ten days from the expiration of the said thirty days, by notice in writing, convene a meeting of creditors for the purpose of appointing a new authorized trustee, and should he neglect or refuse to call such meeting, he shall be guilty of an offence and subject to the penalties provided by this Act.

(10) In case the trustee fails to give the security provided by this section and a new trustee is not appointed by the creditors, the court may, on the application of any creditor, appoint from among the available authorized trustees a new trustee.

15. (1) A majority in number of the creditors who hold half or more in amount of the proved debts of twenty-five dollars or upwards may, at their discretion, at any meeting of creditors, substitute any other authorized trustee acting for or within the same bankruptcy district for the trustee named in the receiving order or to whom an authorized assignment has been made.

(2) An authorized trustee may be removed and another substituted or an additional authorized trustee may be appointed for cause, by the court.

(3) When a new trustee is appointed or substituted, all the property and estate of the debtor shall forthwith vest in the new trustee without any conveyance or transfer, and he shall gazette a notice of the appointment or substitution and register an affidavit of his appointment in the office of the registrar of the court from which the receiving order was issued, or in the case of an authorized assignment, in every office in which the original assignment or copy or counterpart thereof was lodged, registered or filed. Registration of such affidavit in any land registration district, land titles office, registry office or other land registration office, or lodging or filing such affidavit as aforesaid, shall have the same effect as the registration, lodging or filing of a conveyance or of a transfer to the new trustee.

(4) The new trustee shall pay to the removed trustee, out of the funds of the estate, his proper remuneration and disbursements, which shall be ascertained as provided by section forty of this Act.

(5) No authorized trustee shall be bound to accept an authorized assignment or to act as trustee in matters relating to assignments or receiving orders or to compositions, extensions, or arrangements by debtors, if, in his opinion, the realizable value of the property of the debtor is not sufficient to provide the necessary disbursements and a reasonable remuneration for the trustee, unless and until the trustee has been paid or tendered a sum sufficient to defray such disbursements and remuneration.

#### OFFICIAL NAME.

16. (1) The official name of an authorized trustee acting in bankruptcy or authorized assignment proceedings shall be "The Trustee of the Property of..... a Bankrupt (or Authorized Assignor)" (inserting the name of the bankrupt or assignor), and by that name the trustee may in any part of Canada or elsewhere hold property of every description, make contracts, sue or be sued, enter into any engagement binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office.

(2) The official name of an authorized trustee acting with respect to proceedings by a debtor for a composition of, or extension of time for the payment of, his debts, or an arrangement of his affairs shall be "The Trustee acting in re the proposal of ..... (insert the name of the debtor) for a composition of his debts" or "arrangement of his affairs."

#### DUTIES AND POWERS OF TRUSTEES.

17. (1) The trustee shall, as soon as may be, take possession of the deeds, books and documents of the debtor and all other parts of his property capable of manual delivery.

(2) The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the debtor, be in the same position as if he were a receiver of

the property, appointed by the court, and the court may, on his application enforce such acquisition or retention accordingly.

(3) Unless otherwise directed in writing by the inspectors, the trustee shall forthwith, on the making of a receiving order or execution of an authorized assignment, insure and keep insured in his official name until sold or disposed of by him all the insurable property of the debtor, to the full insurable value thereof, in insurance companies duly authorized to carry on business in the province wherein the insured property is situate.

(4) All insurance covering property of the debtor in force at the date of the making of such receiving order or execution of such assignment shall, immediately upon such making or executing, and without any notice to the insurer or other action on the part of the trustee, and notwithstanding any statute or rule of law or contract or provision to the contrary effect, become and be, in the event of loss suffered, payable to the trustee, as fully and effectually as if the name of the trustee were written in the policy or contract of insurance as that of the insured, or as if no change of title or ownership had come about and the trustee were the insured.

18. Subject to the provisions of this Act, an authorized trustee may do all or any of the following things:—

(a) Give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof;

(b) Prove, rank, claim and draw a dividend in respect of any debt due to the debtor;

(c) Exercise any powers the capacity to exercise which is vested in the trustee under this Act, and execute any powers of attorney, deeds and other instruments for the purpose of carrying into effect the provisions of this Act.

19. (1) Where any property of the debtor vesting in an authorized trustee consists of patented articles or goods which were sold to the debtor subject to any restrictions or limitations, the trustee shall not be bound by any such restrictions or limitations but may sell and dispose of any such patented articles, or goods as hereinbefore provided, free and clear of any such restrictions or limitations.

(2) If the manufacturer or vendor of any such patented articles or goods objects to the disposition of them by the trustee as aforesaid and gives to the trustee notice in writing of such objection within five days after the date of the receiving order or authorized assignment, such manufacturer or vendor shall have the right to purchase such patented articles or goods at the invoice prices thereof, subject to any reasonable deduction for depreciation or deterioration.

(3) Where the property of a bankrupt or authorized assignor comprises the copyrights in any work or any interest in such copyright, and he is liable to pay to the author of the work royalties or a share of the profits in respect thereof, the trustee shall not be entitled to sell, or authorize the sale of, any copies of the work, or to perform or authorize the performance of the work, except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt or authorized assignor, nor shall he, without the consent of the author or of the court, be entitled to assign the right or transfer the interest or to grant any interest in the right by license, except upon terms which will secure to the author payments by way of royalty or share of the profits at a rate not less than that which the bankrupt or authorized assignor was liable to pay.

20. (1) The trustee may, with the permission in writing of the inspectors, do all or any of the following things:—

(a) Sell all or any part of the property of the debtor (including the goodwill of the business, if any, and the book debts due or growing due to the debtor), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

(b) Carry on the business of the debtor, so far as may be necessary for the beneficial winding-up of the same;

(c) Bring, institute, or defend any action or other legal proceeding relating to the property of the debtor;

(d) Employ a solicitor or other agent to take any proceedings or do any business, which may be sanctioned by the inspectors;

(e) Accept as the consideration for the sale of any property of the debtor a sum of money payable at a future time subject to such stipulations as to security and otherwise as the inspectors think fit;

(f) Mortgage or pledge any part of the property of the debtor for the purpose of raising money for the payment of his debts;

(g) Refer any dispute to arbitration, compromise any debts, claims and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the debtor and any person who may have incurred any liability to the debtor, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on;

(h) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable against the estate;

(i) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the debtor, made or capable of being made on the trustee by any person or by the trustee on any person;

(j) Divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold.

(2) The permission given for the purposes of this section shall not be a general permission to do all or any of the above mentioned things but shall only be a permission to do any particular thing or things for which permission is sought in the specified case or cases.

(3) (a) All sales of property made by the trustee shall vest in the purchaser all the legal and equitable estate of the debtor therein;

(b) in the province of Quebec, if the sale has been made at public auction at the place prescribed and after advertisement as required for the sale of immovable property by sheriff, in the district or place where such immovable property is situate, the sale made by the trustee shall have the same effect as to mortgages, hypothecs, privileges or other real rights then existing thereon as if the same had been made by the sheriff in the said province under a writ of execution issued in the ordinary course, and the title conveyed by such sale in the said province shall have equal validity with a title created by sheriff's sale, and the conveyance of the trustee shall have the same effect as a sheriff's deed in the said province. Such sale shall be subject to the contribution to the building and jury fund provided for in the case of sheriff's sales. In case of false bidding the same recourse as in case of sheriff's sale may be exercised against the false bidder in the manner prescribed by General Rules.

21. The trustee, with the permission in writing of the inspectors, may appoint the debtor himself to superintend the management of the property of the debtor or any part thereof, or carry on the trade (if any) of the debtor for the benefit of his creditors, and in any other respect to aid in administering the property in such manner and on such terms as the trustee may direct, and may, with like permission, make from time to time such allowance as he may think just to the debtor out of his property for the support of the debtor and his family, or in consideration of his services, if he is engaged in winding-up his estate, but any such allowance may be reduced by the court.

22. (1) Where the trustee has seized or disposed of any property in the possession or on the premises of a debtor against whom a receiving order has been made or by whom an authorized assignment has been made, without notice of any claim by any person in respect of such property and it is thereafter made to appear that the property was not at the date of the making of said receiving order or assignment the property of the debtor, the trustee shall not be personally liable for any loss or damage arising from such seizure or disposal sustained by any person claiming such property, nor for the costs of any proceedings taken to establish a claim thereto, unless the court is of opinion that the trustee has been guilty of negligence in respect of the same.

(2) Where any goods of a debtor against whom a receiving order has been made or by whom an authorized assignment has been made, are held by any person by way of pledge, pawn, or other security, it shall be lawful for the trustee, after giving notice in writing of his intention to do so, to inspect the goods, and, where such notice has been given, such person as aforesaid shall not be entitled to realize his security until he has given the trustee a reasonable opportunity of inspecting the goods and of exercising his right of redemption if he thinks fit to do so.

23. The authorized trustee of a bankrupt or assignor shall keep, in manner prescribed, proper books, in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor of the bankrupt or authorized assignor may, subject to the control of the court, personally or by his agent, inspect any such books.

24. (1) The authorized trustee of a bankrupt or assignor shall from time to time report,—

(a) when required by the inspectors, to every creditor; and,

(b) when required by any specific creditor, to such creditor,

showing the condition of the debtor's estate, the moneys on hand, if any, and particulars of any property remaining unsold. The trustee shall be entitled to charge against the estate of the debtor, for the preparation and delivery of any such report, only his actual disbursements.

(2) The authorized trustee of a bankrupt or assignor (but not the trustee under a composition, extension or arrangement of a debtor's debts or affairs) shall promptly after their receipt or preparation mail to the Dominion Statistician, Department of Trade and Commerce, Ottawa, a true copy of,—

(a) the notice referred to in subsection four of section eleven of this Act;

(b) the statement referred to in subsection one of section fifty-four of this Act;

- (c) the abstract of receipts and disbursements and the dividend sheet referred to in subsection two of section thirty-seven of this Act;
- (d) every order made by the court upon the application for discharge of any bankrupt or authorized assignor; and,
- (e) the statement prepared by the trustee upon which a final dividend is declared.
- (3) Any person shall be entitled to examine and make copies of all or any of the documents mentioned in subsection two hereof, which are in the possession of the trustee.

#### ADMINISTRATION OF ESTATE.

25. The property of the debtor divisible amongst his creditors (in this Act referred to as the property of the debtor) shall not comprise the following particulars:—

- (i) Property held by the debtor in trust for any other person;
- (ii) Any property which as against the debtor is exempt from execution or seizure under legal process in accordance with the laws of the province within which the property is situate and within which the debtor resides.

But it shall comprise the following particulars:—

(a) All such property as may belong to or be vested in the debtor at the date of the presentation of any bankruptcy petition or at the date of the execution of an authorized assignment, and, in the case of a bankrupt, all property which may be acquired by or devolve on him before his discharge; and,

(b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of the property as might have been exercised by the debtor for his own benefit at the date of said petition or assignment, or, in the case of such bankrupt, before his discharge.

26. (1) No property of an estate of a bankrupt or of an authorized assignor shall be removed out of the province where such property was at the date when any receiving order or authorized assignment was made, without the consent in writing of the inspectors or the order of the court in which proceedings under this Act are being carried on or within the jurisdiction of which such property is situate.

(2) The trustee shall deposit in a chartered bank the proceeds of the sale of any property of the estate of the bankrupt or the authorized assignor and all other moneys realized on account of any trust estate which he is administering under this Act and he shall not withdraw or remove therefrom, without the consent in writing of the inspectors or the order of the court, any such moneys, except for payment of dividends and other charges incidental to the administration of the estate.

(3) No trustee in a bankruptcy or under any authorized assignment or composition or scheme of arrangement shall pay any sums received by him as trustee into his private banking account.

27. If the trustee is directed to continue the business of a debtor he may incur obligations and make necessary or advisable advances, which obligations and advances so incurred or made shall be discharged or repaid to the trustee out of the assets of the debtor in priority to the claims of the creditors. Provided that,—

(a) the creditors or inspectors may by resolution limit the amount of the obligations or advances which may be made or paid by the trustee in the continuance of the business or the period of time for the continuance of the business; and,

(b) the trustee shall not be under obligation to continue the business if in his opinion the realizable value of the assets of the debtor is insufficient to fully protect him against possible loss from so doing, and if the creditors, upon demand made by the trustee, neglect or refuse to secure him against such possible loss.

28. (1) The law of set-off shall apply to all claims made against the estate, and also to all actions instituted by the trustee for the recovery of debts due to the debtor in the same manner and to the same extent as if the debtor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences.

(2) If any debtor who has made an authorized assignment or against whom a receiving order has been made, owes or owed debts both individually and as a member of one or more different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other or others after all the creditors of such other estate or estates have been paid in full.

#### SETTLEMENT AND PREFERENCES.

29. (1) Any settlement of property hereafter made, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt or insolvent or makes an authorized assignment within one year after the date of the settlement, be void against the trustee in the bankruptcy or of the assignment and shall, if the settlor becomes bankrupt or insolvent or makes an

assignment as aforesaid at any subsequent time within five years after the date of the settlement, be void against such trustee, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof.

(2) Any covenant or contract hereafter made by any person (hereinafter called "the settlor") in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband or children, or for the future settlement on or for the settlor's wife or husband or children, of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt or makes an authorized assignment as aforesaid, and the covenant or contract has not been executed at the date of the petition in bankruptcy or said assignment, be void against such trustee except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy or assignment proceedings under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied.

(3) Any payment of money hereafter made (not being payment of premiums on a policy of life insurance in favour of the husband, wife, child or children of the settlor) or any transfer of property hereafter made by the settlor in pursuance of such a covenant or contract as aforesaid, shall be void against the trustee unless the person to whom the payment or transfer was made prove either,—

(a) that the payment or transfer was made more than six months before the date of the petition in bankruptcy or the date of the authorized assignment; or,

(b) that at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred; or,

(c) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant or contract and was made within three months after the money or property came into the possession or under the control of the settlor;

but, in the event of any such payment or transfer being declared void, the person to whom it was made shall be entitled to claim for dividend under or in respect of the covenant or contract in like manner as if it had not been executed at the date of the said petition or assignment.

(4) "Settlement" shall, for the purpose of this section, include any conveyance or transfer of property.

30. (1) Where a person engaged in any trade or business makes an assignment to any other person of his existing or future book debts, or any class or part thereof, and is subsequently adjudicated bankrupt or makes an authorized assignment, the assignment of book debts shall be void against the trustee in the bankruptcy, or under the authorized assignment, as regards any book debts which have not been paid at the date of the petition in bankruptcy or of the authorized assignment, unless there has been compliance with the provisions of any statute which now is or at any time hereafter may be in force in the province wherein such person resides or is engaged in said trade or business as to registration, notice and publication of such assignments. Provided that nothing in this section shall have effect so as to render void any assignment of book debts, due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made *bona fide* and for value, or in any authorized assignment.

(2) For the purposes of this section "assignment" includes assignment by way of security and other charges on book debts.

31. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, incurring, taking, paying or suffering the same, or if he makes an authorized assignment, within three months after the date of the making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy or under the authorized assignment.

(2) If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with such view as aforesaid whether or not it was made voluntarily or under

pressure and evidence of pressure shall not be receivable or avail to support such transaction.

(3) For the purpose of this section, the expression "creditor" shall include a surety or guarantor for the debt due to such creditor.

32. (1) Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy or of an authorized assignment on an execution, attachment or other process against property, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy or an authorized assignment,—

- (a) any payment by the bankrupt or assignor to any of his creditors;
- (b) any payment or delivery to the bankrupt or assignor;
- (c) any conveyance or transfer by the bankrupt or assignor for adequate valuable consideration;

(d) any contract, dealing, or transaction by or with the bankrupt or assignor for adequate valuable consideration;

provided that both the following conditions are complied with, namely:—

(i) that the payment, delivery, conveyance, assignment, transfer, contract, dealing, or transaction, as the case may be, is in good faith and takes place before the date of the receiving order or authorized assignment; and,

(ii) that the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, transfer, contract, dealing or transaction was made, executed or entered into, has not at the time of the payment, delivery, conveyance, assignment, transfer, contract, dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt or assignor before that time.

(2) The expression "adequate valuable consideration" in paragraph (c) of this section means a consideration of fair and reasonable money value with relation to that of the property conveyed, assigned or transferred, and in paragraph (d) hereof means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

33. If a person in whose favour any settlement of property, conveyance or transfer which is void under this Act has been made, shall have sold, disposed of, realized on or collected the property so conveyed or transferred, or any part thereof, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee as such, who may recover such property or the value thereof from the person in whose favour such settlement of property, conveyance or transfer was made or from any other person to whom the person in whose favour such settlement of property, conveyance or transfer was made may have resold, redispensed of or paid over the proceeds of such property as fully and effectually as the trustee could have recovered the same if it had not been so sold, disposed of, realized on or collected. Provided that where any person to whom such property has been sold or disposed of shall have paid or given therefor in good faith fair and reasonable consideration he shall not be subject to the operation of this section but the trustee's recourse shall be solely against the person in whose favour such settlement was made for recovery of the consideration so paid or given or the value thereof; and further provided that in case the consideration payable for or upon any sale or resale of such property or any part thereof shall remain unsatisfied the trustee shall be subrogated to the rights of the vendor to compel payment or satisfaction.

34. (1) All transactions by a bankrupt with any person dealing with him *bona fide* and for value, in respect of property whether real or personal, acquired by the bankrupt after the making of a receiving order shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction. For the purposes of this subsection, the receipt of any money, security, or negotiable instrument, from or by the order or direction of a bankrupt by his banker, and any payment and any delivery of any security or negotiable instrument made to, or by the order or direction of a bankrupt by his banker, shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value.

(2) Where a banker has ascertained that a person having an account with him is an undischarged bankrupt, then, unless the banker is satisfied that the account is on behalf of some other person, it shall be his duty forthwith to inform the trustee in the bankruptcy of the existence of the account, and thereafter he shall not make any payments out of the account, except under an order of the court or in accordance with instructions from the trustee in the bankruptcy, unless by the expiration of one month from the date of giving the information no instructions have been received from the trustee.

35. If at any time a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the bankrupt's or authorized assignor's estate, and the trustee, under the direction of the creditors or inspectors, refuses or neglects to take such proceeding after being duly required to do so, the creditor may, as of right, obtain from

the court an order authorizing him to take proceedings in the name of the trustee, but at his own expense and risk, upon such terms and conditions as to indemnity to the trustee as the court may prescribe, and thereupon any benefit derived from the proceedings shall, to the extent of his claim and full costs, belong exclusively to the creditor instituting the same; but if, before such order is granted, the trustee shall, with the approval of the inspectors, signify to the court his readiness to institute the proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceedings, if instituted within such time, shall belong to the estate.

#### CONTRIBUTORIES TO INSOLVENT CORPORATIONS.

36. (1) This section shall apply only to corporations which have become bankrupt or authorized assignors under this Act.

(2) Every shareholder or member of a corporation or his representative shall be liable to contribute the amount unpaid on his shares of the capital or on his liability to the corporation or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company or otherwise; such shareholder or member will hereinafter be referred to as the "contributory."

(3) The amount which the contributory is liable to contribute shall be deemed an asset of the corporation and a debt payable to the trustee forthwith upon the making of a receiving order against the corporation or on the execution by the corporation of an assignment for the general benefit of creditors.

(4) If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the corporation or to its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the corporation for the purposes of this Act and shall be liable to contribute as aforesaid to the extent of his liabilities to the corporation or its members or creditors independently of this Act.

(5) The amount which he is so liable to contribute shall be deemed an asset and a debt as aforesaid.

(6) The trustee may from time to time make demand on any contributory requiring him to pay to the trustee within thirty days from and after the date of the service of such demand, the amount for which such person is so liable to contribute or such portion thereof as the trustee deems necessary or expedient. Any such demand shall be deemed to have been properly served if delivered personally to the contributory or if a copy of the same is mailed in a registered prepaid letter addressed to the contributory at his last known address or at the address shown in or by the stock register or other books of the corporation.

(7) If the contributory disputes liability, either in whole or in part, he shall within fifteen days from the service of such demand give notice in writing to the trustee stating therein what portion of the demand is disputed and setting out his grounds of defence and he shall not thereafter, unless by leave of the court, be permitted to plead in any action or proceeding brought against him by the trustee any grounds of defence of which he has not notified the trustee within said fifteen days.

(8) If at the expiration of thirty days from the date of the service of such demand the contributory has not paid to the trustee the required amount, the trustee may take proceedings against the contributory for the recovery thereof in the manner provided by General Rules.

(9) If the contributory considers the demand excessive or unjust he may apply to the court to reduce or disallow it.

(10) If the court considers the demand to be grossly excessive or unjust it may order the trustee to pay personally the costs of any such application.

(11) The court shall, on the application of any contributory, adjust the rights of the contributories among themselves without the intervention of the trustee and without expense to the estate.

#### DIVIDENDS.

37. (1) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the trustee in bankruptcy or in authorized assignment proceedings shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts. Such dividend as can be paid shall be so paid within six months from the date of the receiving order or assignment, and earlier, if required by the inspectors. Thereafter a further dividend shall be paid whenever the trustee has sufficient moneys on hand to pay to the creditors ten per cent, and more frequently if required by the inspectors, until the estate is wound up and disposed of.

(2) So soon as a final dividend sheet is prepared the trustee shall send by mail to every creditor (1) a notice of the fact, (2) an abstract of his receipts and expenditures as trustee which abstract shall indicate what amount of interest has been received by the trustee for moneys in his hands, and (3) a copy of the dividend sheet with notice thereon (a) of the claims objected to and (b) whether any reservation has been made therefor. After the expiry of fifteen days from the date of the mailing of the last of said notices, abstracts and



dividend sheets, dividends on all debts not objected to up to the time of payment shall be paid.

(3) Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive, before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

(4) Where one partner of a firm is adjudged bankrupt, or makes an authorized assignment, a creditor to whom the bankrupt is indebted jointly with the other partner of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt or authorized assignor until all the separate creditors have received the full amount of their respective debts.

(5) Where joint and separate properties are being administered, dividends of the joint and separate properties shall, on the application of any person interested, be declared together, and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to work done for and the benefit received by each property.

(6) When the trustee has realized all the property of the bankrupt, or authorized assignor, or so much thereof as can, in the joint opinion of himself and of the inspectors, be realized without needlessly protracting the trusteeship, he shall declare a final dividend, but before so doing he shall give notice by registered prepaid letter posted to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the court within a time limited by the notice (which shall be within thirty days after the mailing or service of the notice), he will proceed to make a final dividend without regard to their claims.

(7) After the expiration of the time so limited, or, if the court on application by any such claimant grants him further time for establishing his claim, then on the expiration of such further time, the property of the bankrupt, or authorized assignor shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons.

(8) Where a trustee has published the notice in the form and in the manner provided by section eleven, subsection four, of this Act, and has mailed prepaid and registered a circular to each creditor of the bankrupt or assignor of whom he has notice or knowledge as provided by section forty-two, subsection two, of this Act, such trustee shall at the expiration of thirty days from the date of the mailing of the last of the said circulars or from the date of last publication (whichever date should last occur) be at liberty to distribute the proceeds of the estate of the bankrupt or assignor among the parties entitled thereto, having regard only to the claims of which the trustee has then notice, and shall not be liable for the proceeds of the estate or assets or any part thereof so distributed to any person of whose claim the trustee has not notice at the time of the distribution thereof. The trustee shall, not later than six months after he is at liberty pursuant to the provisions of this section to distribute the proceeds of the estate of the bankrupt or assignor, pay to the Receiver General of Canada all declared but unpaid dividends remaining in his hands, and shall at the same time provide a list of the names and post office addresses, so far as known, of the creditors entitled, showing the respective amounts payable to the respective creditors. The Receiver General shall, thereafter, upon application made, pay to any unpaid creditor his proper dividends as shown on this list, and such payment shall have effect as if made by the trustee.

(9) No action for a dividend shall lie against the trustee but if the trustee refuses to pay any dividend, the court may, if it thinks fit, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld and the costs of the application.

38. The debtor shall be entitled to any surplus remaining after payment in full of his creditors with interest as by this Act provided and of the costs, charges and expenses of the proceedings under the bankruptcy petition or under the authorized assignment.

#### APPEALS FROM DECISIONS OF TRUSTEE.

39. If the debtor or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

#### REMUNERATION OF TRUSTEE.

40. (1) The trustee in bankruptcy or in any other proceedings under this Act shall receive such remuneration as shall be voted to him by the creditors at any general meeting.

(2) Where the remuneration of the trustee has not been fixed under the next preceding subsection before the final dividend, the trustee may insert in the final dividend sheet and retain as his remuneration a sum not exceeding five per cent of the cash receipts, subject to reduction by the court upon application of any creditor or of the debtor.

(3) The remuneration of the trustee for all services shall not under any circumstances exceed five per cent of the cash receipts.

(4) The disbursements of a trustee shall in all cases be taxed by the prescribed authority unless such taxation is waived either by creditors at a general meeting called prior to the declaration of the final dividend, or by the inspectors.

#### DISCHARGE OF TRUSTEE.

41. (1) When the affairs of an estate have been fully administered, or, for sufficient cause, before full administration, an authorized trustee may, upon his own request, be discharged from further performance of all or any of his duties and obligations with respect to such estate.

(2) Such discharge may be granted by order of the court.

(3) The grant of such discharge (whether full or partial) shall operate as a release of the special security provided pursuant to subsection eight of section fourteen.

(4) The trustee shall finally dispose of all books and papers of the estate of the bankrupt or authorized assignor in manner prescribed by General Rules.

#### PART IV.

##### CREDITORS.

##### MEETINGS OF CREDITORS.

42. (1) As soon as may be after the making of a receiving order against a debtor or after the making of an authorized assignment by a debtor, a general meeting of creditors (in this Act referred to as the first meeting of creditors) shall be held for the purpose of considering the affairs of the debtor and to appoint inspectors and give directions to the trustee with reference to the disposal of the estate.

(2) It shall be the duty of the trustee to inform himself, by reference to the debtor and his records and otherwise, of the names and addresses of the creditors, and within five days from the date of the receiving order or assignment, to mail prepaid and registered to every creditor known to him a circular calling the first meeting of creditors at his office or some other convenient place to be named in the notice, for a date not later than fifteen days after the mailing of such notice.

(3) The trustee may at any time call a meeting of creditors, and he shall do so whenever requested in writing by twenty-five per cent in number of the known creditors holding twenty-five per cent in value of the known claims. But, after the first meeting he shall not be under obligation to give notice of any meeting to any creditors other than those who have proved their debts.

(4) Meetings other than the first thereof shall be called by mailing or otherwise giving notice of the time and place thereof to each creditor at the address given in his proof of claim.

(5) At all meetings the chairman shall be such person as the meeting by resolution appoints, and he may with the consent of the meeting adjourn the meeting from time to time and from place to place.

(6) A meeting shall not be competent to act for any purpose except the election of a chairman of and the adjournment of the meeting, unless there are present or represented at least three creditors, or all the creditors if their number does not exceed three.

(7) If within half an hour from the time appointed for the meeting a quorum of creditors is not present or represented, the meeting shall be adjourned to the same day in the following week at the same time and place, or to such other day as the chairman may appoint, not being less than seven nor more than twenty-one days.

(8) The chairman shall cause minutes of the proceedings at the meeting to be drawn up and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting.

(9) A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt provable in bankruptcy or under an authorized assignment to be due to him from the debtor, and the proof has been duly lodged with the trustee before the time appointed for the meeting.

(10) For the purpose of voting, a secured creditor shall unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security.

(11) A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and against whom a receiving order has not been made, or by whom an authorized assignment has not been made, as a security in his hands, and to estimate the value thereof, and for the purpose of voting, but not for the purposes of dividend, to deduct it from his proof.

(12) The chairman of a meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the court. If he is in doubt whether the proof of a creditor should be admitted or rejected, he shall mark the proof as objected to, and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

(13) A creditor may vote either in person or by proxy deposited with the trustee at or before the meeting at which it is to be used. The trustee shall send to each creditor with the notice summoning the first meeting of creditors, a proxy in the form prescribed by General Rules; but neither the name of the trustee nor of any other person shall be printed or inserted in the proxy before it is so sent. A proxy shall not be invalid merely because it is in the form of a letter, telegram or cable.

(14) Subject to the provisions of this Act, all questions at meeting of creditors shall be decided by resolution carried by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows:—

For every claim of or over twenty-five dollars and not exceeding two hundred dollars—  
one vote;

For every claim of over two hundred dollars and not exceeding five hundred dollars—  
two votes;

For every claim of over five hundred dollars and not exceeding one thousand dollars—  
three votes;

For every additional one thousand dollars or fraction thereof—one vote.

(15) No person shall be entitled to vote on a claim acquired after the assignment unless the entire claim is acquired, but this shall not apply to persons acquiring notes, bills or other securities upon which they are liable.

(16) A secured creditor shall not be entitled to vote at any meeting of creditors until he has proved his claim and valued his security as hereinafter provided.

(17) The trustee, if a creditor or a proxy for a creditor, may vote as a creditor at any meeting of creditors, and, in addition, in case of a tie, shall have a casting vote, personally, as if he were a creditor holding a proved claim of twenty-five dollars.

(18) A corporation may vote at meetings of creditors as if a natural person, by an authorized agent.

(19) The vote of the trustee, or of his partner, clerk solicitor, or solicitor's clerk, either as creditor or as proxy for a creditor, shall not be reckoned in the majority required for passing any resolution affecting the remuneration or conduct of the trustee.

#### INSPECTORS.

43. (1) At the first or a subsequent meeting the creditors shall appoint one or more, but not exceeding five, inspectors of the administration by the trustee of the estate of the debtor.

(2) The powers of inspectors may be exercised by a majority of them.

(3) The creditors may, at any meeting, revoke the appointment of any inspector and in such event or in case of the death, resignation, or absence from the province of an inspector, may appoint another in his stead.

(4) Each inspector may be repaid his actual and necessary travelling expenses incurred in and about the performance of his duties, and may also be paid the following fees:—

Estates with assets below \$5,000.....	a fee of \$2.00 per meeting
Estates with assets from \$5,000 to \$15,000.....	a fee of \$3.00 per meeting
Estates with assets from \$15,000 to \$30,000.....	a fee of \$4.00 per meeting
Estates with assets from \$30,000 to \$50,000.....	a fee of \$5.00 per meeting
Estates with assets from \$50,000 to \$100,000.....	a fee of \$7.50 per meeting
Estates with assets from \$100,000 and over.....	a fee of \$10.00 per meeting

(5) In the event of an equal division of opinion at a meeting of inspectors, the opinion of any absent inspector shall be sought in order to resolve the difference, and in the case of a difference which cannot be so resolved it shall be resolved by the trustee, unless it concerns his personal conduct or interest.

#### DEBTS PROVABLE.

44. (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy or in proceedings under an authorized assignment.

(2) Save as aforesaid, all debts and liabilities, present or future, to which the debtor is subject at the date of the receiving order or the making of the authorized assignment or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order or of the making of the authorized assignment, shall be deemed to be debts provable in bankruptcy or in proceedings under an authorized assignment.

(3) The court shall value, at the time and in the summary manner prescribed by General Rules, all contingent claims and all such claims for unliquidated damages as are authorized by this section, and after, but not before, such valuation, every such claim shall for all purposes of this Act, be deemed a proved debt to the amount of its valuation.

PROOF OF DEBTS.

45. (1) Every creditor shall prove his debt as soon as may be after the making of a receiving order or after the date of an authorized assignment or as soon as possible after such creditor has received notice of meeting for the consideration of a composition, extension or scheme of arrangement.

(2) A debt may be proved by delivering or sending through the post in a prepaid and registered letter to the trustee, a statutory declaration verifying the debt.

(3) The statutory declaration may be made by the creditor himself or by some person authorized by or on behalf of the creditor. If made by a person so authorized, it shall state his authority and means of knowledge.

(4) The statutory declaration shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The trustee may at any time call for the production of the vouchers.

(5) The statutory declaration shall state whether the creditor is or is not a secured creditor.

(6) Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors before the first meeting, and at all reasonable times.

PROOF BY SECURED CREDITORS.

46. (1) If a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized. (Eng. Sch. 2 No. 10.)

(2) If a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove for his whole debt. (Eng. Sch. 2 No. 11.)

(3) If a secured creditor does not either realize or surrender his security, he shall within thirty days of the date of the receiving order, or of the making of the authorized assignment, or within such further time as may be allowed by the inspectors, or in case they shall refuse, then within such further time as may be allowed by the court, file with the trustee a statutory declaration stating therein full particulars of his security or securities, the date when each security was given, and the value at which he assesses each thereof. He shall be entitled to receive a dividend only in respect to the balance due to him after deducting the value so assessed.

(4) Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value.

(5) If the trustee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the trustee, or as, in default of such agreement, the court may direct. If the sale be by public auction the creditor, or the trustee on behalf of the estate, may bid or purchase.

(6) Notwithstanding subsections four and five of this section the creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the trustee does not, within one month after receiving the notice or such further time or times as the court may allow, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued.

(7) Where a security has been realized as provided by this section, the net amount realized shall be paid to the secured creditor and shall be substituted for the amount at which he valued such security in his claim and shall be treated in all respects as an amended valuation by the secured creditor. The costs and expenses of any such sale shall be in the discretion of the court.

(8) If the trustee has not elected to acquire the security as hereinbefore provided, a creditor may at any time within two months after filing his claim amend the valuation and proof on showing to the satisfaction of the trustee, or the court, that the valuation and proof were made *bona fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the court shall order, unless the trustee shall allow the amendment without application to the court.

(9) Where a valuation has been amended in accordance with the foregoing subsection, the creditor shall forthwith repay any surplus dividend which he may have received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be, shall be entitled to be paid out of any money, for the time being available

for dividend, any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment.

(10) If a secured creditor does not comply with the foregoing subsections he shall be excluded from all share in any dividend.

(11) Subject to the provisions of subsections five and six of this section, a creditor shall in no case receive more than one hundred cents in the dollar and interest as provided by this Act.

#### PROOF IN RESPECT OF DISTINCT CONTRACTS.

47. If a debtor was, at the date of the receiving order or authorized assignment, liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts.

#### RESTRICTED CREDITORS.

48. (1) Where a married woman has been adjudged bankrupt or has made an authorized assignment, her husband shall not be entitled to claim any dividend as a creditor in respect of any money or other estate hereafter lent or entrusted by him to his wife for the purposes of her trade or business, or claim any wages, salary or compensation for work hereafter done or services hereafter rendered in connection with her trade or business, until all claims of the other creditors of his wife for valuable consideration in money or money's worth have been satisfied.

(2) Where the husband of a married woman has been adjudged bankrupt or has made an authorized assignment, his wife shall not be entitled to claim any dividend as a creditor in respect of any money or other estate hereafter lent or entrusted by her to her husband for the purposes of his trade or business, or claim any wages, salary or compensation for work hereafter done or services hereafter rendered in connection with his trade or business, until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied.

(3) Where any person or firm has been adjudged bankrupt or has made an authorized assignment, any father, son, daughter, mother, brother, sister, uncle or aunt of any such person or of any member of said firm shall not be entitled to claim by way of dividend or otherwise from the trustee any wages, salary or compensation for work hereafter done or services hereafter rendered to said person or firm exceeding an amount equal to three months' wages, salary or compensation, until all claims of the other creditors of said person or firm for valuable consideration in money or money's worth have been satisfied.

(4) Where any corporation has been adjudged bankrupt or has made an authorized assignment no officer, director or shareholder thereof shall be entitled to claim by way of dividend or otherwise from the trustee any wages, salary or compensation for work hereafter done or services hereafter rendered to such corporation exceeding an amount equal to three months' wages, salary or compensation, until all claims of the other creditors of said corporation for valuable consideration in money or money's worth have been satisfied.

#### INTEREST.

49. On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the receiving order or authorized assignment and provable under this Act, the creditor may prove for interest at a rate not exceeding six per cent per annum to the date of the order or authorized assignment from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment.

#### DEBTS PAYABLE AT A FUTURE TIME.

50. A creditor may prove for a debt not payable at the date of the receiving order or of the authorized assignment as if it were payable presently and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of six per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

#### PRIORITY OF CLAIMS.

51. (1) Subject to the provisions of the next succeeding section as to rent, in the distribution of the property of the bankrupt or authorized assignor, there shall be paid, in the following order of priority,—

Firstly, The fees and expenses of the trustee;

Secondly. The costs of the execution creditor (including sheriff's fees and disbursements), coming within the provisions of section eleven, subsections one and ten;

Thirdly. All wages, salaries, commission or compensation of any clerk, servant, travelling salesman, labourer or workman in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment.

(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor is sufficient to meet them.

(3) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.

(4) Subject to the provisions of this Act, all debts proved in the bankruptcy or under an assignment shall be paid *pari passu*.

(5) If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order or assignment at the rate of six per cent per annum on all debts proved in the bankruptcy or under the assignment.

(6) Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

#### RIGHTS OF LANDLORDS.

52. (1) Where the bankrupt or authorized assignor is a tenant having goods or chattels on which the landlord has distrained, or would be entitled to distrain, for rent, the right of the landlord to distrain or realize his rent by distress shall cease from and after the date of the receiving order or authorized assignment and the trustee shall be entitled to immediate possession of all the property of the debtor, but in the distribution of the property of the bankrupt or assignor the trustee shall pay to the landlord in priority to all other debts, an amount not exceeding the value of the distrainable assets, and not exceeding three months' rent accrued due prior to the date of the receiving order or assignment, and the costs of distress, if any.

(2) The landlord may prove as a general creditor for (i) all surplus rent accrued due at the date of said receiving order or assignment; and (ii) any accelerated rent to which he may be entitled under his lease, not exceeding an amount equal to three months' rent.

(3) Except as aforesaid the landlord shall not be entitled to prove as a creditor for rent for any portion of the unexpired term of his lease, but the trustee shall pay to the landlord for the period during which he actually occupies the leased premises from and after the date of the receiving order or assignment, a rental calculated on the basis of said lease.

(4) In case of continued occupation by the trustee of the leased premises for the purposes of the trust estate any payment of accelerated rent made to the landlord shall be credited to the occupation of the trustee.

(5) Notwithstanding any provision or stipulation in any lease or agreement, where a receiving order or an authorized assignment has been made, the trustee may within one month from the date of any such receiving order or assignment, by notice in writing signed by him given to the landlord, elect to retain the premises occupied by the bankrupt or assignor at the time of the receiving order or assignment for the unexpired term of any lease under which such premises were held or for such portion of the term as he shall see fit, upon the terms of the lease and subject to payment of the rent therefor provided by such lease or agreement, or he may disclaim the lease or agreement. Should the trustee not give such notice within the time hereinbefore provided, he shall be deemed to have disclaimed the lease or agreement.

(6) If the trustee so elects to retain such premises for such unexpired term or portion thereof and the provisions of the lease do not preclude the lessee from assigning the term or subletting the premises the trustee shall have power to assign or sublet for the unexpired term.

(7) The entry into possession of the premises by the trustee during the said period of one month shall not be deemed to be evidence of an intention on the part of the trustee to elect to retain the premises nor affect his right to disclaim the lease or agreement.

#### DISALLOWANCE OF CLAIMS.

53. (1) The trustee shall examine every proof and the grounds of the debt, and may require further evidence in support of it. If he considers the claimant is not entitled to rank on the estate, or not entitled to rank for the full amount of his claim, or if directed by a resolution passed at any meeting of creditors or inspectors, he may disallow the claim

in whole or in part, and in such case shall give to the claimant a notice of disallowance. The said notice may be given either by serving the claimant with a copy thereof personally or by mailing such copy in a registered prepaid letter, addressed to the claimant at his last-known address, or at the address shown in or by the claimant's proof. Such disallowance shall be final and conclusive unless within thirty days after the service or mailing of the said notice or such further time as the court may on application made within the same thirty days allow, the claimant appeals to the court in accordance with General Rules from the trustee's decision.

(2) The court may also expunge or reduce a proof upon the application of a creditor or of the debtor, if the trustee declines to interfere in the matter.

## PART V.

### DEBTORS.

#### DUTIES OF DEBTORS.

54. (1) Where a receiving order or an authorized assignment is made, the bankrupt or assignor shall make out and submit to the trustee a statement of and in relation to his affairs in the prescribed form verified by affidavit and showing the particulars of the debtor's assets, debts, and liabilities, the names, residences and occupations of his creditors, the securities held by them respectively, the date, when the securities were respectively given and such further or other information as may be prescribed or as the trustee may require. Such statement shall be submitted within seven days from the date of the receiving order or assignment, but the court may, for special reasons, extend the time.

(2) Any person stating himself in writing to be a creditor of the bankrupt or assignor, may personally or by agent inspect the statement at all reasonable times and take any copy thereof or extract therefrom, but any person untruthfully so stating himself to be a creditor shall be guilty of a contempt of court, and shall be punishable accordingly on the application of the trustee.

(3) Every debtor against whom a receiving order is made and every assignor who makes an authorized assignment shall, unless prevented by sickness or other sufficient cause, attend the first meeting of his creditors, and shall submit to such examination and give such information as the meeting may require.

(4) He shall give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such times on the trustee, execute such powers of attorney, conveyances, deeds, and instruments, and, generally, do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the trustee, or may be prescribed by General Rules, or may be directed by the court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the trustee, or any creditor or person interested.

(5) He shall aid, to the utmost of his power, in the realization of his property and the distribution of the proceeds among his creditors.

(6) If a debtor wilfully fails to perform the duties imposed on him by this section, or to deliver up possession of any part of his property which is divisible amongst his creditors under this Act and which is for the time being in his possession or under his control, to the trustee, or to any person authorized by the court to take possession of it, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of court, and may be punished accordingly.

#### ARREST OF DEBTORS.

55. (1) The court may, by warrant addressed to any constable or prescribed officer of the court, cause a debtor to be arrested, and any books, papers, money and goods in his possession to be seized, and him and them to be safely kept as prescribed until such time as the court may order under the following circumstances:—

(a) If, after the presentation of a bankruptcy petition against him, it appears to the court that there is probable reason for believing that he has absconded, or is about to abscond from Canada, with a view of avoiding payment of the debt in respect of which the bankruptcy petition was filed, or of avoiding appearance to any such petition, or of avoiding examination in respect of his affairs or of otherwise avoiding, delaying or embarrassing proceedings in bankruptcy against him;

(b) If, after presentation of a bankruptcy petition against him or after an authorized assignment has been made by him, it appears to the court that there is probable cause for believing that he is about to remove his goods with a view of preventing or delaying possession being taken of them by the trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods or any books, documents or writings which might be of use to the trustee or to his creditors in the course of the bankruptcy or authorized assignment proceedings;

(c) If, after service of a bankruptcy petition on him or after he makes an authorized assignment, he removes any goods in his possession above the value of twenty-five dollars without the leave of the trustee.

(2) No payment or composition made or security given after arrest made under this section shall be exempt from the provisions of this Act relating to fraudulent preferences.

#### EXAMINATION OF DEBTORS AND OTHERS.

54. (1) Where a receiving order or an authorized assignment has been made, the trustee, upon ordinary resolution passed by the creditors present or represented at a meeting regularly called, or upon the written request or resolution of a majority of the inspectors of the estate, may, without an order, examine under oath before the registrar of the court or other prescribed person, the debtor or any person who is or has been an agent, clerk, servant, officer, director or employee of the debtor, respecting the debtor, his dealings or property, and, in the case of a bankrupt, as to any property, acquired or disposed of by him subsequently to the date of the receiving order.

(2) If the debtor, or any person liable to be examined as provided by the preceding subsection, is served with an appointment or summons to attend for examination and is paid or tendered the proper conduct money and witness fees, but refuses or neglects to attend as required by such appointment or summons, or, if attending, refuses to make satisfactory answers to any questions asked him or refuses to produce any book, document or other paper, having no lawful impediment made known to the examiner at the time of his sitting for such examination and allowed by him, the court may, by warrant, cause him to be apprehended and brought up for examination, and may order him to be committed to the common gaol of the judicial district in which he resides for any term not exceeding twelve months.

(3) The amount of conduct money and witness fee shall be fixed by General Rules.

(4) If any person has, or is believed or suspected to have, in his possession or power any of the property of the debtor, or any book, document or paper of any kind relating in whole or in part to the debtor, his dealings or property, or shewing that such person is indebted to the debtor, such person may, upon ordinary resolution passed by the creditors present or represented at a regularly called meeting (exclusive of such person, if he is a creditor), or upon the written request or resolution of the majority of the inspectors of the estate, be required by the trustee to produce such book, document or paper for the information of such trustee, or to deliver over to him any such property of the debtor.

(5) If such person fails to produce such book, document or other paper, or to deliver over such property, within four days of his being served with a copy of the said resolution and a request of the trustee in that behalf, or if the trustee or the majority of the inspectors is or are not satisfied that full production or delivery has been made, the trustee may, without an order, examine the said person before the registrar of the court or other prescribed person touching any such property, book or document or other paper which he is supposed to have received.

(6) Any such person may be compelled to attend and testify, and to produce upon his examination any book, document or other paper which under this section he is liable to produce, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as is provided by subsections two and three of this section.

(7) If any person on such examination admits that he is indebted to the debtor, the court may, on the application of the trustee, order him to pay to the trustee, at such time and in such manner as to the court seems expedient, the amount admitted, or any part thereof, either in full discharge of the whole amount in question or not, as the court thinks fit, with or without costs of the examination.

(8) If any person on such examination admits that he has in his possession any property belonging to the debtor, the court may, on the application of the trustee, order him to deliver to the trustee such property, or any part thereof, at such time, and in such manner, and on such terms, as to the court may seem just.

55. Where a receiving order is made against a debtor or where a debtor makes an authorized assignment, the court, on the application of the trustee, may from time to time order that for such time, not exceeding three months, as the court thinks fit, post letters, post packets and telegrams addressed to the debtor at any place or places mentioned in the order for re-direction, shall be re-directed, sent or delivered by the Postmaster General or the officers acting under him, or by the various telegraph and cable systems, government and other, operating in Canada, or by the operators thereof, to the trustee, and the same shall be done accordingly.

#### DISCHARGE OF BANKRUPT OR ASSIGNOR.

56. (1) Any debtor may, at any time after being adjudged bankrupt or making an authorized assignment, apply to the court for an order of discharge; to become effective not sooner than three months next after the date of his being adjudged bankrupt or of his making such assignment, and the court shall appoint a day for hearing the application.



(2) A bankrupt or authorized assignor intending to apply for his discharge shall produce to the registrar of the court a certificate from the trustee specifying the names and addresses of his creditors of whom the trustee has notice (whether they have proved or not) and it shall be the duty of the trustee to furnish such certificate upon request therefor by the bankrupt or authorized assignor. The registrar shall, not less than twenty-eight days before the day appointed for hearing the application, give to the trustee notice of the application and of the time and place of the hearing of it, and the trustee shall not less than fourteen days before the day appointed for hearing the application give to each creditor who has proved his debt like notice.

(3) The trustee shall file with the registrar of the court, at least three days before the day appointed for hearing the application, his report as to the conduct and affairs of the bankrupt or assignor (including a report as to the conduct of the bankrupt or assignor during the proceedings under his bankruptcy or assignment). If the bankrupt or assignor has been examined, the trustee shall also file such examination, and shall report to the court any fact, matter or circumstance which would, under this Act, justify the court in refusing an unconditional order of discharge.

(4) On the hearing of the application the court shall take into consideration the report of the trustee, and may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt or authorized assignor or with respect to his after-acquired property.

(5) The court shall refuse the discharge in all cases where the bankrupt or authorized assignor has committed any offence under this Act or any offence connected with his bankruptcy or assignment or the proceedings thereunder, unless for special reasons the court otherwise determines, and shall on proof of any of the facts mentioned in the next succeeding section, either,—

(a) refuse the discharge; or,

(b) suspend the discharge for a period of not less than two years: provided that the period may be less than two years if the only fact proved of those hereinafter mentioned is that his assets are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities; or,

(c) suspend the discharge until a dividend of not less than fifty cents in the dollar has been paid to the creditors; or,

(d) require the bankrupt or assignor, as a condition of his discharge, to consent to judgment being entered against him by the trustee for any balance or part of any balance of the debts provable under the bankruptcy or assignment which is not satisfied at the date of the discharge, such balance or part of any balance of the debts to be paid out of the future earnings or after-acquired property of the bankrupt or assignor in such manner and subject to such conditions as the court may direct; but execution shall not be issued on the judgment without leave of the court, which leave may be given on proof that the bankrupt or assignor has, since his discharge, acquired property or income available towards payment of his debts.

Provided that, if at any time after the expiration of one year from the date of any order made under this section the bankrupt or assignor satisfies the court that there is no reasonable probability of his being in a position to comply with the terms of such order the court may modify the terms of the order, or of any substituted order, in such manner and upon such conditions as it may think fit.

59. The facts referred to in the next preceding section are,—

(a) that the assets of the bankrupt or assignor are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible;

(b) that the bankrupt or assignor has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy or the making of the assignment;

(c) that the bankrupt or assignor has continued to trade after knowing himself to be insolvent;

(d) that the bankrupt or assignor has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;

(e) that the bankrupt or assignor has brought on, or contributed to, his bankruptcy or assignment by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs;

(f) that the bankrupt or assignor has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him;

(g) that the bankrupt or assignor has, within three months preceding the date of the receiving order or assignment, incurred unjustifiable expense by bringing a frivolous or vexatious action;

(h) that the bankrupt or assignor has, within three months preceding the date of the receiving order or of the making of the assignment, when unable to pay his debts as they became due, given an undue preference to any of his creditors;

(i) that the bankrupt or assignor has, within three months preceding the date of the receiving order or of the making of the assignment, incurred liabilities with a view of making his assets equal to fifty cents in the dollar on the amount of his unsecured liabilities;

(j) that the bankrupt or assignor has, on any previous occasion, been adjudged bankrupt or has made an authorized assignment or made a composition, extension or arrangement with his creditors;

(k) that the bankrupt or assignor has been guilty of any fraud or fraudulent breach of trust.

60. (1) For the purposes of the preceding section the assets of a bankrupt or authorized assignor shall be deemed of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities when the court is satisfied that the property of the bankrupt or assignor has realized, or is likely to realize, or with due care in realization, might have realized an amount equal to fifty cents in the dollar on his unsecured liabilities, and a report by the trustee shall be *prima facie* evidence of the amount of such liabilities.

(2) For the purposes of this and the next preceding sections the report of the trustee shall be *prima facie* evidence of the statements therein contained.

(3) Any statutory disqualification on account of bankruptcy shall cease if and when the bankrupt obtains from the court his discharge with a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his part. The court may, if it thinks fit, grant such a certificate, and a refusal to grant such a certificate shall be subject to appeal.

(4) At the hearing of the application, the court may read the examination of the bankrupt or assignor, and may put such further questions to him and receive such evidence as it may think fit.

(5) The trustee, the debtor and any creditor may attend and be heard in person or by counsel.

(6) The powers of suspending and of attaching conditions to the discharge of a bankrupt or authorized assignor may be exercised concurrently.

(7) In either of the following cases, that is to say:

(a) In the case of a settlement made before and in consideration of marriage where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement; or,

(b) In the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife);

if the settlor is adjudged bankrupt or makes an authorized assignment or compounds or arranges with his creditors, and it appears to the court that such settlement, covenant or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the court may refuse or suspend an order of discharge or grant an order subject to conditions, or refuse to approve a composition or arrangement, as the case may be, in like manner as in cases where the debtor has been guilty of fraud.

61. (1) An order of discharge shall not release the bankrupt or authorized assignor,—

(a) from any debt on a recognizance nor from any debt with which the bankrupt or assignor may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence, and he shall not be discharged from such excepted debts unless an order in council proceeding from the Crown in the proper right is filed in court consenting to his being discharged therefrom; or,

(b) from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party; or,

(c) from any liability under a judgment against him in an action for seduction, or under an affiliation order, or for alimony or under a judgment against him as a co-respondent in a matrimonial case, except to such an extent and under such conditions as the court expressly orders in respect of such liability; or,

(d) from any debt or liability for necessities of life, and the court may make such order for payment thereof as it deems just or expedient.

(2) An order of discharge shall release the bankrupt or assignor from all other debts provable in bankruptcy or under an authorized assignment.

(3) An order of discharge shall not release any person who at the date of the receiving order or assignment was a partner or co-trustee with the bankrupt or authorized assignor

or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him.

(4) An order of discharge shall be conclusive evidence of the bankruptcy, and of the validity of the proceedings therein, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge.

(5) Notice of the order of discharge of a bankrupt or authorized assignor shall be forthwith gazetted.

62. (1) Where, in the opinion of the court, a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order annul the adjudication.

(2) Where an adjudication is annulled under this section, all sales and dispositions of property and payments duly made, and all acts theretofore done by the trustee, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court may appoint, or, in default of any such appointment, revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court may declare by order.

(3) Notice of the order annulling an adjudication shall be forthwith gazetted and published in a local paper.

(4) For the purposes of this section any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court.

## PART VI.

### COURTS AND PROCEDURE.

#### JURISDICTION.

63. (1) The following named courts are constituted Courts of Bankruptcy and invested within their territorial limits as now established, or as these may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:—

(a) In the provinces of Alberta, British Columbia, Nova Scotia, Ontario and Prince Edward Island, the Supreme Court of the province;

(b) In the provinces of Manitoba and Saskatchewan, the Court of King's Bench of the province;

(c) In the Province of New Brunswick, the King's Bench Division of the Supreme Court of the province;

(d) In the province of Quebec, the Superior Court of the province; and,

(e) In the Yukon Territory, the Territorial Court of the Yukon Territory.

(2) Subject to the provisions of this Act and to General Rules, the judge of the court exercising jurisdiction in bankruptcy or in authorized assignment proceedings may exercise in chambers the whole or any part of his jurisdiction.

(3) The courts in this subsection named are constituted Appeal Courts of Bankruptcy, and, subject to the provisions of this Act with respect to appeals, are invested with power and jurisdiction to make or render an appeal asserted, heard and decided according to their ordinary procedure, except as varied by General Rules, the order or decision which ought to have been made or rendered by the court appealed from. All appeals asserted under authority of this Act shall be made,—

(a) In the provinces of Alberta, Nova Scotia and Prince Edward Island, to the Supreme Court *in banc* of the province;

(b) In the provinces of British Columbia, Manitoba and Saskatchewan, to the Court of Appeal of the province;

(c) In the province of Ontario, to the Appellate Division of the Supreme Court of the province;

(d) In the province of New Brunswick, to the Appeal Division of the Supreme Court of the province;

(e) In the province of Quebec, to the Appeal side of the Court of King's Bench;

(f) In the Yukon Territory, to the Court of Appeal of the province of British Columbia.

## SITTINGS AND DISTRIBUTION OF BUSINESS OF COURTS.

64. (1) The courts having jurisdiction in bankruptcy under this Act shall not be subject to be restrained in the execution of their powers hereunder by the order of any other court.

(2) Periodical sittings for the transaction of the business of such courts shall be held at such times and places and at such intervals as each of such courts shall for itself prescribe.

(3) Except as otherwise provided by this Act, all the powers and jurisdiction in bankruptcy and otherwise conferred by this Act may and shall be exercised by or under the direction of one of the judges of the court upon which such powers and jurisdiction are so conferred, and the Minister of Justice shall from time to time assign a judge or judges of such court for that purpose. The judgment, decision or order of such judge shall be deemed the judgment, decision or order of the court, and references in this Act to the court shall, where necessary, apply to such judge exercising the powers and jurisdiction of such court. Provided that during vacation or during the illness of the judge so assigned or during his absence, or for any other reasonable cause, such powers and jurisdiction or any part thereof may be exercised by or under the direction of any judge of the court named for that purpose by the Chief Justice thereof.

(4) The Chief Justice of each court upon which such powers and jurisdiction are so conferred shall from time to time appoint and assign such registrars, clerks, and other officers in bankruptcy as he deems necessary or expedient for the transaction or disposal of matters in respect of which power or jurisdiction is given by this Act.

(5) Each province of Canada shall constitute for the purposes of this Act, one bankruptcy district, but the Governor in Council may divide any such bankruptcy district into two or more bankruptcy divisions, and name or number them. A judge shall be assigned to each of such divisions to exercise therein the powers and jurisdiction conferred by this Act on the court of which he is a member.

(6) In case the Chief Justice of the court having jurisdiction in bankruptcy in any province shall report to the Minister of Justice that it is impossible or highly inconvenient for any judge of his court to undertake to exercise within any bankruptcy division in such province the powers and jurisdiction conferred on such court, the Minister of Justice may, from time to time, assign to exercise within said division said powers and jurisdiction any district, county or other judge, who shall for all the purposes of this Act be deemed a judge of the court having jurisdiction in bankruptcy, and references in this Act to the court or to the judge of the court shall, where necessary, apply to such district, county or other judge, so assigned.

## POWERS OF REGISTRAR.

65. (1) The registrars of the several courts exercising bankruptcy jurisdiction under this Act shall have the powers and jurisdiction in this section mentioned, and any order made or act done by such registrars in the exercise of the said powers and jurisdiction shall be deemed the order or act of the court.

(2) Subject to General Rules limiting the powers conferred by this section, a registrar shall have power,—

(a) to hear bankruptcy petitions where they are not opposed, and to make receiving orders and adjudications thereon, where they are not opposed;

(b) to hold examinations of debtors;

(c) to grant orders of discharge where the application is not opposed;

(d) to approve compositions, extensions or schemes of arrangement where they are not opposed;

(e) to make interim orders in cases of urgency;

(f) to make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers;

(g) to hear and determine any unopposed or *ex parte* application;

(h) to summon and examine any person known or suspected to have in his possession effects of the debtor or to be indebted to him, or capable of giving information respecting the debtor, his dealings or property;

(i) to hear and determine appeals from the decisions of a trustee allowing or disallowing a creditor's claim where such claim does not exceed five hundred dollars.

(3) A registrar shall not have power to commit for contempt of court.

(4) Any person dissatisfied with an order or decision of the registrar may appeal therefrom to a judge, in manner prescribed by General Rules.

## GENERAL RULES.

66. (1) The Governor in Council may make, alter or revoke, and may delegate to the judges of the several courts exercising bankruptcy jurisdiction under this Act the power to make, alter or revoke, General Rules not inconsistent with the terms of this Act for carrying into effect the objects thereof.

(2) Such rules shall not extend the jurisdiction of the court, save and except that, for the purpose of enabling the provision of rules having application to corporations, but for

such purpose only, the *Winding-up Act*, chapter 144 of the *Revised Statutes of Canada*, shall be deemed part of this Act.

(3) All General Rules, as from time to time made, shall be laid before Parliament within three weeks after made, or, if Parliament is not then sitting, within three weeks after the beginning of the next Session. Such rules shall be judicially noticed, and shall have effect as if enacted by this Act.

#### FEEES AND RETURNS.

67. All attorneys, solicitors and counsel acting for the trustee or for the estate of a debtor in respect of proceedings under this Act, shall be paid out of the assets of such estate their reasonable costs and fees as fixed in a tariff provided by General Rules; but, except as hereinafter provided, the aggregate amount of such costs and fees so payable out of the assets of estates whereof the gross proceeds exceed five thousand dollars shall not exceed five per centum of such gross proceeds. This provision shall not disentitle such attorneys, solicitors and counsel to any costs or fees which may be awarded against or be payable by persons other than the trustee or the estate of the debtor, and notwithstanding anything in this Act contained, in estates whereof the gross proceeds do not exceed five thousand dollars, the costs or fees payable may, by unanimous vote of the inspectors, be increased to any amount not to exceed ten per centum of the gross proceeds of such estate. Such tariff shall direct by whom and in what manner such costs and fees are to be collected and accounted for and to what account they shall be paid.

#### PROCEDURE.

68. (1) All proceedings in bankruptcy or under authorized assignments subsequent to the presentation of a bankruptcy petition or the making of an authorized assignment shall be entitled "In the matter of the Bankruptcy" of the debtor, or "In the matter of the Authorized Assignment" of the debtor, as the case may be.

(2) Subject to the provisions of this Act and to General Rules, the costs of and incidental to any proceeding in court under this Act shall be in the discretion of the court.

(3) The court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose.

(4) The court may at any time amend any written process or proceedings under this Act upon such terms, if any, as it may think fit to impose.

(5) Where by this Act, or by General Rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose.

(6) Subject to General Rules, the court may in any matter take the whole or any part of the evidence either *via voce*, or by interrogatories, or upon affidavit, or, out of the Dominion of Canada, by commission.

(7) Where two or more bankruptcy petitions are presented against the same debtor or against joint debtors, the court may consolidate the proceedings, or any of them on such terms as the court thinks fit.

(8) Where the petitioner does not proceed with due diligence on his bankruptcy petition, the court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor, or may dismiss the petition.

(9) If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive.

(10) The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to such conditions as the court may think just.

69. (1) Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm, without including the others.

(2) Where there are more respondents than one to a bankruptcy petition the court may dismiss the petition as to one or more of them, without prejudice to the effect of the petition as against the other or others of them.

(3) Where a receiving order has been made on a bankruptcy petition by or against one member of a partnership, any other bankruptcy petition by or against a member of the same partnership shall be filed in or transferred to the court in which the first-mentioned petition is in course of prosecution, and unless the court otherwise directs, the same trustee shall be appointed as may have been appointed in respect of the property of the first mentioned member of the partnership, and the court may give such directions for consolidating the proceedings under the petitions as it thinks just.

70. (1) Where a member of a partnership is adjudged bankrupt, the court may authorize the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the

action relates shall be void; but notice of the application for authority to commence the action shall be given to him, and he may show cause against it, and on his application, the court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and, if he does not claim any benefit therefrom, he shall be indemnified against costs in respect thereof as the court directs.

(2) Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case the court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath or otherwise, as the court may direct.

(3) Where a bankrupt or authorized assignor is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt or authorized assignor.

71. (1) Any order made by a court exercising jurisdiction in bankruptcy under this Act in any province of Canada shall be enforced in the courts having jurisdiction in bankruptcy in all other provinces of Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

(2) All courts having jurisdiction in bankruptcy in all provinces of Canada and the officers of such courts respectively shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy and in proceedings under authorized assignments, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

(3) The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of such judge or officer shall be subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior court when the appeal shall be under section seventy-four of this Act.

72. (1) Any warrant of a court having jurisdiction in bankruptcy may be enforced in any part of the Dominion of Canada in the same manner and subject to the same privileges in, and subject to which, a warrant issued by any justice of the peace under or in pursuance of the *Criminal Code* may be executed against a person for an indictable offence.

(2) A search warrant issued by a court having jurisdiction in bankruptcy for the discovery of any property of a debtor may be executed in manner prescribed or in the same manner and subject to the same privileges in and subject to which a search warrant for property supposed to be stolen may be executed according to law.

73. Where the court commits any person to prison, the commitment may be to such convenient prison as the court thinks expedient, and if the gaoler of any prison refuses to receive any prisoner so committed, he shall be liable for every such refusal to a fine not exceeding five hundred dollars.

#### REVIEW AND APPEAL.

74. (1) Every court having jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

(2) Any person dissatisfied with an order or decision of the court or a judge in any proceedings under this Act may,—

(a) if the question to be raised on the appeal involves future rights; or,

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy or authorized assignment proceedings; or,

(c) if the amount involved in the appeal exceeds five hundred dollars; or,

(d) if the appeal is from the grant or refusal to grant a discharge and the aggregate of the unpaid claims of creditors exceeds five hundred dollars;

appeal to the Appeal Court.

(3) The decision of the Appeal Court upon any such appeal shall be final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of that court.

(4) The Supreme Court of Canada shall have jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

(5) No such appeal to the Supreme Court of Canada shall operate as a stay of proceedings unless the judge who permits such appeal shall so order, and to the extent to which he shall order, and the appellant shall not be required to provide any security for costs, but unless he provides security for costs, in an amount to be fixed by the judge permitting the appeal, he shall not be awarded costs in the event of his success upon such appeal.

(6) The decision of the Supreme Court of Canada on any such appeal shall be final and conclusive.

## PART VII.

## SUPPLEMENTAL PROVISIONS.

75. Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the provisions of this Act as if she were a *feme sole*, and for all the purposes of this Act any judgment or order obtained against her, whether or not expressed to be payable out of her separate property shall have effect as though she were personally bound to pay the judgment debt or sum ordered to be paid.

76. Subject to such modifications as may be made by General Rules, the provisions of this Act shall apply to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general partners of a limited partnership being adjudged bankrupt or making an authorized assignment, the assets of the limited partnership shall vest in the trustee.

77. (1) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting by a person describing himself as or appearing to be chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

(2) Until the contrary is proved, every meeting of creditors in respect to the proceedings whereof a minute has been so signed, shall be deemed to have been duly convened and held and all resolutions passed or proceedings thereat to have been duly passed or had.

(3) A copy of the *Canada Gazette* containing any notice inserted therein in pursuance of this Act, shall be evidence of the facts stated in the notice.

(4) The production of a copy of the *Canada Gazette* containing any notice of a receiving order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date.

78. Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate, made by any court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit or document made or used in the course of any bankruptcy proceedings or other proceedings had under this Act shall if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.

79. Subject to General Rules, any affidavit to be used in a court exercising jurisdiction in bankruptcy under this Act may be sworn before any person authorized to administer oaths in the court having jurisdiction or before any registrar of the court or before any officer of a court having jurisdiction in bankruptcy authorized in writing in that behalf by the court, or before a justice of the peace for the province, county or place where it is sworn, or, in the case of a person who is out of Canada, before a notary public, a magistrate or justice of the peace or other person qualified to administer oaths in the country where he resides, he being certified to be a magistrate or justice of the peace or qualified as aforesaid by a British consul or vice-consul or by a notary public.

80. Every court having jurisdiction in bankruptcy under this Act shall have a seal describing the court, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of any such court in all legal proceedings.

81. In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceedings under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.

82. (1) Where by this Act any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, then in the computation of that limited time the same shall be taken as exclusive of the day of that date or of the happening of that event, and as commencing at the beginning of the next following day; and the act or proceeding shall be done or taken at latest on the last day of that limited time as so computed, unless the last day is a Sunday or a statutory holiday throughout the province where the act or proceeding is to be done or taken or a day on which the court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards which is not one of the days in this section specified.

(2) Where by this Act any act or proceeding is directed to be done or taken on a certain day, then, if that day happens to be one of the days in this section specified, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards which shall not be one of the days in this section specified.

83. All notices and other documents for the service of which no special mode is directed may be sent by registered and prepaid post to the last known address of the person to be served therewith.

84. (1) No proceeding in bankruptcy or under an authorized assignment shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by

the defect or irregularity and that the injustice cannot be remedied by any order of that court.

(2) No defect or irregularity in the appointment of an authorized trustee or an inspector shall vitiate any act done by him in good faith.

85. For all or any of the purposes of this Act, a corporation may act by any of its officers authorized in that behalf under the seal of the corporation, a firm may act by any of its members, and a lunatic may act by his committee or by the guardian or curator of his property.

86. Save as provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown.

87. (1) All persons who are barristers, solicitors or advocates of any court in any province may practise as barristers, solicitors and advocates in the courts exercising bankruptcy jurisdiction under this Act in any or in all of the provinces.

(2) All persons who may practise as barristers, solicitors or advocates in the courts exercising bankruptcy jurisdiction under this Act shall be officers of such courts.

88. Nothing in the provisions of this Act shall interfere with, or restrict the rights and privileges conferred on banks and banking corporations by *The Bank Act*.

## PART VIII.

### BANKRUPTCY OFFENCES.

89. Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made, or who has made an authorized assignment under this Act, shall in each of the cases following be guilty of an indictable offence and liable to a fine not exceeding one thousand dollars or to a term not exceeding two years' imprisonment or to both such fine and such imprisonment:—

(a) If he does not to the best of his knowledge and belief fully and truly discover to the trustee all his property, real and personal, and how and to whom and for what consideration and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any) or laid out in the ordinary expense of his family, unless he proves that he had no intent to defraud;

(b) If he does not deliver up to the trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless he proves that he had no intent to defraud;

(c) If he does not deliver up to the trustee, or as he directs, all books, documents, papers and writing in his custody or under his control relating to his property or affairs, unless he proves that he had no intent to defraud;

(d) If after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he conceals any part of his property to the value of fifty dollars or upwards or conceals any debt due to or from him, unless he proves that he had no intent to defraud;

(e) If after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he fraudulently removes any part of his property to the value of fifty dollars or upwards;

(f) If he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud;

(g) If, knowing or believing that a false debt has been proved by any person under the bankruptcy or authorized assignment, he fails for the period of a month to inform the trustee thereof;

(h) If, after the presentation of a bankruptcy petition against him or after he makes an authorized assignment, he prevents the production of any book, document, paper or writing, affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law;

(i) If, after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation or falsification of any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law;

(j) If, after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law;

(k) If, after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after the making of an authorized assignment by him



or within six months next before the date of making thereof, he fraudulently parts with, alters or makes any omission in, or is privy to the fraudulently parting with, altering or making any omission in, any document affecting or relating to his property or affairs;

(l) If, after the presentation of a bankruptcy petition against him or after the making of an authorized assignment by him or at any meeting of his creditors within six months next before such presentation or assignment, he attempts to account for any part of his property by fictitious losses or expenses;

(m) If, within six months next before the presentation of a bankruptcy petition against him or next before the date of the making of an authorized assignment by him, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same;

(n) If, within six months next before the presentation of a bankruptcy petition against him or next before the date of the making of an authorized assignment by him he obtains, under the false pretense of carrying on business and, if a trader, of dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless he proves that he had no intent to defraud;

(o) If, within six months next before the presentation of a bankruptcy petition against him, or next before the date of the making of an authorized assignment by him or after the presentation of a bankruptcy petition against him or the making of an authorized assignment by him he pawns, pledges or disposes of any property which he has obtained on credit and has not paid for, unless in the case of a trader such pawning, pledging or disposing is in the ordinary way of his trade and unless in any case he proves that he had no intent to defraud;

(p) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to an agreement with reference to his affairs or to his bankruptcy;

(q) If he knowingly makes or causes to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing, with intent that it shall be relied upon respecting the financial condition or means or ability to pay of himself or any other person, firm or corporation in whom or in which he is interested, or for whom or for which he is acting, for the purpose of procuring in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan, or credit, the extension of a credit, the discount of any account receivable, or the making, acceptance, discount or endorsement of a bill of exchange, cheque, draft or promissory note, either for the benefit of himself or such person, firm or corporation;

(r) If he, knowing that a false statement in writing has been made respecting the financial condition or means or ability to pay of himself or any other person, firm or corporation in whom or in which he is interested or for whom or for which he is acting, procures upon the faith thereof, either for the benefit of himself or such person, firm or corporation, any of the benefits mentioned in the preceding paragraph.

90. Where an undischarged bankrupt or an undischarged authorized assignor,—

(a) either alone or jointly with any other person obtain credit to the extent of five hundred dollars or upwards from any person without informing that person that he is an undischarged bankrupt or an undischarged authorized assignor; or,

(b) engages in any trade or business under a name other than that under which he was adjudicated bankrupt or made such authorized assignment without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt or made such authorized assignment; he shall be guilty of an indictable offence and liable to a fine not exceeding five hundred dollars, or to a term not exceeding one year's imprisonment, or to both such fine and such imprisonment.

91. (1) If any person who has on any previous occasion been adjudged bankrupt or made an authorized assignment or extension or arrangement with his creditors, is adjudged bankrupt, makes an authorized assignment or secures or asks for a composition, extension or arrangement with his creditors, he shall be guilty of an indictable offence and liable to a fine of one thousand dollars and to one year's imprisonment if, having, during the whole or any part of the two years immediately preceding the date of the presentation of the bankruptcy petition or of the making of the authorized assignment or of the securing or asking for the composition, extension or arrangement, been engaged in any trade or business, he has not kept proper books of account throughout those two years or such part thereof, as aforesaid, and if so engaged at the date of presentation of the petition or the making of the assignment or the securing or asking for the composition, extension or arrangement, thereafter, whilst so engaged, up to the date of the receiving order, or the making of the assignment or the securing or asking for the composition, extension or arrangement, or has not preserved all books of account so kept: Provided that a person who has not kept or has not preserved such books of account shall not be convicted of an offence under this section if his unsecured liabilities at the date of the making of the receiving order, or the assignment or of the securing or asking for the

composition, extension or arrangement did not exceed five hundred dollars or if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable.

(2) For the purposes of this section, a person shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, also accounts of all goods sold and purchased, and statements of annual and other stock-takings.

(3) Paragraphs (i), (j) and (k) of section eighty-nine of this act (which relate to the destruction, mutilation, and falsification and other fraudulent dealings with books and documents), shall, in their application to such books as aforesaid, have effect as if "two years next before the presentation of the bankruptcy petition" and "two years next before the date of the making of an authorized assignment" were substituted for the time mentioned in those paragraphs as the time prior to such presentation or making within which the acts or omissions specified in those paragraphs constitute an offence.

92. If any creditor, or any person claiming to be a creditor, in any bankruptcy proceedings, or in any proceedings pursuant to section thirteen of this Act, for obtaining a composition, extension or arrangement of a debtor's debts or of his affairs, or in any proceedings under an authorized assignment, wilfully and with intent to defraud makes any false claim, or any proof, declaration or statement of account, which is untrue in any material particular, he shall be guilty of an indictable offence, and shall on conviction on indictment be liable to imprisonment with or without hard labour for a term not exceeding one year.

93. Where an authorized trustee reports to any court exercising jurisdiction under this Act that, in his opinion, a debtor in respect of whose estate a receiving order has been made or who has made an authorized assignment has been guilty of any offence under this Act, or where the court is satisfied, upon the representation of any creditor or inspector, that there is ground to believe that the debtor has been guilty of any such offence, the court shall, if it appears to the court that there is a reasonable probability that the debtor will be convicted, order that the debtor be prosecuted for such offence. Provided that it shall not be obligatory on the court, in the absence of any application by the trustee for such an order, to make an order under this section for the prosecution of an offence unless it appears to the court that the circumstances are such as to render a prosecution desirable.

94. Where a debtor has been guilty of any criminal offence, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition, extension or scheme of arrangement has been accepted or approved.

95. (1) Where there is, in the opinion of the court, ground to believe that the bankrupt or any other person has been guilty of any offence under this Act, the court may commit the bankrupt or such other person for trial.

(2) For the purpose of committing the bankrupt or such other person for trial, the court shall have power to take depositions, bind over witnesses to appear, admit the accused to bail, or otherwise.

(3) In an indictment for an offence under this Act, it shall be sufficient to set forth the substance of the offence charged in the words of this Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant or document of, any court acting under this Act.

(4) Where any person is prosecuted for an offence under this Act no other prosecution shall be instituted against him for the same offence under any other Act.

96. Any person, who,—

(a) not being an authorized trustee, advertises or represents himself to be such; or,

(b) being an authorized trustee, either before providing the bond required by section fourteen, subsection four, of this Act, or after providing the same but at any time while the said bond is not in force, acts as or exercises any of the powers of an authorized trustee; or,

(c) having been appointed an authorized trustee, with intent to defraud fails to observe or to perform any of the provisions of this Act, or fails duly to do, observe or perform any act or duty which he may be ordered to do, observe or perform by the court, pursuant to any of the provisions of this Act;

shall be guilty of an indictable offence and liable to a fine not exceeding one thousand dollars or to a term not exceeding two years' imprisonment or to both such fine and such imprisonment.

97. [Repealed.]

98. This Act shall come into operation at a day to be named by proclamation of the Governor in Council.\*

\* This act became effective July 1, 1920. See proclamation on page 1565, ante.

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**GENERAL RULES**  
under the  
**CANADIAN BANKRUPTCY ACT**

promulgated by the  
**GOVERNOR IN COUNCIL**

June 30, 1920.

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# GENERAL RULES UNDER THE CANADIAN BANKRUPTCY ACT\*

## PART I.

### PRELIMINARY.

1. These Rules may be cited as "the Bankruptcy Rules," and shall come into operation on the First day of July, A. D. 1920.

2. (1) In these Rules, unless the context or subject matter otherwise requires,—

"The Act" means "The Bankruptcy Act" and amendments thereto for the time being in force.

"The Court" means the Court as defined by The Bankruptcy Act and includes a Registrar when exercising the powers of the Court pursuant to the Act or these rules.

"Creditor" includes a corporation and a firm of creditors in partnership.

"Contributory" means a contributory as defined by Section 36(2) of the Act.

"Judge" means the Judge to whom bankruptcy business is for the time being assigned in any Court having jurisdiction under the Act, or any other judge having authority under the Act or these rules to act.

"Proper Officer" means the officer appointed by the Chief Justice of the Court for the transaction or disposal of the particular matter in question.

"Province" includes Territory.

"Registrar" means a registrar, deputy registrar or local registrar having jurisdiction in bankruptcy.

"Seal" shall mean the seal ordinarily used in civil actions and matters before it by the Court having jurisdiction, and the words "Sealed" or "and Sealed" where used shall refer to such seal.

"Taxing Officer" means and includes the officer of the Court whose duty it is to tax costs in bankruptcy proceedings or in pursuance of an authorized assignment or a composition, extension or scheme of arrangement.

"Trustee" or "authorized Trustee" means a Trustee or authorized trustee as defined by The Bankruptcy Act.

"Written," "writing" and any like expression shall include typewriting, printing or mimeographing or partly one and partly another.

(2) The definitions contained in section two of the Act shall, where applicable and unless the context or subject matter otherwise requires, apply to and be part of these rules.

3. (1) The forms in the Appendix, where applicable, or forms to the like effect with such variations as circumstances may require, shall be used. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same, unless the Court shall otherwise direct.

(2) The provisions contained in the forms prescribed shall be deemed to be authorized by these rules.

## PART II.

### GENERAL PROCEDURE.

4. All matters and applications shall be heard and determined in Chambers unless the Court or a judge shall in the particular matter or application otherwise direct.

5. A Registrar may without any general or special directions of the judge hear and determine any matter or application referred to in Section 65(2) of the Act.

6. Any matter or application pending before a Registrar which under the Act, or the Bankruptcy Rules for the time being in force, a Registrar has jurisdiction to determine, shall be adjourned to be heard before the Judge, if the Judge shall, either specially or by any general direction applicable to the particular case, so direct.

### *Proceedings.*

7. Every proceeding in Court under the Act shall be dated, and shall be intitled in the name of the Court in which it is taken "In Bankruptcy," and then in the matter to which it relates. Numbers and dates may be denoted by figures.

(2) Unless otherwise provided, all proceedings and documents required, under the Act or these Rules, to be filed in Court or with the proper officer, shall be filed with the registrar.

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\* Promulgated June 30th, 1920.

8. All proceedings in Court shall be written on sheets of paper of the size ordinarily used in civil actions or matters before it by the Court; but no objection shall be allowed to any proof, affidavit, or other proceedings on account of its being written or printed on paper of other size.

9. All proceedings of the Court shall remain of record in the Court, but they may at all reasonable times be inspected by any person.

10. All petitions, and warrants and subpoenas issued by the Court, shall be sealed.

11. (1) The judge may at any time, for good cause shown, order the proceedings in any matter under the Act to be transferred to the Court in another bankruptcy district or division.

(2) Where the proceedings in any matter are transferred to the Court in another bankruptcy district or division the proper officer of the first Court shall send by post the records of proceedings transferred, to the Registrar of the Court in the bankruptcy district or division to which the transfer is made and shall include with such records a copy of the order of transfer.

12. When any bankruptcy proceeding has been commenced in a bankruptcy district or division in which it should not have been commenced, the Judge of the Court of such bankruptcy district or division may order that the proceeding shall be transferred to the Court in the bankruptcy district or division in which the same should have been commenced, or that it be continued in the Court in which it was commenced; but, unless and until a transfer is made under these Rules, the proceeding shall continue in the Court in which it was commenced.

13. Where any proceedings in bankruptcy have been commenced against a corporation or where a corporation has made an authorized assignment, the Court may, on the application of the trustee or any creditor or shareholder, grant leave that all further proceedings in the winding up of the corporation or liquidation of its assets be continued under *The Winding Up Act* and amendments thereto, and may make such order for the transfer of proceedings or to effectuate such leave as to the Court shall seem best.

#### *Motions and Practice.*

14. Every application (unless otherwise provided by these Rules, or the Court shall in any particular case otherwise direct) shall be made by motion.

15. Where any party, other than the applicant, is affected by the motion, no order shall be made, unless upon the consent of such party duly shown to the Court, or upon proof to the satisfaction of the Court that notice of the intended motion has been duly served upon such party; provided that the Court, if satisfied that the delay caused by serving notice would or might entail serious mischief, may make any order *ex parte* upon such terms as to cost and otherwise, and subject to such undertaking, if any, as the Court may think just; and any party affected by such order may move to set it aside.

16. Unless the Court gives leave to the contrary, notice of motion shall be served on any party to be affected thereby not less than four days before the day named in the notice for hearing the motion. An application for leave to serve short notice of motion may be made *ex parte*.

17. In cases in which personal service of any notice of motion, order, or other proceeding, is required the same may be effected by delivering to each party to be served a copy of the notice of motion, or other proceeding, as the case may be.

18. Every affidavit to be used in supporting or opposing any motion or application shall be filed with the proper officer not later than the day before the day of the hearing.

19. A party intending to move shall, not later than the day before the day of the hearing, file with the proper officer a copy of his notice of motion.

#### *Settlement of Order.*

20. All orders made by a Judge in Chambers shall be settled and signed by him or by the Registrar or proper officer. All orders made by the Registrar shall be settled and signed by the Registrar. The person who has the carriage of any order which in the opinion of the Judge or Registrar requires to be settled shall obtain from the Judge or Registrar, as the case may be, an appointment to settle the order and give reasonable notice of the appointment to all persons who may be affected by the order, or to their solicitors.

#### *Security in Court.*

21. (1) Except where otherwise provided any security required to be given shall be by bond of a guarantee company or corporation approved by the Court.

(2) Provided, however, that the Court may in its discretion permit the security to be given by bond with one or more surety or sureties to the Registrar of the Court or to the person proposed to be secured and in such case the Court may require the surety or sureties to make an affidavit of justification and may also require such notice to be given to the person proposed to be secured as the Court deems advisable or expedient.

22. The bond shall be taken in a penal sum, which shall be not less than the sum for which security is to be given, and probable costs to be estimated by the Court, unless the opposite party consents to it being taken for a less sum.

23. Where a person is required to give security he may, in lieu thereof, lodge in Court a sum equal to the sum in question in respect of which security is to be given and the probable costs to be estimated as aforesaid of the trial of the question, together with a memorandum to be approved of by the Registrar and to be signed by such person, his solicitor, or agent, setting forth the conditions on which the money is deposited.

24. Where a person gives security by bond or makes a deposit of money in lieu of giving a bond, he shall forthwith before being entitled to proceed give notice in writing to the person to whom the security is to be given.

25. Except as in the Act or these rules otherwise provided the Rules for the time being in force in civil actions or matters before it of the Court relating to payment into or out of Court of moneys shall apply to moneys lodged in Court or to be paid out of Court under these Rules.

#### *Affidavits.*

26. Every affidavit shall be drawn up in the first person, and shall state the description and true place of abode of its deponent, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any part of an affidavit containing unnecessary matters or which in the opinion of the taxing officer is unduly prolix.

27. The Court may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client.

28. No affidavit having in the jurat or body thereof, any interlineation, alteration, or erasure shall, without leave of the Court, be read or made use of in any matter depending in Court unless the interlineation, alteration or erasure is authenticated by the initials of the officer or person taking the affidavit.

29. Where an affidavit is sworn by any person who appears to the person taking the affidavit to be illiterate or blind, the person taking the affidavit shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature or declared his inability to sign in the presence of such person. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent.

30. The Court may receive any affidavit sworn for the purpose of being used in any matter notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received.

31. No affidavit (other than a proof of debt) shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent, clerk or partner of such solicitor, or before the party himself.

32. Where by this Act or in these Rules it is provided that an affidavit or declaration be made by a debtor, authorized trustee or any other person and such debtor, authorized trustee or other person is a corporation, such affidavit or declaration may be made by the manager or by any officer or employee of the corporation, who has knowledge of the facts deposed to providing that he states therein that he has such knowledge.

33. The Court shall take judicial notice of the seal and/or signature of any person authorized by or under the Act or these rules to take affidavits or to certify to such authority.

#### *Witnesses and Depositions.*

34. Any party to any proceeding in Court may by a writ of subpoena in the prescribed form, with or without a clause requiring the production of books, deeds, papers, documents and writings, require the attendance of a witness for the purpose of using his evidence upon any motion, petition or other proceeding before the Court or any judge or registrar. The name of one or more witnesses may be inserted in the subpoena.

35. A copy of the subpoena shall be served, personally, on the witness, within a reasonable time before the time of the return thereof, and service of the subpoena may, where required, be proved by affidavit.

36. The costs of witnesses, whether they have been examined or not, may, in the discretion of the Court or taxing officer, be allowed; provided, however, that the Court may at any time limit the number of witnesses to be allowed on taxation of costs.

37. The Court may, in any matter where it shall appear necessary for the purpose of justice, make an order for the examination upon oath before the Court or any officer, or other person, and at any place, of any witness or person, and may empower any party to any such matter to give such depositions in evidence therein on such terms (if any) as the Court may direct.

38. (1) Where the evidence of any person is taken on or for use on the hearing of any motion, application or issue or in pursuance of an order for examination, commission or letters of request or where the debtor or any other person is examined under section 56 of the Act, or otherwise under the Act or these Rules, such evidence or examination may be taken in shorthand by a shorthand writer approved and duly sworn by the judge, registrar, or person before whom the examination is taken. A shorthand writer who has been duly appointed to report trials at sittings of the Court need not be sworn.

(2) When taken in shorthand the evidence or examination may be taken down by question and answer; and unless otherwise ordered it shall not be necessary for the depositions to be read over to or signed by the person examined, unless the judge or registrar so directs, when the examination is taken before a judge or registrar, or in other cases unless any of the parties so desire.

(3) A copy of the depositions so taken, certified by the judge, registrar or person before whom the same were taken as correct, shall for all purposes have the same effect as the original depositions in ordinary cases.

39. An order for examination, commission or letters of request to examine witnesses, and the writ, order, commission or request, shall follow the forms for the time being in use in the Court in civil actions or matters before it with such variations as circumstances may require.

40. The Court may, in any matter, at any stage of the proceedings, order the attendance of any person for the purpose of producing any writings or other documents named in the order, which the Court may think fit to be produced.

41. Any person wilfully disobeying any subpoena or order requiring his attendance for the purpose of being examined or producing any object, book or document shall be deemed guilty of contempt of Court, and may be dealt with accordingly.

42. Any witness required to attend for the purpose of being examined, or to produce any document, or to give evidence, shall be entitled to the witness fees and conduct money provided by the tariff of costs in the appendix hereto.

#### *Discovery and Examination.*

43. Any party to any proceeding in Court may, with leave of the Court, administer interrogatories to or obtain discovery of documents or examination for discovery from any other party to such proceeding, or any other person as authorized by the Court, and may also cross-examine any person upon an affidavit made by him in such a proceeding. Proceedings under this Rule shall be regulated as nearly as may be by the Rules of the Court for the time being in force in relation to like matters in civil actions or matters in such Court. An application for leave under this Rule may be made *ex parte*.

#### *Warrants, Arrests and Commitments.*

44. A warrant of seizure, or a search warrant, or any other warrant issued under the provisions of the Act, or these rules, shall be addressed to the Sheriff or such other officer or person as the Court may in each case direct.

45. When a debtor is arrested under a warrant issued under section fifty-five of the Act, he shall be given into custody of the Governor or Keeper of the prison or gaol mentioned in the warrant, who shall produce such debtor before the Court as it may from time to time direct, and shall safely keep him until such time as the Court shall otherwise order; and any books, papers, moneys, goods, and chattels in the possession of the debtor, which may be seized, shall forthwith be lodged with the trustee.

46. Where a person is apprehended under a warrant issued under section fifty-six(2) of the Act the officer apprehending him shall forthwith bring him before the Court issuing the warrant to the end that he may be examined, and if he cannot immediately be brought up for examination or examined, the officer shall deliver him into custody of the Governor or Keeper of the prison or gaol mentioned in the warrant, and the said Governor or Keeper shall receive him into custody and shall produce him before the Court as it may from time to time direct or order and subject to such direction or order shall safely keep him.

47. The officer executing a warrant issued under section fifty-six(2) of the Act shall forthwith, after apprehending the person named in the warrant and bringing him before the Court as in the last preceding rule mentioned, or after delivering him to the Governor or Keeper of the prison or gaol in the last preceding rule mentioned, as the case may be, report such apprehension or delivery to the court issuing the warrant, and apply to the Court to appoint a day and time for the examination of the person so apprehended, and the Court shall thereupon appoint the earliest practicable day for the examination and shall issue its direction or order to the said Governor or Keeper to produce him for examination at a place and time to be mentioned in such direction or order. Notice of any such appointment shall forthwith be given by the Registrar to the Trustee and to such other person who shall have applied for the examination or warrant.

48. Where an order of committal is made against any person, for disobeying any order of the Court, to do some particular act or thing, the Court may direct that the order of



committal shall not be issued, provided that such person complies with the previous order within a specified time.

49. Where a debtor or witness refuses or neglects to attend at the time and place appointed for his examination or, if attending, refuses to be sworn, or to answer any lawful question, the rules of practice for the time being in force in similar or analogous proceedings in civil actions or matters before the Court shall in so far as the same are applicable, and not inconsistent with the Act or these Rules, apply.

#### *Service and Execution of Process.*

50. Every solicitor suing out, filing or serving any petition, notice, summons, order, or other document, shall indorse thereon his name or firm and place of business, which shall be called his address for service. All notices, orders, documents, and other written communications which do not require personal service shall be deemed to be sufficiently served on such solicitor if left for him at his address for service.

51. Service of notices, orders, or other proceedings shall be effected before the hour of five in the afternoon, except on Saturdays, when it shall be effected before the hour of one in the afternoon. Service effected after five in the afternoon on any week day, except Saturday, shall for the purpose of computing any period of time subsequent to such service be deemed to have been effected on the next following day which is not a legal holiday. Service effected after one in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the next following day which is not a legal holiday.

52. It shall be the duty of the sheriff or bailiff of the Court having jurisdiction or such officer or officers as the Court may direct, to serve such orders, summonses, petitions and notices as the Court may require him to serve; to execute warrants and other process; and to do and perform all such things as may be required of him by the Court. Where any notice or other proceeding may be served by post it shall be sent by registered letter.

53. Every order of the Court may be enforced as if it were a judgment of the Court.

#### *Costs and Taxation.*

54. (1) The Court in awarding costs may direct that the same shall be taxed and paid as between party and party or as between solicitor and client, or the Court may fix a sum to be paid in lieu of taxed costs.

(2) In the absence of any express direction costs of an opposed motion shall follow the event, and shall be taxed as between party and party.

(3) Where an action is brought by or against an authorized trustee as representing the estate of the debtor, or where an authorized trustee is made a party to a cause or matter, on his application or on the application of any other party thereto, he shall not be personally liable for costs unless the judge before whom the action, cause or matter is tried for some special reason otherwise directs.

55. (1) When a receiving order is made on a creditor's petition the costs of the petitioning creditor shall be taxed and be payable out of the estate.

(2) When the proceeds of the estate are not sufficient for the payment of the petitioning creditor's costs and of any costs necessarily incurred by the trustee down to the conclusion of the first meeting of creditors, the Court may order such costs to be paid by the petitioning creditor.

56. The costs directed by any order to be paid shall be taxed on production of a copy of such order, and the allocatur or certificate of taxation shall be signed and dated by the taxing master or officer and delivered to the person who presented such bill for taxation.

57. (1) The tariff of costs set forth in the Appendix and the regulations contained in such tariff, shall, subject to these Rules, apply to the taxation and allowance of costs and charges in all proceedings.

(2) Where the estimated assets of the debtor, in accordance with the certificate of the authorized trustee, do not exceed the sum of fifteen hundred dollars, a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely—two-thirds of the charges ordinarily allowed, disbursements being added, unless the Court by order directs that increased costs be allowed.

58. Every person whose bill or charges is or are to be taxed shall in all cases give not less than two days' notice of the appointment to tax the same to the Trustee, or to the opposite party or his solicitor, as the case may be.

59. Every person whose bill or charges is or are to be taxed shall on application of the trustee furnish to the trustee a copy of his bill or charges so to be taxed on payment at the rate of fifteen cents per folio, which payment may be charged to the estate.

60. Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred, the trustee may pay such costs and charges as cannot be paid out of the joint estate out of the separate estates of such co-debtors or one or more of them in such proportion as he may determine, with the consent of the inspectors of the estates out of which the payment is intended to be made, or, if such inspectors withhold or refuse their consent, then with the approval of the Court.

61. Subject to the provisions of the Act, no costs shall be paid out of the estate or assets of the debtor, excepting the costs of the solicitor or solicitors employed by the trustee and such costs as have been awarded against the trustee or the estate of the debtor by order of the Court in any action or proceeding under the Act or these Rules.

#### *Fees.*

62. The fees to be charged for or in respect of proceedings under the Act shall be as fixed by the tariff in part three of the Appendix and shall be collected and may be retained by the registrars or other proper officers who perform the duties under the Act or these Rules in respect of which such fees are payable. In case of any proceedings not covered by the tariff a fee may be charged of an amount equal to the tariff fee for the proceeding most nearly resembling the one in question. In the case of any dispute as to the amount of fees charged the judge shall fix and settle the amount.

#### *Rules Relating to the Business of the Court.*

63. The judge or judges of the Court appointed by the Minister of Justice to have jurisdiction in bankruptcy shall with the approval of the Chief Justice of the Court regulate the bankruptcy sittings and vacations of the Court.

64. Any Registrar in bankruptcy may act for any other Registrar.

65. Writs of execution shall issue from the proper office of the Court and all proceedings thereon and in relation thereto shall be regulated as nearly as may be by the Rules of the Court for the time being in force in relation to executions in civil actions or matters before such Court.

66. Where any registrar, clerk or other officer in bankruptcy refuses or neglects to act as such registrar, clerk or other officer or to perform or carry out any act, matter or thing connected with the office to which he has been appointed or assigned for the transaction or disposal of any matter in respect of which power or jurisdiction is given by "The Bankruptcy Act" or by these Rules, then, and in every such case, the registrar, clerk or other officer so neglecting or refusing, shall be guilty of contempt of court and be liable to be punished accordingly.

#### *Appeals from Registrar.*

67. An appeal from the registrar shall be by ordinary notice of motion to the judge of the bankruptcy district or division in which the proceedings are pending. No appeal shall be brought unless the notice thereof is filed with the registrar and served within ten days after the pronouncing of the order or decision complained of, or within such further time as may be allowed by the judge. The notice shall set forth fully the grounds of appeal. No security for the costs of the appeal need be given by the appellant.

#### *Appeals to Appeal Court.*

68. No appeal from a judge to the Appeal Court shall be brought unless notice thereof is filed with the registrar and served within ten days after the pronouncing of the order or decision complained of or within such further time as may be allowed by a judge.

(2) At or before the time of entering an appeal the party intending to appeal shall lodge in the Court the sum of one hundred dollars to satisfy, in so far as the same may extend, any costs that the appellant may be ordered to pay. Provided that the Appeal Court may in any special case increase or diminish the amount of such security or dispense therewith.

69. The proper officer of the Court appealed from shall upon receiving a copy of the notice of appeal promptly transmit to the Registrar of the Appeal Court the notice of appeal and the file of proceedings in the matter under appeal.

70. Where an issue or question is, under the provisions of section seventy-one of the Act, tried by a Court other than the Court in which the bankruptcy proceedings are pending, any appeal from the decision of such Court shall be made to and be heard by the Appeal Court of the province in which the bankruptcy proceedings are pending.

71. Subject to the foregoing Rules, appeals to the Appeal Court in any bankruptcy district or division shall be regulated by the Rules of such Court, for the time being in force in relation to appeals in civil actions or matters.

#### *Appeals to Supreme Court.*

72. An application for special leave to appeal from a decision of the Appeal Court and to fix the security for costs, if any, shall be made to a Judge of the Supreme Court of Canada within thirty days after the pronouncing of the decision complained of and notice of such application shall be served on the other party at least fourteen days before the hearing thereof.

(2) Where any security for the costs of such appeal is fixed the same shall be given to the Registrar in the manner and form prescribed by the rules and practice of the Supreme Court of Canada, or in manner and form to like effect.

73. Subject to the foregoing rules appeals to the Supreme Court of Canada shall, as nearly as possible, be regulated by the rules of such Court for the time being in force in relation to appeals in civil matters or actions.

### PART III.

#### PETITION IN BANKRUPTCY.

74. Every petition shall be fairly written and no alteration, interlineations, or erasures shall be made therein, after the same has been filed, without the leave of the Registrar.

75. A petitioning creditor who is resident abroad, or whose estate is vested in a trustee under any law relating to bankruptcy, or against whom a petition is pending under any such law, or who has made default in payment of any judgment, order for payment of money or of any costs ordered by any Court to be paid by him to the debtor, may be ordered to give security for costs to the debtor and proceedings under the petition may be stayed until such security is furnished.

76. With every creditor's petition when filed there shall be lodged a copy to be sealed and issued to the petitioner. The petition shall be deemed to have been presented to the Court on the day of the filing thereof.

77. A true copy of the creditor's petition together with a notice of the time and place of the presentation and hearing thereof shall be personally served upon the debtor at least eight days before the presentation and hearing; provided that where it is proved to the satisfaction of the Court that the debtor has absconded, or in any other case for good cause shown, the Court may, on such terms, if any, as the Court may think fit to impose, hear the petition at such earlier date and without such service as the Court may deem expedient.

78. If the Court is satisfied by affidavit or other evidence that the debtor is keeping out of the way to avoid service of the petition or any other document, or service of any other legal process, or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition or such other document to some adult inmate at his usual or last known residence or place of business, or by registered letter, or in such other manner as the Court may direct, and such petition or other document shall then be deemed to have been duly served on the debtor.

79. Service of the petition may be proved by affidavit, with a sealed copy of the petition attached, and the same shall be filed in Court as soon as practicable after the service.

80. Any notice, petition or other document for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place or one of the principal places of business of the firm in the province wherein the proceedings are taken, or if there is no such place then at the principal place of business of the firm in Canada, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

81. The provisions of the last preceding rule shall so far as the nature of the case will admit apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own.

82. Any notice, petition or other document for which personal service is necessary shall be deemed to be duly served on a corporation if it is served at the head office or principal place, or one of the principal places of business of a corporation in the province wherein the proceedings are taken or if there is no such place at the head office or principal place of business of the corporation in Canada, on the president, vice-president, secretary, treasurer, manager or upon any officer of the corporation or upon any person having at the time of service the control or management of the business of the corporation at the place of such service.

83. Where a debtor is not in Canada, the Court may order service of the petition or any other document to be made within such time and in such manner and form as it shall think fit.

84. If a debtor against whom a bankruptcy petition has been filed dies before service thereof, the Court may order service to be effected on the personal representatives of the debtor, or on such other person as the Court may think fit.

#### *Interim Receiver.*

85. After the presentation of a petition, upon the application of a creditor, or of an authorized trustee, or of the debtor himself, and upon proof by affidavit of sufficient grounds for the appointment of an authorized trustee as interim receiver of the property of the debtor or any part thereof, the Court may, if it thinks fit, and upon such terms as may be just, make such appointment; such order may be made *ex parte*.

86. Where, after an order has been made appointing an authorized trustee interim receiver, the petition is dismissed, the Court shall, upon application to be made within 21 days from the date of the dismissal thereof, adjudicate, with respect to any damages or claim thereto arising out of the appointment, including the proper remuneration of the trustee, and shall make such order as the Court thinks fit.

*Hearing of Petition.*

87. Where a debtor intends to show cause against a petition he shall file a notice with the proper officer, specifying the statements in the petition which he intends to deny or dispute, and shall transmit by post to the solicitor of the petitioning creditor a copy of the notice three days before the day on which the petition is to be heard.

88. If the debtor does not appear at the hearing, the Court may make a receiving order and adjudge the debtor bankrupt on such proof of the statements in the petition as the Court shall think sufficient.

89. On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved to the satisfaction of the Court by affidavit or by any evidence which would be admissible to prove the facts in a civil action in the Court.

90. Where proceedings on a petition have been stayed for the determination of the question of the validity of the petitioning creditor's debt, which question may be determined in such manner as the Court may direct, and such question has been decided in favour of the validity of the debt, the registrar shall, on production of the judgment of the Court, or a copy thereof, and on the application of the petitioning creditor, fix a day on which further proceedings on the petition may be had. The petitioning creditor shall within forty-eight hours of the date of said appointment mail or deliver to the debtor, at the address given in his notice of dispute, a notice in writing of such appointment, and a like notice to his solicitor, if known.

91. Where proceedings on a petition have been stayed for the determination of the question of the validity of the petitioning creditor's debt, and such question has been decided against the validity of the debt, the registrar shall on the production of the judgment of the Court or a copy thereof, and on application of the debtor, fix a day on which he may apply to the Court for the dismissal of the petition with costs. The debtor shall within forty-eight hours of the date of the appointment mail or deliver to the petitioner (and to his solicitor, if known) notice in writing of the time and place fixed for the hearing of the application.

*Receiving Order.*

92. When a receiving order is made on a creditor's petition there shall be stated in the receiving order the nature and date, or dates, of the act, or acts, of bankruptcy upon which the order has been made.

93. The Trustee shall cause a copy of the receiving order or of the order appointing the trustee an interim receiver, as the case may be, to be served on the debtor.

94. A receiving order against a firm shall operate as a receiving order not only against the firm, but also against each person who at the date of the order is a partner in that firm.

95. The rights or liabilities of any past or present limited partner of a limited partnership, against which a receiving order has been made or which has made an authorized assignment, as such rights or liabilities are fixed or defined by the statutory provision (if any) of the province wherein the partnership business is or has been carried on, shall not in any way be prejudiced or affected by these Rules.

96. An application to the Court to rescind a receiving order or to stay proceedings thereunder, or to annul an adjudication, shall not be heard except upon proof that notice of the intended application and a copy of the affidavits in support thereof have been duly served upon the trustee. Unless the Court gives leave to the contrary, notice of any such application together with copies of such affidavits shall be served on the trustee not less than four days before the day named in the notice for hearing the application. Pending the hearing of the application, the Court may make an interim order staying such of the proceedings as it thinks fit.

*Statement of Affairs.*

97. (1) Every debtor shall be furnished by the trustee with instructions for the preparation of his statement of affairs. Such statement of affairs shall be made out in duplicate and shall be verified by the debtor. The trustee shall file with the Registrar one of such verified statements.

(2) Where the debtor is a partnership it shall submit a statement, in duplicate, of its partnership affairs verified by one of the partners or by the manager in charge of the business and each partner shall submit a statement, in duplicate, of his separate affairs verified personally.

(3) Where the debtor is a corporation the statement of affairs, in duplicate, shall be verified by the president, vice-president, secretary, treasurer, general manager, manager or by any officer or director of the corporation having knowledge of the facts contained in such statement.

*Composition, Extension or Scheme of Arrangement.*

98. Where a debtor intends to submit a proposal for a composition, extension or scheme of arrangement the prescribed forms in the appendix, of proposal, notice and report shall be used by the trustee for the purpose of meetings of creditors for consideration of the proposal.

99. Whenever an application is made to the Court to approve of a composition, extension or scheme, the trustee shall, not less than seven days before the hearing of the application, send notice by registered mail of the application to the debtor and to every creditor who has proved his debt; and the trustee shall file his report not less than two days before the time fixed for hearing the application.

100. In any case in which an application is made to the Court to approve a composition, extension or scheme and the trustee reports to the Court any fact, matter, or circumstance which would justify the Court in refusing to approve of the composition, extension or scheme, such application shall be deemed to be an opposed application within the meaning of section 65(2) (d) of the Act.

101. On the hearing of any application to the Court to approve of a composition, extension or scheme the Court shall in addition to considering the report of the trustee hear the trustee, the debtor and/or any opposing, objecting or assenting creditor thereon, and an appeal to the Court of Appeal shall lie at the instance of the trustee, the debtor or any such creditor from any order of the Court made upon such application.

102. No costs incurred by a debtor, of or incidental to an application to approve a composition, extension or scheme, other than the cost incurred by the trustee, shall be allowed out of the estate if the Court refuses to approve the composition, extension or scheme.

103. The Court before making an order approving a composition, extension or scheme shall, in addition to investigating the other matters as required by the Act, require proof that the provisions of section 13(1) and (2) of the Act have been complied with.

104. At the time a composition, extension or scheme is approved, the Court may correct or supply any accidental or formal slip, error, or omission therein, but no alteration in the substance of the composition, extension or scheme shall be made.

105. Where a composition, extension or scheme is annulled, the property of the debtor shall, unless the Court otherwise directs, forthwith re-vest in the trustee, if any, in whom the estate was originally vested without any special order being made or necessary.

106. Every person claiming to be a creditor under any composition, extension or scheme, who has not proved his debt before the approval of such composition, extension or scheme, shall lodge his proof with the trustee thereunder, who shall admit or disallow the same. And no creditor shall be entitled to enforce payment of any part of the sums payable under a composition, extension or scheme unless and until he has proved his debt and his proof has been admitted or allowed.

*Discharge of Trustee.*

107. The application of an authorized trustee for a grant of discharge (whether full or partial) shall be made in the prescribed form to the Registrar and shall be verified by the affidavit of such authorized trustee. Such application shall contain or have attached thereto a complete and itemized statement showing all moneys realized by such authorized trustee from and out of the property of the bankrupt or assignor and of all moneys disbursed and expenses incurred and the remuneration claimed by such authorized trustee; and full particulars, description and value of all property belonging to the estate which has not been sold or realized upon, setting out the reasons why such property has not been sold or realized upon; and full particulars and information with regard to any unsettled disputes, actions or proceedings between such authorized trustee and either the debtor or any creditor or creditors or any other person connected with the estate.

108. The trustee shall, unless otherwise ordered by the Court on an *ex parte* application, at least ten days prior to the hearing of the application send notice in writing by registered mail to the debtor and to each of the creditors.

109. (1) If the debtor or any creditor desires to oppose the application for discharge he shall file with the Registrar, at least two days prior to the hearing or within such further time as the Court may allow, a notice in writing of his intention to oppose the application setting out his reasons therefor and shall serve a copy of the said notice on the authorized trustee, within the time aforesaid.

(2) If the application for discharge is not opposed the Registrar may either grant or refuse the same. If the application is opposed the same shall be adjourned for hearing before a judge.

110. The authorized trustee shall keep for a period of at least six years from the date of declaring a final dividend all current books of record and important documents of the estate of the bankrupt or authorized assignor. After the expiration of such period the trustee may destroy unimportant books and documents but shall continue to keep for a further period of fourteen years from the date thereof all title papers relating to real or immovable estate, important documents under seal and such other books and papers which in the judgment of the trustee should be kept. During the said periods the trustee shall at all times produce and dispose of all books and papers in his possession as ordered by the Court.

111. In the case of the sale of immovable property in the Province of Quebec by the trustee, if the purchaser has not paid the whole of the purchase price or given security when he may lawfully do so under the provisions of the Code of Civil Procedure for the Province of Quebec, the trustee may obtain from the Court an order for the resale of the property; the purchaser may however prevent the resale for false bidding by paying to the trustee, before such resale, the amount of his bid with the interest accrued by reason of his default and all costs incurred thereby; if a resale takes place the false bidder is liable to the trustee for the difference between the amount of his bid and the price brought on the resale with all costs incurred by reason of his default for the payment of which on application of the trustee, the Court may make an order against the false bidder; if the price obtained on the resale is greater, it goes to the benefit of the estate.

#### *Meeting of Creditors.*

112. (1) Where a meeting of creditors is called by notice, the proceedings had and resolutions passed at such meeting shall, unless the Court otherwise orders, be valid, notwithstanding that some creditors shall not have received the notice sent to them and notwithstanding the inadvertent omission to send such notice to one or more creditors.

(2) Where a meeting of creditors is adjourned, the adjourned meeting shall be held at the same place as the original place of meeting, unless in the resolution for adjournment another place is specified.

113. A debtor who is required by a trustee to attend any meeting of creditors (other than the first meeting) and who resides at a distance of more than ten miles from the place of such meeting, shall be entitled to be paid for such attendance the like conduct money and expenses as if he were a witness required to attend in Court or for the purpose of being examined.

114. Every class of creditors shall express its views and wishes separately from every other class and the effect to be given to such views and wishes shall, in case of any dispute and subject to the provisions of the Act, be in the discretion of the Court having regard to the financial condition of the debtor.

#### *Proof of Claims.*

115. In any case in which it shall appear from the debtor's statement of affairs that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or his foreman, or the bookkeeper of the debtor, or some other person on behalf of all such creditors. Such proof shall have annexed thereto, as forming part thereof, a schedule setting forth the names of the workmen and others, and the amounts severally due to them. Any proof made in compliance with this Rule shall have the same effect as if separate proofs had been made by each of the said workmen and others.

116. Where a creditor's proof has been admitted the notice of dividend shall be sufficient notification to such creditor of such admission.

#### *Disallowance of Claims.*

117. The appeal of a claimant from the trustee's decision under section 53 of the Act shall be by notice of motion to a judge and the trustee shall be served with a copy thereof in the ordinary manner provided by these Rules. The judge shall hear and dispose of the appeal summarily on affidavits or viva voce evidence or both as to the judge shall seem best.

118. The trustee shall in no case be personally liable for costs in relation to an appeal from his decision rejecting or disallowing any proof wholly or in part.

#### *Contingent or Unliquidated Claims.*

119. Where a contingent claim has been filed with a trustee, or one in the nature of unliquidated damages arising by reason of a contract, promise or breach of trust, and the trustee under the provisions of section 20 of the Act has been unable to make a compromise or other arrangement satisfactory to the inspectors in respect thereto, the trustee shall apply to a judge, by way of notice of motion, to value the claim, serving the claimant with a copy of the notice of motion in the ordinary manner provided by these Rules. The trustee shall prior to the hearing of the motion file with the registrar a copy of the claim in question, and an affidavit or affidavits by the trustee, the debtor or of some other person having knowledge of the claim setting out as full particulars and information as to the claim as have been ascertained, also setting out what steps (if any) were taken to make a compromise or other arrangement in respect of the claim, and particulars of any offer of compromise or arrangement made by the trustee with the permission of the inspectors, and such other facts as the trustee deems advisable. The judge shall hear and dispose of the matter summarily and either on affidavits or viva voce evidence or both as to the judge shall seem best.

*Settlements and Preferences.*

120. Applications by a trustee, or any person, to set aside or avoid under the Act, or any other Act or law, any settlement, conveyance, transfer, security or payment, or to declare for or against the title of the trustee to any property adversely claimed, and any proceedings under "The Winding-up Act" against any past or present director, manager, liquidator, receiver, employee, or officer of any company, against whom a receiving order has been made, or which has made an authorized assignment, shall be to a Judge in chambers by notice of motion served in the ordinary manner as provided by these rules. The Judge may proceed in a summary manner to try the question or issue in the case or may adjourn the hearing, or may direct or settle any question or issue to be tried, or may give such directions for the preparation and filing of pleadings and for the trial of such question or issue, or may make such other order in the premises as to the Judge shall seem best.

121. Any application or notice of motion under the preceding rule may contain a description of the land (if any) in question, and upon filing the same or a copy thereof, signed by the solicitor of the applicant, with the proper officer, a certificate of *lis pendens* may be issued for registration, and in case the said application or motion is refused in whole or in part, a certificate of such order may be issued for registration.

*Contributories to Insolvent Corporations.*

122. The demand of an authorized trustee on any contributory shall be in the prescribed form and there shall be no duty imposed on the authorized trustee to make demands on a *pro rata* basis so far as the contributories of a debtor are concerned or to adjust rights as between contributories.

123. If a contributory does not pay the authorized trustee the amount demanded and does not give notice in writing, to the trustee, disputing the demand within the time and in the manner provided by the Act, the authorized trustee may from and after the expiration of thirty days from the date of service of the demand, make an *ex parte* application to the Court in the prescribed form for judgment against the contributory and the Court may on such application, without notice to the contributory, give judgment in favour of the trustee for the amount demanded or such amount as the Court finds justly owing and for the costs of the application.

124. In the case where a contributory has given notice in writing to the trustee disputing the demand, within the time and in the manner provided by the Act, the trustee may, from and after the expiration of thirty days from the date of service of the demand, make application to the Court in the prescribed form for judgment against the contributory, giving the contributory at least four days' notice of such application, and the Court on the hearing of the application may proceed in a summary way to try the question or issue in the case or may adjourn the hearing or may direct and settle any question or issue to be tried between the authorized trustee and the contributory or may give such directions for the preparation and filing of pleadings or for the trial of such question or issue or may make such other order in the premises as to the Court shall seem best.

125. The authorized trustee may include in any application more than one contributory.

126. At least two days before the hearing of any such application the authorized trustee shall file with the proper officer the verified statement of the affairs of the debtor; an estimate of the authorized trustee as to the realizable value of all property of the debtor, and a list of all proved or provable claims against the estate of the debtor in so far as the authorized trustee is able to ascertain.

127. If it should appear to the Court that the issue of immediate execution under any judgment recovered or entered by an authorized trustee against a contributory would be an undoubted hardship on the contributory, or would be unjust or inequitable, the Court may, on the application or request of the contributory and on such terms as to security or otherwise as the Court deems advisable, order that execution be stayed pending the adjustment of rights between contributories or for such period as to the Court shall seem best.

128. In case a contributory desires to have the Court adjust rights and liabilities as between contributories he may make application to the Court in the prescribed form setting out his grounds in an affidavit in the prescribed form. He shall give at least four days' notice of such application to all other contributories from whom he claims contributions. The Court may on an *ex parte* application direct the method of service of said notice, whether by personal service, mail or otherwise, as to the Court may seem best.

129. The Court may on any such application order any one or more of the contributories of the debtor to pay into Court such amounts as may be found by the judge to be just and equitable and in default of payment of the amount so found the Court may give judgment against any defaulting contributor directing payment of such amount to the applicant or to the trustee or otherwise and may dispose of the costs of such application.

130. All moneys paid into Court shall be adjusted, divided and paid out according to the directions of the judge and where the judge deems advisable such moneys or any portion thereof may be paid out to the authorized trustee.

*Examination of Debtor and Others.*

131. Examinations under section fifty-six of the Act or any other examination may be held before a Registrar or before any person or officer who is qualified or authorized to hold examinations for discovery or of judgment debtors in accordance with the Rules, for the time being in force in civil actions or matters of the Court in the bankruptcy district or division in which the examination is held or to be held or before such other person as the Court on an *ex parte* application therefor may order.

132. Such examination may be held in the bankruptcy district or division in which the debtor or other person to be examined resides or in which he is served with the appointment for examination, or in which the debtor, or such other person, resided or carried on business at the date of the receiving order or authorized assignment, notwithstanding that such bankruptcy district or division may not be the same district or division in which the bankruptcy of the debtor occurred or in which the debtor made an authorized assignment or in which the proceedings are being carried on; or the examination may be held at such time and place and in such bankruptcy district or division in Canada as the Court on application may order. Such application, unless the Court otherwise directs, may be made *ex parte*.

133. Any such registrar, person or officer empowered to hold examinations may grant, in duplicate, an appointment for examination in the form provided by the Appendix or in form to like effect.

134. A duplicate of such appointment shall be served upon the debtor or person to be examined at least forty-eight hours before the time of examination.

*Discharge.*

135. (1) In any case in which an application is made to the Court by a debtor for his discharge and the trustee reports to the Court any fact, matter or circumstance which would, under the Act, justify the Court in refusing an unconditional order of discharge, such application shall be deemed to be an opposed application within the meaning of section sixty-five (2) (c) of the Act.

(2) The Court may, on the application by a debtor for his discharge, cause the debtor to be brought before the Court for examination or further examination.

136. An appeal to the Appeal Court shall lie at the instance of the trustee, the debtor and or at the instance of any creditor or creditors, who oppose the discharge, from any order of the Court made upon the application for discharge.

137. When a debtor intends to dispute any statement with regard to his conduct and affairs contained in the trustee's report he shall at or before the time appointed for hearing the application for discharge give notice in writing to the trustee specifying the statements in the report, if any, which he proposes at the hearing to dispute. Any creditor who intends to oppose the discharge of a debtor on grounds other than those mentioned in the trustee's report shall give notice of the intended opposition, stating the grounds thereof, to the trustee and to the debtor at or before the time appointed for the hearing of the application. In either of such cases the judge or registrar may enlarge the hearing of the application as deemed advisable.

138. (1) A debtor shall not be entitled to have any of the costs of or incidental to his application for discharge allowed to him out of his estate.

(2) If the debtor does not make his application for discharge until after the trustee has paid the final dividend, he shall, before the order of discharge is signed or delivered out, pay to the trustee such remuneration and solicitor's costs as the Court may allow.

139. (1) Where the Court grants an order of discharge conditionally upon the debtor consenting to judgment being entered against him by the trustee for the balance or any part of the balance of the debts provable under the bankruptcy or authorized assignment which is not satisfied at the date of his discharge, the order of discharge shall not be signed, completed or delivered out until the debtor has given the required consent. The judgment shall be entered in the Court having jurisdiction in bankruptcy in the district or division in which the order of discharge is granted.

(2) If the debtor does not give the required consent within ten days of the making of the conditional order the Court may, on the application of the trustee, revoke the order or make such other order as the Court may think fit.

140. The order of the Court made on an application for discharge shall be dated on the day on which it is made, and shall take effect from the day on which the order is drawn up and signed; but such order shall not be delivered out or gazetted until after the expiration of the time allowed for appeal, or, if an appeal be entered, until after the decision of the Appeal Court thereon.

141. (1) An application by the trustee for leave to issue execution on a judgment entered pursuant to a conditional order of discharge shall be made to the Court in writing, and shall state shortly the grounds on which the application is made.

(2) The trustee shall give not less than four days' notice of the application to the debtor, and shall at the same time furnish him with a copy of the application.



142. Where a debtor is discharged subject to the condition that judgment shall be entered against him, or subject to any other condition as to his future earnings or after-acquired property, it shall be his duty until such judgment or condition is satisfied, from time to time, to give the trustee such information as he may require with respect to his earnings and after-acquired property and income, and not less than once a year to file in the Court and with the trustee a statement showing the particulars of any property or income he may have acquired subsequent to his discharge.

143. Any statement of after-acquired property or income filed by a debtor whose discharge has been granted subject to conditions, shall be verified by affidavit, and the trustee may require the debtor to attend before an examiner to be examined on oath with reference to the statements contained in such affidavit, or as to his earnings, income, after-acquired property, or dealings. Where a debtor neglects to file such affidavit or to attend for examination when required so to do, or properly to answer all such questions as the Court may decide to be proper, the Court may, on the application of the trustee, rescind the order of discharge.

144. Where after the expiration of one year from the date of any order made upon a debtor's application for a discharge, the debtor applies to the Court to modify the terms of the order on the ground that there is no reasonable probability of his being in a position to comply with the terms of such order, he shall give 14 days' notice by mail of the hearing of the application to the trustee and to all his creditors.

#### *Miscellaneous.*

145. No person shall, as against the trustee, be entitled to withhold possession of the books of account belonging to the debtor or to set up any lien thereon.

146. Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

147. Where an authorized trustee provides the security required by section 14(4) of the Act in cash, the amount thereof shall be paid by the authorized trustee to the Receiver General, and the authorized trustee shall receive interest thereon, payable yearly at the rate of three per cent per annum.

148. In all cases in which any number of days not directed to be clear days is prescribed by the Act or by these Rules, or by any notice or order in reference to any proceeding under the Act, the same shall be reckoned exclusively of the date from which the computation is made, but inclusively of the day on which the act or proceeding referred to is to be done or taken.

149. Where notice is to be given or service is required to be made a certain number of days before the day on which something is to be done, if the words "clear days" or "at least" or "not less than" are used, both the day of service or of giving notice and the day on which such thing is to be done shall be excluded from the computation.

150. Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, days on which the offices of the Court are closed shall not be reckoned in the computation of such limited time.

151. Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices of the Court are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking same, be held to be duly done or taken on the next day on which the said offices are open.

152. The general practice of the Court in civil actions or matters before it, including the course of proceedings and practice in Judges' chambers, shall in cases not provided for by the Act and amendments thereto, or these Rules, and so far as the same are applicable and not inconsistent with the said Act or these Rules, apply to all proceedings under the said Act.

# GENERAL INDEX

[To Bankruptcy Act; text, General Orders and Forms.]

[1623]



# GENERAL INDEX

[This index covers the entire work, including the Bankruptcy Act, General Orders, Forms and text of the treatise. It does not include the Appendix.]

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